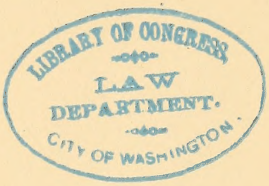
INDIANA MUNICIPAL LAW

THE LAW APPLICABLE TO

CITIES AND TOWNS

IN

INDIANA



CONTROLLING THEIR INCORPORATION, ORGANIZATION AND GOVERNMENT AS CONTAINED IN THE CONSTITUTIONAL AND STATUTORY LAW OF THE STATE AND FEDERAL AND STATE COURT DECISIONS

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INDIANAPOLIS

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PREFACE

This work is a complete compilation of the law applicable to cities and towns in Indiana, and controlling their incorporation, organization and government. This law is presented as it is determined by the constitution of the United States and the state of Indiana; by the general statutes of the state as they have been amended and are now in force; and by the decisions of the federal courts and the courts of last resort of the state. Miscellaneous statutes and provisions bearing relation to the various incorporating acts and in aid of their objects are included, together with full notes of all the decisions construing and applying them. An appendix containing a list of special and temporary acts is added.

A system of cross-references makes readily accessible the several constitutional provisions and statutes, or sections thereof, bearing upon the same subjects or having close connection, and the decisions thereunder.

The general act for the incorporation of towns was passed in 1852, that for cities generally in 1867, and those for the larger cities in 1891, 1893 and 1899. In addition to these, other acts relating to the subject have been passed in great number. Legislation upon the subject has become complicated and confusing; and judicial decisions based upon statutes and involving municipal questions have become numerous and frequently conflicting. In many instances there is but an apparent conflict in the decisions—the result of changes in the laws by repeal, amendment, or new enactment. It has become a great labor to ascertain and apply the law; and in view of the present and growing importance of the subject, the presentation of all the law thereon in orderly, classified and compact form has been deemed necessary.

With the consent of the owners of the copyrights, I have made free use of the syllabi of the Indiana Supreme and Appellate Court Reports, Burns' Revised Statutes 1894, and Supplement 1897, including annotations, Burns' Indiana Index-Digest, Ripley's Digest, Black's Digest and Woollen's Digest. I gratefully acknowledge my indebtedness to the authors of the several works mentioned.

JOHN E. SCOTT.

August 1, 1899.

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844. City clerk—Duty.
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949. City treasurer—Office abolished.
950. Treasurer of county to be city treasurer—Duties.
951. Duties of treasurer.
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954. City treasurer to deliver precepts.
955. Taxation—Assessments.
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CITIES AND TOWNS, INDIANA.

CONSTITUTION OF THE UNITED STATES.

1787.

ART.
1. The Congress.

ART.
4. Citizens—Privileges and Immunities.

ARTICLES IN AMENDMENT OF THE CONSTITUTION.

14. Citizens—Privileges and Immunities.

ARTICLE 1.—THE CONGRESS.

SEC.
1. Powers of congress.

SEC.
2. Restrictions upon states.

1. Powers of congress.—8. The congress shall have power * * * to regulate commerce with foreign nations, and among the several states, and with Indian tribes; * * * and, to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof. R. S. 1894, § 8.

Power to regulate commerce.—States can not embarrass commercial communication, abridge the freedom of commerce, discriminate in favor of the products of one state, lay burdens upon instruments of commerce, or exact licenses from persons, natural or artificial, engaged in interstate commerce, and this is so whether congress has or has not legislated upon the subject. Western U. Tel. Co. v. Pendleton, 95 Ind. 12; Western U. Tel. Co. v. Pendleton, 122 U. S. 347; Western U. Tel. Co. v. Alabama State Board, 132 U. S. 472; City of Indianapolis v. Bieler, 138 Ind. 30; Crutcher v. Kentucky, 141 U. S. 47; Wabash, etc., Ry. Co. v. Illinois, 118 U. S. 557; Brimmer v. Rebman, 138 U. S. 78; McCall v. California, 136 U. S. 104; Stoutenburgh v. Hennick, 129 U. S. 141; Asher v. Texas, 128 U. S. 129; Robbins v. Shelby County Taxing District, 120 U. S. 489; In re Rahrer, 140 U. S. 545; Leisy v. Hardin, 135 U. S. 100; Minnesota v. Barber, 136 U. S. 313; Scott v. Donald, 165 U. S. 58; 4 Elliott Railroads, § 1664, *et seq.*

Congress possesses exclusive authority over interstate commerce, but may, by appro-

priate legislation, subject any article of interstate commerce to the police regulations of any state. City of Indianapolis v. Bieler, 138 Ind. 30; In re Rahrer, 140 U. S. 545; Commonwealth v. Calhane, 154 Mass. 115; Scott v. Donald, 165 U. S. 58.

Municipal ordinances.—Municipal ordinances and by-laws which assume to regulate or lay burdens upon interstate commerce are void. 1 Beach Pub. Corp., § 506 and cases.

Police power and regulations.—The state is not inhibited from enacting police regulations which operate upon instrumentalities or articles of commerce, provided no discriminations are made against classes of citizens, and no restrictions are placed upon commercial intercourse. Congress can not exercise police powers for the protection of the inhabitants of a state; this is a domestic matter, to be governed and regulated by state laws. Brechbill v. Randall, 102 Ind. 528; Western U. Tel. Co. v. Pendleton, 95 Ind. 12; Western U. Tel. Co. v. Pendleton, 122 U. S. 347; New York, etc., R. Co. v. New York, 165 U. S. 628; 2 Beach Pub. Corp., § 1014; 2 Elliott Railroads, § 667 and cases.

Police power delegated to cities.—The state may delegate certain of its police powers to cities and towns and many of the powers exercised by municipalities are of this character. The police power must be exercised in subordination to both the state and federal constitutions. 1 Dillon Munic. Corp., 4th ed., §§ 141, 142 and cases; City of Crawfordsville v. Braden, 130 Ind. 149.

Where a subject is within the police power of the state, the question as to what regulations are proper and needful is one for legislative consideration and decision. Jamieson v. Indiana, etc., Co., 128 Ind. 555; New York, etc., R. Co. v. New York, 165 U. S. 628.

Licenses.—In the exercise of police power, municipal corporations may, when empowered by the state, require a license of peddlers, hackmen, draymen, omnibus drivers, retail liquor dealers, showmen, green grocers, billiard saloons, pawn brokers and many other occupations. Shuman v. City of Ft. Wayne, 127 Ind. 109.

Interstate commerce—License fee—Peddler—Traveling agent—Sale by sample.—An ordinance which prohibits any traveling merchant, or peddler, from selling, or offering to sell, any merchandise without having obtained a license, can not be enforced against one who makes negotiations for the sale of property situated and owned in another state. An ordinance requiring a license fee from agents representing citizens of another state, who offer goods not in this state for sale by sample, is void, because it assumes to establish a regulation affecting commerce between the states. McLaughlin v. City of South Bend, 126 Ind. 471, 472; Martin v. Town of Rosedale, 130 Ind. 109; McCall v. California, 136 U. S. 104; Stoutenburgh v. Hennick, 129 U. S. 141; Robbins v. Shelby County Taxing District, 120 U. S. 489; Asher v. Texas, 128 U. S. 129; Brennan v. Titusville, 153 U. S. 289; Leloup v. Port of Mobile, 127 U. S. 640; In re Nichols, 48 Fed. Rep. 164; Corson v. Maryland, 120 U. S. 502; Ward v. Maryland, 12 Wall. 418.

An ordinance of a town of this state requiring all traveling peddlers of goods to take out license is not void on the assumption that it applies only to non-residents of such town, for it equally applies to citizens thereof; but it is void as to residents of other states who are engaged in selling goods located in such other states, even though the sale is only by sample, on the ground that it is an interference with interstate commerce. Martin v. Town of Rosedale, 130 Ind. 109.

A municipal ordinance which imposes a license tax on every merchandise broker who maintains a store-room or ware-room or office within the city limits is void, under the commerce clause, as to a broker whose sole business is the making of contracts by sample for the sale and delivery to citizens of this state of goods, wares and merchandise, which, at the time of entering into the contracts, are the property of citizens of other states, and situated in such other states. In re Rozelle, 57 Fed. Rep. 155.

A municipal ordinance imposing a tax and other restrictions on the selling of meats produced in other states, and nothing of the kind on meats produced in the state in

which the ordinance is passed, is void. Georgia Packing Co. v. Mayor, etc., 60 Fed. Rep. 774.

An ordinance of the city of Baltimore providing for the collection of a wharfage charge of and from all vessels depositing or transporting goods or articles other than the productions of the state of Maryland, is void. Guy v. Baltimore, 100 U. S. 434.

Cities and towns—Ordinance—Hawkers and peddlers.—When the incorporating act authorizes it, a city or town may adopt an ordinance restraining any person from hawking or peddling within the corporate limits without having a license so to do. Such ordinance does not violate the above or any other federal or state constitutional provision. City of Huntington v. Cheesbro, 57 Ind. 74; Emert v. Missouri, 156 U. S. 296.

A city ordinance requiring a hawker or peddler, who is not a resident of the city, and who proposes to sell goods, wares or merchandise which are not grown or manufactured in the county in which such city is situated, to procure a license and pay a fee therefor, before he may lawfully follow his calling in such city, discriminates against the citizens and products of other communities, and is unconstitutional and void. Graffty v. City of Rushville, 107 Ind. 502; Welton v. Missouri, 91 U. S. 275; Guy v. Baltimore, 100 U. S. 434. See Sears v. Board, etc., 36 Ind. 267.

An ordinance imposing a license on hawkers and peddlers does not interfere with interstate commerce in the case of a peddler of chairs imported into the state before his employment begins, even though the sale by him be conditional and the title remains in the foreign owner. City of South Bend v. Martin, 142 Ind. 31.

But the right of congress to regulate interstate commerce "is co-extensive with the subject on which it acts and can not be stopped at the external boundary of the state, but must enter its interior, and must be capable of authorizing the disposition of those articles which it introduces, so that they become mingled with the common mass of property within the territory entered." Brennan v. Titusville, 153 U. S. 289; Leisy v. Hardin, 135 U. S. 100; Gibbons v. Ogden, 9 Wheat. 1; Brown v. Maryland, 12 Wheat. 419; In re Spain, 47 Fed. Rep. 208.

Interstate commerce—Intrastate commerce.—The negotiation of sales of goods which are in another state for the purpose of introducing them into the state in which the negotiation is made is interstate commerce, and can not be restrained or taxed by the state into which they are sought to be so introduced. To tax the sale of such goods, or the offer to sell them, before they are brought into the state, is a tax on interstate commerce. Goods which have been sent by the owners and manufacturers from one state into another, for sale, reaching their final destination and resting place before they are sold, or offered for sale, cease to be subjects of interstate commerce and become incorporated in the general mass of property in the state to which they have been so sent, and the selling or offering for sale of such property is not interstate commerce, but internal and domestic commerce. Both the occupation of selling the goods, and the goods themselves, in such case, are subject to the taxing power and the police power of the state. Emert v. Missouri, 156 U. S. 296; City of South Bend v. Martin, 142 Ind. 31.

And an ordinance prohibiting peddling is an unlawful interference with interstate commerce as to a salaried soliciting and distributing agent, when such agent solicits orders for books and forwards such orders to another salaried agent of such firm, who sends them to said firm, the latter shipping the books upon said orders to the agent from whom the orders are received by it, and he in turn repacking and reshipping the books to the soliciting and distributing agent for distribution upon said orders. City of Huntington v. Mahan, 142 Ind. 695.

Intoxicating liquors.—Under the act of congress approved August 8, 1890, intoxicating liquors transported from one state into another for use, sale or storage in the latter state, are subject to its police regulations; and an ordinance of the city of

Indianapolis licensing breweries, distilleries and their depots and agencies established in the city, with other wholesale dealers in malt liquors, but excepting from its operation residents of the city doing a wholesale business in bottled beer, is valid against residents and non-residents alike, but the exception sought to be made is void for discrimination. City of Indianapolis v. Bieler, 138 Ind. 30.

Original packages.—States can not prohibit the importation from another state of any article of merchandise and the sale thereof in the original packages, unless by authority of congress; and any burden placed upon such property, or the sale thereof by the owner, or his agent, is in violation of the power in congress to regulate interstate commerce. Leisy v. Hardin, 135 U. S. 100; Lyng v. Michigan, 135 U. S. 161.

So long as congress remains silent as to any branch or article of interstate commerce such silence is an indication of its will that such branch or article of commerce shall remain unrestricted; yet congress may, by appropriate legislation, subject any article of interstate commerce to the police regulations of any state. In re Rahrer, 140 U. S. 545; Crutcher v. Kentucky, 141 U. S. 47; Wabash, etc., Ry. Co. v. Illinois, 118 U. S. 557; Brimmer v. Rebman, 138 U. S. 78; City of Indianapolis v. Bieler, 138 Ind. 30.

An ordinance which provides that it shall be unlawful to sell liquors at wholesale or retail in connection with drugs, or in drug stores, does not interfere with interstate commerce. Jacobs Pharmacy Co. v. City of Atlanta, 89 Fed. Rep. 244.

Telegraph companies—Control by congress.—The telegraph is an instrument of commerce; intercourse by telegraph is commercial intercourse, and when it extends beyond the state is interstate and subject to the control of congress. Western U. Tel. Co. v. Pendleton, 95 Ind. 12; Pensacola Tel. Co. v. Western U. Tel. Co., 96 U. S. 1; Telegraph Co. v. Texas, 105 U. S. 460; Western U. Tel. Co. v. Pendleton, 122 U. S. 347; Ratterman v. Western U. Tel. Co., 127 U. S. 411; Leloup v. Port of Mobile, 127 U. S. 640.

Telegraph companies—License tax.—A city, when authorized by its charter, may impose a license tax by ordinance upon a telegraph company which has accepted the provisions of the act of congress approved July 24, 1866, for business done exclusively within such city, but not including any business done to or from points without the state, and not including any business done for the government of the United States, its officers or agents. An ordinance imposing a license tax of $500 in such case is an exercise of police power and is not in conflict with the federal constitution. Postal Tel. Cable Co. v. Charleston, 153 U. S. 692; Western U. Tel. Co. v. City Council of Charleston, 56 Fed. Rep. 419.

License tax—City ordinance.—A municipal ordinance requiring a telegraph company, which is engaged in transmitting messages to all parts of the United States, and which has accepted the act of congress of July 24, 1866, to pay a license tax, is void. Leloup v. Port of Mobile, 127 U. S. 640. See Osborne v. Mobile, 16 Wall. 479.

Telegraph companies—Interstate and federal business.—The business done by telegraph companies, which have accepted the provisions of the act of July 24, 1866, between points without the state and the city, and all business done for the United States government, is protected from taxation by the interstate commerce clause. Western U. Tel. Co. v. Texas, 105 U. S. 460; Western U. Tel. Co. v. Alabama State Board of Assessment, 132 U. S. 472; Leloup v. Port of Mobile, 127 U. S. 640.

Telegraph companies—Occupation of streets—Rental.—A city ordinance requiring telegraph and telephone companies, which are not taxed on their gross income for city purposes, to pay for the privilege of using the streets, alleys and public places, to the city, the sum of five dollars per annum for each telegraph or telephone pole erected or used by them on the streets, alleys or public places in said city, does not impose a privilege or license tax. Such charge is in the nature of rental, and the ordinance is valid. St. Louis v. Western U. Tel. Co., 148 U. S. 92; St. Louis v. Western U. Tel. Co., 149 U. S. 465; Postal Tel. Cable Co. v. Baltimore, 156 U. S. 210. See City of Philadelphia v. Western U. Tel. Co., 81 Fed. Rep. 948.

Interstate commerce—Ordinances imposing tax on telegraph poles and wires.—Where city enacted two ordinances, one imposing a charge of $1 per annum for each telegraph pole maintained in the city of Philadelphia by any telegraph company, and the other, in addition to the pole charge, required the annual payment of $2.50 per mile on all wires suspended above ground, the ordinances were unreasonable and void. City of Philadelphia v. Western U. Tel. Co., 82 Fed. Rep. 797.

An ordinance imposing the payment of five times the cost of supervising and controlling the corporation imposes a tax and is void as applied to a corporation engaged in interstate commerce. City of Philadelphia v. Western U. Tel. Co., 40 Fed. Rep. 615.

It is lawful for a state to impose taxes upon property owned and used within it by a corporation of another state, even when such corporation is engaged in interstate commerce, and the exaction of a license tax is a valid exercise of power by municipal corporations, in order to cover expenses to which they may be put in the enforcement of their police rules and regulations. City of Philadelphia v. Western U. Tel. Co., 89 Fed. Rep. 454; Western U. Tel. Co. v. Attorney-General, 125 U. S. 530.

The amount of the license charges rests with the city councils in the first instance, and it is only where such discretion has been manifestly abused that the courts are justified in interfering. City of Philadelphia v. Western U. Tel. Co., 89 Fed. Rep. 454.

Telegraph poles—License tax.—Cities may impose a reasonable license tax upon the poles of telegraph companies maintained within the corporate limits. Whether the amount of license tax imposed is reasonable is open to judicial inquiry. City of Philadelphia v. Western U. Tel. Co., 89 Fed. Rep. 454.

Railroads—Regulation.—A railroad company created by a state is for all purposes of local government a domestic corporation, and its railroad within the state is a matter of domestic concern. Even when its road connects with railroads in other states, the state which created the corporation may make all needful regulations of a police character for the government of the company while operating its road in that jurisdiction. It may prescribe the location and the plan of construction of the road, the rate of speed at which the trains shall run, and the places at which they shall stop, and may make any other reasonable regulations for their management in order to secure the objects of the corporation and the safety, good order, convenience and comfort of the passengers and of the public. Such regulations are not in themselves regulations of interstate commerce; and it is only when they operate as such in the circumstances of their application that they can be required to give way to the paramount authority of the constitution of the United States. Gladson v. Minnesota, 166 U. S. 427.

License tax—Railroad agency.—An ordinance of a city which requires an agent of a railroad company engaged in interstate commerce, whose business it is to solicit passengers to travel over the railroad which he represents, from the state of California into and through other states to the city of New York, to pay a license fee for the privilege of conducting such business in the city, is a tax upon interstate commerce and is unconstitutional. McCall v. California, 136 U. S. 104; Norfolk, etc., R. Co. v. Pennsylvania, 136 U. S. 114.

A railroad which, through its connections and traffic contracts, has become a link in a through line of road, over which, as part of the business thereof, freight and passengers are carried into and out of a state, is engaged in interstate commerce. An office maintained by such railroad, in a state other than the one in which it is incorporated, because of the necessities of the interstate business of the company, and for no other purpose, can not be taxed by the state in which such office is maintained. Norfolk, etc., R. Co. v. Pennsylvania, 136 U. S. 114.

Taxation—Unit rule—Interstate commerce.—The tax law of March 6, 1891 (R. S. 1894, § 8408, *et seq.*), is not invalid as authorizing the importation of values, by reason of considering the road as a unit and taking such value for assessment as the part of the road lying within the state bears to the whole road, and such a mode of assessment

does not interfere with interstate commerce. Indianapolis, etc., Ry. Co. v. Backus, 133 Ind. 609, 612; Evansville, etc., R. Co. v. West, 139 Ind. 254.

Unit system—Applied to railroads, sleeping car, express, telephone and telegraph companies.—Pittsburgh, etc., Ry. Co. v. Backus, 154 U. S. 421; Cleveland, etc., Ry. Co. v. Backus, 154 U. S. 439; Pullman Palace Car Co. v. Hayward, 141 U. S. 36; Massachusetts v. Western U. Tel. Co., 141 U. S. 40; Western U. Tel. Co. v. Attorney-General, 125 U. S. 530; Western U. Tel. Co. v. Henderson, 68 Fed. Rep. 589; Western U. Tel. Co. v. Taggart, 141 Ind. 281; State v. Adams, American, United States Express Co., 144 Ind. 549; Maine v. Grand Trunk R. Co., 142 Ind. 217; Western U. Tel. Co. v. Taggart, 163 U. S. 1; Pullman Palace Car Co. v. Pennsylvania, 141 U. S. 18; Adams Express Co. v. Ohio, 165 U. S. 194.

The tax law of March 6, 1891 (R. S. 1894, § 8408, *et seq.*), does not authorize the importation of values from other states, nor does the method of assessment of rolling stock, valued in accordance with the rule of rating the roads as a unit, and taking such a portion of its value as the length of the road lying within the state bears to the whole road, operate to import values upon which assessments for taxation are made; nor does such method of assessment tax interstate commerce. Cleveland, etc., Ry. Co. v. Backus, 133 Ind. 513, 543; Pittsburgh, etc., Ry. Co. v. Backus, 133 Ind. 625, 655; Evansville, etc., R. Co. v. West, 139 Ind. 254; Pittsburgh, etc., Ry. Co. v. Backus, 154 U. S. 421; Cleveland, etc., Ry. Co. v. Backus, 154 U. S. 445.

Railroad bridge.—The fact that a railroad bridge across a navigable stream is an instrument of interstate commerce does not exempt so much of it as is within either state from taxation by such state. Pittsburgh, etc., Co. v. Board of Public Works, 172 U. S. 32.

Taxes—Interstate commerce—Telegraph company.—The statute of 1893 (R. S. 1894, § 8478, *et seq.*) providing for the assessment and valuation of telegraph lines is valid, and is not an infringement of interstate commerce. That statute and the statute of 1891 (R. S. 1894, § 8408, *et seq.*) are only different parts of one and the same law of taxation. Western U. Tel. Co. v. Taggart, 141 Ind. 281; Pittsburgh, etc., Ry. Co. v. Backus, 154 U. S. 421, 447.

A tax upon a carrier upon business done in a state is not a tax upon interstate commerce, although the carrier is engaged in business between the states. Pacific Express Co. v. Seibert, 142 U. S. 339.

The property of corporations engaged in interstate commerce, situated within the state, may be taxed the same as other property of individuals or corporations engaged in the same line of business. Postal, etc., Cable Co. v. Adams, 155 U. S. 688.

Navigable waters—Control—Bridges, etc.—The power vested in congress to regulate commerce with foreign nations and among the several states includes the control of the navigable waters of the United States, so far as may be necessary to insure their free navigation, and by "Navigable waters of the United States," are meant such as are navigable in fact, and which by themselves or their connection with other waters form a continuous channel for commerce with foreign countries or among the states. Congress may provide for the erection of bridges, or for the removal of the same, over navigable waters, and may prescribe their height, location and other matters affecting navigation. Miller v. Mayor of New York, 109 U. S. 385; The Daniel Ball, 10 Wall. 557; Escanaba Co. v. Chicago, 107 U. S. 678; State v. Wheeling and Belmont Bridge Co., 18 How. 421; Gilman v. Philadelphia, 3 Wall. 713; Luxton v. North River Bridge Co., 153 U. S. 525; Covington, etc., Bridge Co. v. Kentucky, 154 U. S. 204; Newport and Cincinnati Bridge Co. v. United States, 105 U. S. 470; Harman v. Chicago, 147 U. S. 396; The Clinton Bridge, 10 Wall. 454.

An ordinance of the city of New Orleans "to establish the rate of licenses for professions, callings and other business," etc., which assessed and directed to be collected a certain sum from "every member of a firm or company, agency, person or corporation

running tow-boats to and from the Gulf of Mexico, or owning and running job-boats within the corporate limits" is in conflict with the authority of congress to regulate commerce and is void. Moran v. New Orleans, 112 U. S. 69.

Vessels navigating the Chicago river, licensed by the United States, can not be required to pay a license tax by the city of Chicago. Harman v. Chicago, 147 U. S. 396.

The levying of a tax upon vessels or other water-craft, or the exaction of a license fee by the state within which the property subject to the exaction has its *situs*, is not a regulation of commerce within the meaning of the constitution. Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365; Transportation Co. v. Wheeling, 99 U. S. 273; Covington, etc., Bridge Co. v. Kentucky, 154 U. S. 204.

A tax imposed by the city of Wheeling upon certain steamboats used in navigating the Ohio between that city and Parkersburg and intermediate places on both sides of the river, in the states of West Virginia and Ohio, the principal office of the company being in Wheeling, and the vessels starting from that city on their voyages, and when not running being laid up there, is valid. Transportation Co. v. Wheeling, 99 U. S. 273.

A vessel engaged in interstate commerce, temporarily in a port, with a *situs* at another port, is not subject to state or municipal taxes while in such temporary port. Hays v. Pacific, etc., Co., 17 How. 596.

Internal and non-navigable waters—Highways, turnpikes, railways, canals, etc.—Congress has no right to interfere, concerning strictly internal commerce of the state, and while the regulations of the state may affect interstate commerce indirectly, their bearing upon it is so remote that it can not be termed in any just sense an interference. The states may authorize the construction of highways, turnpikes, railways and canals between points in the same state, and regulate tolls for the use of the same; and may authorize the building of bridges over non-navigable streams, and otherwise regulate the navigation of the strictly internal waters of the state, such as do not, by themselves or by connection with other waters, form a continuous highway over which commerce is or may be carried on with other states or foreign countries. Covington, etc., Bridge Co. v. Kentucky, 154 U. S. 204; Railroad v. Maryland, 21 Wall. 456; Veazie v. Moor, 14 How. 568; The Montello, 11 Wall. 411; Sands v. Manistee River, etc., Co., 123 U. S. 288; Elliott Roads and Streets, pp. 27, 28.

Cases in which states, directly or by delegation to municipalities, may act in the absence of action by congress.—In the absence of regulation by congress states may enact laws for regulation of pilots; quarantine and inspection laws and the policing of harbors; the improvement of navigable channels; the regulation of wharfs, piers and docks; the construction of dams and bridges across the navigable waters of a state, and the establishment of ferries. Covington, etc., Bridge Co. v. Kentucky, 154 U. S. 204, 211, and cases; Brown v. Houston, 114 U. S. 622, 630; Escanaba Co. v. Chicago, 107 U. S. 678; Transportation Co. v. Parkersburg, 107 U. S. 691; Ouachita Packet Co. v. Aiken, 121 U. S. 444; Packet Company v. Catlettsburg, 105 U. S. 559.

Jurisdiction of congress, when exclusive.—In the absence of congressional action the states may continue to regulate matters of local interest only incidentally affecting foreign and interstate commerce, such as pilots, wharves, harbors, roads, bridges, tolls, freights, etc., but whenever the matter is national in character or admits of one uniform system or plan of regulations, the power of congress is exclusive, and, in such case, non action upon the part of congress is equivalent to a declaration that interstate commerce, as to such matter, shall remain free and untrammeled. Brown v. Houston, 114 U. S. 622; Bowman v. Chicago, etc., Ry. Co., 125 U. S. 465; Covington, etc., Bridge Co. v. Kentucky, 154 U. S. 204; Mobile County v. Kimball, 102 U. S. 691.

Harbors—Wharves—Quarantine stations.—The constitution of the United States does not prohibit states from improving harbors, bays and rivers which are aids to commerce, nor from collecting toll for the use of improved national waterways; and states may erect wharves, collect fees for the use thereof, and collect fees at quarantine stations.

County of Mobile v. Kimball, 102 U. S. 691; Sands v. Manistee Co., 123 U. S. 288; Packett Co. v. Catlettsburg, 105 U. S. 559; Packett Co. v. Keokuk, 95 U. S. 80; Packett Co. v. St. Louis, 100 U. S. 423; Morgan's Co. v. Louisiana Board, 118 U. S. 455; Ouachita Co. v. Aiken, 121 U. S. 444; 1 Beach Pub. Corp., § 565.

Wharfage fees can not be charged to vessels of other states when such fees are not charged to local vessels of the state. Guy v. Baltimore, 100 U. S. 434.

Bridges.—In the absence of action upon the subject by congress, a municipal corporation, under authority delegated by the state, may regulate the construction, repair, and use, of bridges over navigable waters within the city limits. Escanaba Co. v. Chicago, 107 U. S. 678; Cardwell v. American Bridge Co., 113 U. S. 205; Elliott Roads and Streets, p. 27.

Ferries.—When a state expressly grants to an incorporated city the power "to license, tax and regulate ferries," the latter may impose a license tax on the keepers of ferries living in the state, although their boats ply between landings lying in two different states, and the act by which this exaction is authorized will not be held to be a regulation of commerce. Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365; Fanning v. Gregoire, 16 How. 524; Conway v. Taylor's Ex'rs, 1 Black 603; Covington, etc., Bridge Co. v. Kentucky, 154 U. S. 204.

Cities and towns situated on navigable waters, under authority conferred by their charters, in the absence of action by congress, may, by ordinance, provide for the erection of wharves, regulate wharfage in proportion to the tonnage of vessels, and forbid vessels landing within the corporate limits, except as places designated as wharves or landing places. Packet Co. v. Catlettsburg, 105 U. S. 559.

Municipal ordinances, regulating rate of wharfage, enacted under authority of a statute of the state, in the absence of action upon the subject by congress, are not in conflict with the constitution. If the rates fixed are unreasonable, relief must be sought under the laws of the state. Ouachita Packet Co. v. Aiken, 121 U. S. 444; Transportation Co. v. Parkersburg, 107 U. S. 691.

2. Restrictions upon states.—10. No state shall * * * pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contract; or grant any title of nobility. * * * R. S. 1894, § 10.

See *post*, § 14 and notes.

Provisions construed.—In order to come within the provision, "that no state shall pass any law impairing the obligation of contracts," not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the state. The prohibition is aimed at the legislative power of the state, and not at the decisions of its courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals. New Orleans Water Works Co. v. Louisiana, etc., Co., 125 U. S. 18.

Municipal ordinances.—A by-law or ordinance of a municipal corporation, however, is a law of the state within the meaning of the constitution, and when it impairs the obligation of a contract is void. New Orleans Water Works Co. v. Louisiana, etc., Co., 125 U. S. 18; Murray v. Charleston, 96 U. S. 432; 1 Beach Pub. Corp., § 506.

An ordinance, when accepted, may become a contract, and in such case the obligation of the contract can not be impaired by a subsequent ordinance. 1 Beach Pub. Corp., § 506.

Municipal charters not contracts.—Municipal corporations are mere instrumentalities of the state for the more convenient administration of local government. In the absence of restrictions in the state constitution, their powers may be enlarged, abridged or entirely withdrawn at the pleasure of the legislature. Meriwether v. Garrett, 102 U. S. 472; 1 Dillon Munic. Corp., 4th ed., § 54; United States v. Cruikshank, 92 U. S. 542;

New Orleans v. New Orleans Water Works Co., 142 U. S. 79; Dartmouth College Case, 4 Wheat. 518; Mount Pleasant v. Beckwith, 100 U. S. 514; Butchers' Union v. Crescent City Co., 111 U. S. 746.

But such a corporation, in respect to its private or proprietary rights and interests, may be entitled to constitutional protection. New Orleans v. Water Works Co., 142 U. S. 79.

Municipal contracts—Repeal or amendment of municipal charter—Creation of new corporation.—The state's plenary power over its municipal corporations to change their organization, to modify their method of internal government, or to abolish them altogether, is not restricted by contracts entered into by the municipality with its creditors or with private parties. An absolute repeal of a municipal charter is therefore effectual, so far as it abolishes the old corporate organization; but when the same or substantially the same inhabitants are erected into a new corporation, whether with extended or restricted territorial limits, such new corporation is treated as in law the successor of the old one, entitled to its property rights and subject to its liabilities. Shapleigh v. San Angelo, 167 U. S. 646; Broughton v. Pensacola, 93 U. S. 266; Mount Pleasant v. Beckwith, 100 U. S. 520; Mobile v. Watson, 116 U. S. 289; Hainer's Municipal Securities, §§ 32, 33, 34.

Municipal creditors—To what extend protected.—As to the rights and remedies of municipal creditors upon repeal of municipal charter, see Meriwether v. Garrett, 102 U. S. 472; Von Hoffman v. City of Quincy, 4 Wall. 535; Mount Pleasant v. Beckwith, 100 U. S. 514; Shapleigh v. San Angelo, 167 U. S. 646; Wolff v. New Orleans, 103 U. S. 358; New Orleans v. New Orleans Water Works Co., 142 U. S. 79; In re Copenhaver, 54 Fed. Rep. 660; Mobile v. Watson, 116 U. S. 289; Amy v. Shelby Co. Taxing District, 114 U. S. 387; 1 Dillon Munc. Corp., 4th ed., § 69; Hainer's Municipal Securities, § 34 and cases.

Where the resource for the payment of the bonds of a municipal corporation is the power of taxation existing when the bonds were issued, any law which withdraws or limits the taxing power and leaves no adequate means for the payment of the bonds is forbidden by the constitution, and is null and void. Mobile v. Watson, 116 U. S. 289; 1 Dillon Munc. Corp., 4th ed., § 69 n.; Hainer's Municipal Securities, §§ 27–120, *et seq.*

Judgment for tort.—The doctrine of the previous note does not apply to judgments for torts against a municipal corporation. Louisiana v. Mayor of New Orleans, 109 U. S. 285.

Police—Insurance and pension fund.—A statute provided for the payment of the police force of the city of San Francisco at a rate not exceeding $102 a month for each officer, and that the treasurer of the city and county "should retain from the pay of each police officer the sum of two dollars per month, to be paid into a fund to be known as the police life and health insurance fund," to be administered as provided in said act, etc. The act provided, that upon the death of any member of the police force, there should be paid out of said fund to his legal representatives, the sum of one thousand dollars. The fund so created was a public fund, entirely at the disposal of the government and a police officer had no vested right in it that could not be taken away by the state prior to the happening of the conditions entitling the officer or his representatives to payment therefrom. Pennie v. Reis, 132 U. S. 464.

Obligation of contracts—Municipal franchises.—Franchises granted to corporations to supply cities and their inhabitants with water, light, methods of transit, etc., are contracts protected by the constitution. New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650; New Orleans Co. v. Rivers, 115 U. S. 674; Citizens' St. R. Co. v. City Co., 56 Fed. Rep. 746; Louisville Co. v. Citizens' Co., 115 U. S. 683; St. Tammany Water Works v. New Orleans Water Works, 120 U. S. 64; City Railway Co. v. Citizens' R. Co., 166 U. S. 557; Western Paving, etc., Co. v. Citizens' St. R. Co., 128 Ind. 525.

The rights and franchises which have become vested upon the faith of such contracts

can be taken by the public, upon just compensation to the owners, under the power of eminent domain. New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 673.

The granting of privileges by a municipal corporation to a private company, to supply the inhabitants of the corporation with gas, does not prohibit the municipality from erecting gas works. Hamilton, etc., Co. v. Hamilton City, 146 U. S. 258.

The granting of an exclusive privilege to a water company of furnishing a city and its inhabitants with water does not prohibit the municipality from constructing and operating water-works of its own. Lehigh Water Company's Appeal, 102 Pa. St. 515.

The grant by ordinance of a municipal corporation, under authority of charter provisions, of a right to supply gas or water to a municipality and its inhabitants through pipes and mains laid in the streets, upon condition of the performance of its service by the grantee, is the grant of a franchise vested in the state in consideration of the performance of a public service, and, after performance by the grantee, is a contract protected by the constitution of the United States against state legislation to impair it. Walla Walla City v. Walla Walla Water Co., 172 U. S. 1; New Orleans Gaslight Co. v. Louisiana Light, etc., Co., 115 U. S. 650.

Where an ordinance authorizing a contract with a water company for a water supply for a period of years declared that, until such contract should be avoided by a court of competent jurisdiction, the city should not erect, maintain, or become interested in any water-works, except the ones established by the company, an ordinance thereafter passed during the term of such contract, which provided for the immediate construction of a system of water-works by the city for the purpose of supplying the city and its inhabitants with water, impaired the obligation of the former. Walla Walla City v. Walla Walla Water Co., 172 U. S. 1.

Contracts valid when made—Subsequent legislation and decisions.—If a contract when made is valid by the laws of the state, as then expounded by all the departments of its government, and administered in its courts of justice, its validity and obligation can not be impaired by any subsequent act of the legislature of the state, or decision of its courts, altering the construction of the law. Taylor v. Ypsilanti, 105 U. S. 60; Ohio Life Ins. Co. v. Debolt, 16 How. 416; City v. Lamson, 9 Wall. 477; Douglas County v. Pike, 101 U. S. 677; Stephenson v. Boody, 139 Ind. 60.

Municipal bonds issued under a statute which, when passed, was valid by the laws of the state, as declared and acted upon by the several departments of its government, are not affected by decisions of the supreme court of the state rendered thereafter. Taylor v. Ypsilanti, 105 U. S. 6.

State constitution—Amendments.—Obligations of contracts can not be impaired by amendments to the state constitution. Fisk v. Jefferson Police Jury, 116 U. S. 131; Von Hoffman v. City of Quincy, 4 Wall. 535; Nelson v. St. Martin's Parish, 111 U. S. 716; County of Moultrie v. Rockingham Savings Bank, 92 U. S. 631; Bier v. McGehee, 148 U. S. 137; 2 Elliott Railroads, § 832.

Ultra vires contracts.—If the contract of a corporation is *ultra vires*, legislation in conflict therewith does not impair the obligation of a contract. City of New Orleans v. New Orleans Water Works Co., 142 U. S. 79.

Grant of franchises—A state law.—Municipal grants, under legislative authority, to corporations to occupy and use streets for the purpose of supplying the municipality and its inhabitants with gas, water, transit facilities, etc., are laws within the meaning of the provision of the constitution forbidding states to pass any law impairing the obligation of contracts. Citizens' St. R. Co. v. City Ry. Co., 56 Fed. Rep. 746; New Orleans Gaslight Co. v. Louisiana, etc., Co., 115 U. S. 650; Water Works Co. v. Rivers, 115 U. S. 674.

A municipal ordinance, not passed under legislative authority, is not a law of the state, within the constitutional prohibition against a state law impairing the obligation of contracts. A suit to prevent the enforcement of such an ordinance would not be one

arising under the federal constitution. Hamilton Gaslight and Coke Co. v. Hamilton City, 146 U. S. 258; Missouri v. Harris, 144 U. S. 210.

Street car companies—Ordinance—Contract.—An ordinance of a city granting to a street railroad company the use of its streets for thirty years, in consideration that the company lay its tracks and operate a railway thereon upon certain conditions prescribed by the ordinance, when accepted by the company and the road built and operated as specified, constitutes a contract which the state is not at liberty to impair during its continuance. City Railway Co. v. Citizens' R. Co., 166 U. S. 557; Western Paving, etc., Co. v. Citizens' St. R. Co., 128 Ind. 525.

Amendment—Extension—Acceptance—Estoppel.—If the term of the contract in such case be extended by ordinance, such extension being beneficial to the company, acceptance thereof will be presumed; if such extension is granted at the request of the company, such previous request obviates the necessity of a subsequent acceptance. Where the extension is granted without consideration, the city will be estopped to deny the validity of the extension if the company incur a new liability by issue of bonds and mortgage securing the same, which are accepted by investors on the faith of the city's action. City Railway Co. v. Citizens' R. Co., 166 U. S. 557.

In such case the continued operation of the road is a sufficient consideration for the extension of the franchise. City Railway Co. v. Citizens' R. Co., 166 U. S. 557.

A subsequent contract and ordinance, granting to another railroad company the right to occupy the streets for street railroad purposes, which the prior company has right to use under its contract, is invalid, in so far as it may be construed to interfere with the prior company in the construction, operation and maintenance of its street car system. City Railway Co. v. Citizens' R. Co., 166 U. S. 557.

Railroad—Contract—License.—An ordinance which authorizes a railroad company to erect new bridges of a certain construction, provided said company shall construct good and sufficient approaches and grade to each of said bridges and extend the same, etc., does not constitute a contract when accepted or acted upon; it is only a license. Wabash R. Co. v. Defiance, 167 U. S. 88; Baltimore v. Baltimore Trust & G. Co., 167 U. S. 98.

The legislative power of a city may control and improve its streets, and such power, when duly exercised by ordinances, will override any license previously given, by which the control of a certain street has been surrendered to any individual or corporation. The common council can no more denude itself of the right to improve streets by regrading or otherwise than it can of its power to legislate for the benefit of the health, safety and morals of the inhabitants of the city. Wabash R. Co. v. Defiance, 167 U. S. 88.

Viaduct—Contract—Subsequent legislation.—An agreement between a railroad company and a city respecting the erection of a viaduct entered into by authority of a statute, is a contract in such sense that the respective parties thereto continue to be bound by its provisions so long as the legislation, in virtue of which it was entered into, remains unchanged; but it remains within the power of the legislature, in the exercise of police power, to supervise, control and change such agreements, saving any rights previously vested. Chicago, etc., Railroad Co. v. Nebraska, 170 U. S. 57.

Power to regulate use of streets is a continuing one—Street car—Double tracks.—The power to regulate the use of streets is a continuing power, and is not exhausted by being once exercised. Where a municipal corporation has granted to a street car company the right or license to lay double tracks in a street, it may by ordinance thereafter, in the exercise of its power to regulate the use of the street, require that one of the tracks be taken up. Such an ordinance does not change the terms of a contract, if the power of regulation is exercised in good faith and not arbitrarily or capriciously. Baltimore v. Baltimore Trust Co., 166 U. S. 673.

Exclusive privilege—Water contract.—A grant, under legislative authority, of an exclusive privilege, for a term of years, of supplying a municipal corporation and its

people with water drawn by means of a system of water-works from a particular stream or river does not preclude a grant to other persons of the privilege of supplying, during the same period, the same corporation and people with water drawn in like manner from a different stream or river. Stein v. Bienville Water Supply Co., 141 U. S. 67; Stein v. Bienville Water Supply Co., 34 Fed. Rep. 145.

Where the exclusive privilege to supply the city and its inhabitants with water was not restricted to water drawn from a particular stream, but embraced water from any other stream, a grant of a privilege to any other person or corporation to supply water to the city or its inhabitants is inconsistent with the clause of the National Constitution forbidding a state from passing any law impairing the obligation of contracts. St. Tammany Water Works v. New Orleans Water Works, 120 U. S. 64.

Where the city of New Orleans, acting under legislative authority, granted to a water company, for the term of fifty years, the exclusive privilege of supplying that city and its inhabitants "with water from the Mississippi, or any other stream or river, by mains or conduits, and for erecting and constructing any necessary works or machines for that purpose," and, subsequently, under the sanction of a new state constitution, adopted after that contract was made, the city passed an ordinance allowing the right and privilege to an individual to lay water pipes in certain streets from the said river to supply water to a hotel, the grant was inconsistent with the previous one to the water company, and the provision in the new constitution of Louisiana and the ordinance impaired the city's contract with the water-works company, and were void. New Orleans Water Works Co. v. Rivers, 115 U. S. 674; St. Tammany, etc., Co. v. New Orleans Water Works Co., 120 U. S. 64.

Street car companies—Modification of charter—Imposition of additional burdens.—No question can arise as to the impairment of the obligation of a contract, when a street car company accepts all of its corporate powers subject to the reserved power of the state to modify its charter and to impose additional burdens upon the enjoyment of its franchise, where, after a city has granted to such company, by ordinance, the right of operating a street railway with the requirement that it should pave between the rails, and, thereafter, under a subsequent act of the legislature authorizing it, the city assessed a special tax against the company and required it to pave the street for one foot outside of the rails. Sioux City Street Ry. Co. v. Sioux City, 138 U. S. 98.

Police power—Not impaired.—The granting of franchises to street car companies, water companies, gas companies, etc., involving privileges or exclusive privileges, does not impair the police power of the state. The state and its municipalities, to the extent of the powers delegated to them, may continue to exercise the police power over such corporations, and may make all regulations reasonably necessary to secure and protect the public health, public morals and the public safety. New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650; New York & N. E. R. Co. v. Bristol, 151 U. S. 556; Chicago, etc., R. Co. v. Chicago, 166 U. S. 226; New Orleans Water Works Co. v. Rivers, 115 U. S. 674; Louisville Gas Co. v. Citizens' Gas-Light Co., 115 U. S. 683; Butchers' Union Slaughter-House, etc., Co. v. Crescent City, etc., Co., 111 U. S. 746.

The legislature can not, by contract with an individual or corporation, restrain, diminish or surrender its power to enact laws for the preservation of the public health and morals. For cases in which this principle is applied to slaughter-houses, lotteries, prohibition of liquor traffic, etc., see Butchers' Union Slaughter-House, etc., Co. v. Crescent City, etc., Co., 111 U. S. 746; Fertilizing Co. v. Hyde Park, 97 U. S. 659; Boyd v. Alabama, 94 U. S. 645; Stone v. Mississippi, 101 U. S. 814; Beer Co. v. Massachusetts, 97 U. S. 25.

Delegation of police power to municipal corporations—Regulation of use of streets by corporations, etc.—The state may delegate police power to municipal corporations for the regulation of the use of the streets for the reception of sewers, water pipes, gas pipes, pipes for heating and manufacturing purposes, underground railroads,

trenches for wires for telegraph, telephone and other purposes. The right to exercise this power can not be alienated, surrendered or abridged by the legislature by any grant, contract or delegation whatsoever, and its proper exercise does not impair contract rights. People v. Squire, 107 N. Y. 593; New York v. Squire, 145 U. S. 175.

Ordinances—Impairing obligations of contracts—Injunction.—Courts of equity can not enjoin a city council from the exercise of legislative power, or from passing an ordinance the enforcement of which would be in derogation of contract rights. When ordinances have been passed which are unconstitutional and void as impairing the obligation of a contract, their enforcement can be prevented by appropriate proceedings instituted directly against the parties who seek to have the benefit of them. New Orleans Water Works v. New Orleans, 164 U. S. 471.

Special charter—Corporation—Eminent domain.—A special charter to a corporation is a contract which the legislature may not amend, or otherwise materially modify, unless the power to do so is expressly reserved; yet the charter and the property of the corporation is subject to the right of eminent domain which remains in the state. The exercise of this power by a state, or by a municipal corporation under the authority of the state, is not an interference with the inviolability of contracts, for the reason that all contracts are made subject to the right of eminent domain. City of Terre Haute v. Evansville, etc., R. Co., 149 Ind. 174; Murphy v. Beard, 138 Ind. 560; Elliott Roads and Streets, pp. 143, 144; 2 Dillon Munic. Corp., § 586.

Same—Municipal corporation—Railroad right of way—Condemnation—Statute.—A statute which authorizes a municipal corporation to condemn the property of a railroad company, already devoted to public use, for the purpose of a street, is not void as authorizing the violation of a contract, because all contracts are subject to the exercise of the power of eminent domain. City of Terre Haute v. Evansville, etc., R. Co., 149 Ind. 174.

Private water supply system—Condemnation of.—Where a water supply system is owned by private individuals, and they supply water to a municipality under a contract, such water supply system may be condemned for the use of the city upon payment of compensation to the owners, including compensation for the termination of the contract. Long Island Water Supply Co. v. Brooklyn, 166 U. S. 686.

A contract is property, and, like any other property, may be taken under condemnation proceedings for public use. Long Island Water Supply Co. v. Brooklyn, 166 U. S. 686; New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650.

Power of taxation.—The power of taxation on the part of a municipal corporation is not private property or a vested right of property; such power is an exercise by the legislature of a public and governmental power which can not be imparted in perpetuity, and is always subject to revocation, modification and control, and is not the subject of contract. Williams v. New Jersey, 130 U. S. 189; New Orleans v. New Orleans Water Works Co., 142 U. S. 79.

License tax—Gas companies—Street railroad companies.—A franchise to build and run a street railway, or to erect, construct and maintain gas works and vend gas, granted by the state, is as much subject to taxation as any other property.

The imposition of a license tax by the city for the operation of a street railroad, or gas works, under authority of a statute, where the company has been granted a franchise to operate, etc., does not impair the obligation of a contract. New Orleans, etc., R. Co. v. New Orleans, 143 U. S. 192; Memphis Gas Co. v. Shelby Co., 109 U. S. 398.

Damages caused by mob.—The right to reimbursement for damages caused by a mob or riotous assemblage of people is not founded upon any contract between a city and the sufferers; liability in such case is created by the law of the legislature, and can be withdrawn or limited at its pleasure. The character of the liability is not changed by the fact that the amount of loss has been ascertained and established by judgments rendered. Louisiana v. Mayor of New Orleans, 109 U. S. 286.

Limitation of actions.—The legislature may prescribe a limitation for the bringing of suits where none previously existed, as well as shorten the time within which suits to enforce existing causes of action may be commenced, provided, in each case, a reasonable time, taking all the circumstances into consideration, be given by the new law for the commencement of suit before the bar takes effect. Such legislation does not impair the obligation of contracts, or deprive any person of property without due process of law. As applied to actions upon sales for city taxes see Wheeler v. Jackson, 137 U. S. 245; Terry v. Anderson, 95 U. S. 628.

ARTICLE 4.—CITIZENS—PRIVILEGES AND IMMUNITIES.

3. Citizens—Privileges and immunities.—2. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. * * * R. S. 1894, § 19.

See *post*, §§ 4 and 13.

Corporations.—Corporations are not citizens within the meaning of the constitution when it declares that the citizens of each state shall be entitled to the privileges and immunities of citizens in the several states. Pembina Co. v. Pennsylvania, 125 U. S. 181; Norfolk, etc., R. Co. v. Pennsylvania, 136 U. S. 114; Paul v. Virginia, 8 Wall. 168; Farmers' and Mechanics' Ins. Co. v. Harrah, 47 Ind. 236.

Schools—White and colored children.—States may provide separate schools for the education of white and colored children. Cory v. Carter, 48 Ind. 327; State v. Grubb, 85 Ind. 213; State v. Gray, 93 Ind. 303; Plessy v. Ferguson, 16 Sup. Ct. R. 1138.

Liquor licenses.—Licenses to retail intoxicating liquors may be confined to the citizens of the state where sales are made. Welsh v. State, 126 Ind. 71.

ARTICLES IN AMENDMENT OF THE CONSTITUTION.

ARTICLE 14.—CITIZENS—PRIVILEGES AND IMMUNITIES.

4. Citizens—Privileges and immunities.—1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. R. S. 1894, § 39.

See *ante*, § 3, and *post*, §§ 6, 11, 13 and notes.

First ten amendments.—The first ten articles of amendment to the constitution of the United States were not intended to limit the powers of the state governments in respect to their own people, but to operate on the national government alone. Spies v. Illinois, 123 U. S. 131; Walker v. Sauvinet, 92 U. S. 90; Kelly v. Pittsburgh, 104 U. S. 78; Presser v. Illinois, 116 U. S. 252; Miller v. Texas, 153 U. S. 535; Barron v. Baltimore, 7 Pet. 242; Withers v. Buckley, 20 How. 84; 3 Elliott Railroads, § 980.

Fourteenth amendment construed.—The fourteenth amendment nullifies and makes void all state legislation, and state action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws. It has no reference to individual invasion of individual rights. The privileges and immunities protected are those arising out of the nature and essential character of the federal government. Civil Rights Cases, 109 U. S. 3; United States v. Cruikshank, 92 U. S. 542; Virginia v. Rives, 100 U. S. 313; Slaughter House Cases, 16 Wall. 36; Duncan v. Missouri, 152 U. S. 377.

Whoever, by virtue of public position under a state government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state. Ex parte Virginia, 100 U. S. 339.

The prohibitions of the fourteenth amendment extend to all acts of the state, whether through its legislative, its executive or its judicial authorities. Scott v. McNeal, 154 U. S. 34; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226.

Federal rule of construction of state constitution and statutes.—In proceedings for the taking of private property for public use the federal courts accept the construction placed by the supreme court of the state upon its own constitution and statutes as correct. Backus v. Fort Street Union Depot Co., 169 U. S. 557; Long Island, etc., Co. v. Brooklyn, 166 U. S. 685; Merchants and Manufacturers' Bank v. Pennsylvania, 167 U. S. 461.

Police power.—The inhibitions of the constitution upon the impairment of the obligation of contracts or the deprivation of property without due process or the equal

protection of the laws, are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals. New York & N. E. R. Co. v. Bristol, 151 U. S. 556; New Orleans Gas Light Co. v. Louisiana, etc., Co., 115 U. S. 650; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226; Davis v. Massachusetts, 167 U. S. 43; Mugler v. Kansas, 123 U. S. 623; Budd v. New York, 143 U. S. 517: Barbier v. Connolly, 113 U. S. 27; Giozza v. Tiernan, 148 U. S. 657; In re Kemmler, 136 U. S. 436; People v. Squire, 145 U. S. 175; Powell v. Pennsylvania, 127 U. S. 678; Slaughter Houses Cases, 16 Wall. 36; 1 Dillon Munic. Corp., 4th ed., § 141 and n; 2 Beach Conts., § 1663.

The state, when providing by legislation for the protection of the public health, the public morals, or the public safety, is subject to the paramount authority of the constitution of the United States, and may not violate rights secured or guaranteed by that instrument, or interfere with the powers confided to the general government. Henderson v. Mayor of New York, 92 U. S. 259; Railroad Co. v. Husen, 95 U. S. 465; New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650; Walling v. Michigan, 116 U. S. 446; Yick Wo v. Hopkins, 118 U. S. 356; Steamship Co. v. Louisiana Board of Health, 118 U. S. 455; Mugler v. Kansas, 123 U. S. 623.

Corporations—Not citizens.—A corporation is not a citizen, within the meaning of this section, and has not privileges and immunities secured to citizens against state legislation. Orient Ins. Co. v. Daggs, 172 U. S. 557; Blake v. McClung, 172 U. S. 239.

Corporations--Persons.—Corporations are persons within the meaning of the provisions of the fourteenth amendment. Minneapolis Railway Co. v. Beckwith, 129 U. S. 26; Santa Clara County v. Southern Pacific R. Co., 118 U. S. 394; Pembina Mining Co. v. Pennsylvania, 125 U. S. 181; Charlotte, etc., Ry. Co. v. Gibbes, 142 U. S. 386.

Subjects of police regulation.--The state may delegate to municipalities authority to regulate and control markets, the use and storing of dangerous articles, to prevent fires, suppress nuisances, preserve health, etc., etc. 1 Dillon Munic. Corp., 4th ed., § 141 and n.

Municipal corporations--State control.—The regulation of municipal corporations is a matter peculiarly within the domain of state control. Whether territory shall be governed by a county, a city, or a township organization is a matter of state legislation. A state statute does not deny equal protection of the laws, because five towns are put into a class by themselves, organized into a single municipal corporation, and separated from other towns in the state by being subjected to different control in respect to highways. Williams v. Eggleston, U. S. Sup. Ct., May 2, 1898; Kelly v. Pittsburgh, 104 U. S. 78; Forsyth v. Hammond, 166 U. S. 506.

Railroad tracks within corporate limits—Implied condition.—A railroad company must be deemed to have laid its tracks within the corporate limits of a city subject to the condition that new streets of the city might be opened and extended from time to time across its tracks as the public convenience required and under such restrictions as might be prescribed by statute. Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226.

Laws regulating the crossing of highways by railroad companies with their tracks, and providing for the bearing of the expense thereof by railroad companies, are not in conflict with the constitution as denying the equal protection of the laws. New York, etc., Co. v. Bristol, 151 U. S. 556.

Where the occupation of a portion of a street, not adjacent to abutting property on the street, by a railroad company, under the constitution and laws of a state as interpreted by the supreme court of the state, is *damnum absque injuria*, consequential damages resulting from such occupancy is not a taking of the property. Statutes and ordinances authorizing such occupancy without providing for compensation to the owners are not invalid. Meyer v. City of Richmond, 172 U. S. 82. 19 Sup. Ct. 106.

Due process of law—Compensation.—Due process of law, as applied to judicial proceedings instituted for the taking of private property for public use, means such process

as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public. Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226; Scott v. Toledo, 36 Fed. Rep. 385; Elliott Roads and Streets, p. 178; 3 Elliott Railroads, § 980, n. 1.

Opening street across railroad right of way—Nominal damages.—If the opening of a street across railroad tracks does not unduly interfere with the company's use of the right of way for legitimate railroad purposes, then the compensation would be nominal. The owner of private property taken under the right of eminent domain obtains just compensation if he is awarded such sum as, under all the circumstances, is a fair and full equivalent for the thing taken from him by the public. In such case the city is not bound to condemn and pay for the fee. Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226.

Subterranean telegraph, telephone and electrical illuminations—Police power.—Where an electric sub-way company, by the acceptance of an ordinance, acquired the right to lay its wires under ground, in and through the streets, avenues and highways of the city, in accordance with certain specified plans of construction, the ordinance providing that excavations and the removal and replacement of pavements to be under the control and supervision of the commissioner of public works, and, thereafter, the legislature created a board of commissioners of electrical sub-ways, and it was made the duty of such board to cause all electrical wires and other conductors of electricity to be removed from the surface and placed under ground wherever practicable, the statute requiring any company, operating or intending to operate electrical conductors in any city, to file with said board, map or maps, giving location, courses, etc., and to obtain the approval of said board of the plan of construction, the statute also providing that the salaries and expenses of such board should be assessed upon and collected from the several companies operating electrical conductors in such city, which are, or shall be required to place and operate their conductors under ground, said act did not violate or impair any contract right vested in said sub-way company by said ordinance, nor did it deprive said company of its property without due process of law, nor deny it the equal protection of the laws. By said statute the reserve power of the state or municipality to regulate the use of the streets and highways was merely transferred from one public functionary to another. Independently of any contractual relations between such company and the city this statute was an exercise of the general police powers of the state. New York v. Squire, 145 U. S. 175; People, ex rel., v. Squire, 107 N. Y. 593; Railway Co. v. Gibbes, 142 U. S. 386.

Electric wires in cities.—Laws requiring electric wires to be placed under ground are a legitimate exercise of police power, and are valid against telegraph companies which have accepted the provisions of the act of congress, July 24, 1866, and thereby become entitled to construct lines along all post roads, etc. Western U. Tel. Co. v. City of New York, 38 Fed. Rep. 552. As to telephone companies under said act see Richmond v. Southern, etc., Co., U. S. Sup. Ct., May 22, 1899.

Police power—Electric light company.—A company occupying the streets with gas pipes, electric wires, etc., for illuminating purposes, under contract with the city, is subject to reasonable regulations in the exercise of the police powers of the city. Laclede Gas Light Co. v. Murphy, 170 U. S. 78; New York v. Squire, 145 U. S. 175; St. Louis v. Western U. Tel. Co., 148 U. S. 92, 149 U. S. 465.

Annexation of territory to city—Not a taking of property.—The annexation of territory to a city is not a taking of property, nor does it deprive any person of his property. Taggart v. Claypool, 145 Ind. 590; Kelley v. Pittsburgh, 104 U. S. 78; Stiltz v. City of Indianapolis, 55 Ind. 515; Paul v. Town of Walkerton, 150 Ind. 565.

Same.—Prior to their amendment by act of 1895, §§ 3808 and 3809, R. S. 1894, authorizing the annexation by cities of contiguous territory by ordinance, but restricting the right of appeal to freeholders of the territory sought to be annexed, did not deny

to any person the equal protection of law and did not deprive any person of property without due process of law. Taggart v. Claypool, 145 Ind. 590; Pittsburg, etc., Ry. Co. v. City of Indianapolis, 147 Ind. 292.

It is for the state to determine its political subdivisions, the number and size of its municipal corporations, and their territorial extent. These are matters of a local nature. Forsyth v. Hammond, 166 U. S. 506.

Due process and equal protection of law—Taxation.—The act of March 6, 1891 (R. S. 1894, § 8408, *et seq.*), relating to taxation, creating a state board of tax commissioners and providing, among other things, for the assessment of "railroad track" and "rolling stock" of railway companies, by said state board, is a valid enactment and does not deny to such property owners "due process of law" or "the equal protection of the law," in the assessment of their property. Cleveland, etc., Ry. Co. v. Backus, 133 Ind. 513, 541; Pittsburgh, etc., Ry. Co. v. Backus, 133 Ind. 625, 652; Evansville, etc., R. R. Co. v. West, 139 Ind. 254; Pittsburgh, etc., Ry. Co. v. Backus, 154 U. S. 421; Cleveland, etc., Ry. Co. v. Backus, 154 U. S. 445.

Due process—Equal protection.—Under the tax law of March 6, 1891 (R. S. 1894, § 8408, *et seq.*), the only real difference in the assessment of "railroad track" and "rolling stock" and other property is that other property is valued and assessed by assessors and county boards of review, with a right of hearing on the part of the owners of such property, before the county board of review, which is vested with power to correct errors, and a right of appeal is given from such board to the state board; while property denominated "railroad track" and "rolling stock" is valued and assessed in the first instance by the state board, with a right of hearing before such board, to the owners of such property, with power vested in such board to correct errors. The difference in the mode of assessment is not such as denies to owners of such railroad property the "equal protection of the law," nor does it deny them "due process of law." Indianapolis, etc., Ry. Co. v. Backus, 133 Ind. 609, 611; Evansville, etc., R. R. Co. v. West, 139 Ind. 254.

A statute which provides for notice to the owner of a public sale of lands for taxes, and if the same is not sold at public sale, the same may then be sold at private sale without further notice to the owner, is not void, and the notice provided for is due process of law. Newton v. Raper, 150 Ind. 630.

Equal protection of the law.—The provision of the constitution guaranteeing to all persons the equal protection of the law does not require that all persons shall have the right of a hearing or trial before the same tribunal, and in all the same tribunals, and that they shall have the same right of appeal from one tribunal to another; but a law which operates alike upon all persons under like circumstances is not obnoxious to the provisions of the fourteenth amendment to the United States constitution, that no person shall be denied the equal protection of the laws. Cleveland, etc., Ry. Co.v. Backus, 133 Ind. 513, 529; Pittsburgh, etc., Ry. Co. v. Backus, 133 Ind. 625, 640; Evansville, etc., R. R. Co. v. West, 139 Ind. 254; Pittsburgh, etc., Ry. Co. v. Backus, 154 U. S. 421; Cleveland, etc., Ry. Co. v. Backus, 154 U. S. 445.

The application of the unit rule is not open to the objection of denying the equal protection of the laws. Adams Express Co. v. Ohio, 165 U. S. 194.

Due process of law—Law of the land.—"Due process of law" and "law of the land" mean one and the same thing, and mean that one shall hold his life, liberty and property under the protection of the general rules which govern society, and the assessment and collection of taxes, and the hearing of property owners with reference thereto, are, from necessity, summary proceedings. Cleveland, etc., Ry. Co. v. Backus, 133 Ind. 513, 532; Pittsburgh, etc., Ry. Co. v. Backus, 133 Ind. 625, 644; Evansville, etc., R. R. Co. v. West, 139 Ind. 254; Cleveland, etc., Ry. Co. v. Backus, 154 U. S. 445; Pittsburgh, etc., Ry. Co. v. Backus, 154 U. S. 421.

In matters of taxation it is sufficient that the party assessed should have an oppor-

tunity to be heard, either before a judicial tribunal or before a board of assessment, at some stage of the proceedings. Pittsburgh, etc., Co. v. Board of Public Works, 172 U. S. 32.

Public improvements—Street improvements, etc.—Assessments.—The legislature, in the exercise of its power of taxation, has the right to direct the whole or part of the expense of a public improvement, such as the laying, grading, repairing and widening of a street, to be assessed upon the owners of lands benefited thereby; the determination of the territorial district which should be taxed for a local improvement is within the province of legislative discretion, and if the legislature provides for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law. Spencer v. Merchant, 125 U. S. 345; Kentucky Railroad Tax Cases, 115 U. S. 321; Lent v. Tillson, 140 U. S. 316; Davidson v. New Orleans, 96 U. S. 97, 104; Hagor v. Reclamation Dist., 111 U. S. 701; Bauman v. Ross, 167 U. S. 548; Walston v. Nevin, 128 U. S. 578; Stanley v. Supervisors, 121 U. S. 535; Mobile v. Kimball, 102 U. S. 691; United States v. Memphis, 97 U. S. 284; Palmer v. McMahon, 133 U. S. 660; Huling v. Kaw Valley Ry. Co., 130 U. S. 559; Garvin v. Daussman, 114 Ind. 429; Kuntz v. Sumption, 117 Ind. 1.

The rule of apportionment among the parcels benefited rests within the discretion of the legislature, and may be directed to be in proportion to the position, the frontage, the area or the market value, or in proportion to the benefits as estimated by commissioners. Bauman v. Ross, 167 U. S. 548; Mattingly v. District of Columbia, 97 U. S. 687; Spencer v. Merchant, 125 U. S. 345; Walston v. Nevin, 128 U. S. 578; Shoemaker v. United States, 147 U. S. 282; Paulsen v. Portland, 149 U. S. 30; Fall Brook Dist. v. Bradley, 164 U. S. 112.

Whenever the law operates alike on all persons and property, similarly situated, equal protection is not denied. Walston v. Nevin, 128 U. S. 578; Wurts v. Hoagland, 114 U. S. 606; Railroad Co. v. Richmond, 96 U. S. 521.

The exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation. An assessment of abutting property under a rule which excludes any inquiry as to special benefits resulting to the property assessed is illegal, and a federal court may entertain a suit to enjoin the enforcement of such assessment. Village of Norwood v. Baker, 172 U. S. 269.

A statute which authorizes the assessment of abutting property for the cost of a public improvement without reference to special benefits resulting to the property from the improvement is void. Loeb v. Trustees of Columbia Tp., 91 Fed. Rep. 37; Village of Norwood v. Baker, 172 U. S. 269.

Construction of sewers—Notice—Due process of law.—It is not essential to the validity of a section in the charter of a city granting power to construct sewers that there should in terms be expressed either the necessity for or the time or manner of notice. Where a statute authorizes a city to provide for the construction of sewers and drains, and to tax the cost thereof upon the adjacent property owners, but does not require that any notice shall be given to the property owners, failure to require notice does not render the statute unconstitutional or void, but notice must nevertheless be given, and the city would have a broad discretion with reference to the kind of notice and the manner of giving the same. Paulsen v. Portland, 149 U. S. 30.

A statute conferring upon a tribunal power to finally dispose of the property rights of an individual, and failing to provide for notice, denies to the citizen due process of law, and is unconstitutional. Kuntz v. Sumption, 117 Ind. 1; Garvin v. Daussman, 114 Ind. 429.

Kind of notice and hearing.—The notice and hearing which the constitution de-

mands need only be such as are adapted to the nature of the assessment proposed, and such as afford the property owner an opportunity to show that, according to the method prescribed for making the assessment, the amount charged against him is not correct. Garvin v. Daussman, 114 Ind. 429.

Due process of law—Assessment—Notice.—Section 85, of the act of 1891, as amended by the act of 1893, R. S. 1894, § 3856 (see *post*, § 466), relating to the construction of sewers in cities of more than one hundred thousand inhabitants, the giving of the notice of the work to be done, describing in such notice the boundary lines of the district or area to be drained and to be assessed for the cost of the same, and fixing a day on which remonstrances will be heard, is constitutional, the notice required by the statute being ample to the property holders of the district, and ample opportunity being given to the property owners to be heard. Swain v. Fulmer, 135 Ind. 8, 12.

In proceedings of this character notice by publication is sufficient. Lent v. Tillson, 140 U. S. 316; Paulsen v. Portland, 149 U. S. 30; Bauman v. Ross, 167 U. S. 548.

Federal question—Notice—Jurisdiction.—Where it is alleged that the notice of an assessment was insufficient, and specifically that by reason thereof property was sought to be taken without due process of law, a federal question is presented and the federal court has jurisdiction. Bellingham Bay, etc., Co. v. New Whatcom, 172 U. S. 314.

Water rents—Priority of lien—Due process of law.—An act making water rents a lien on property prior to other and earlier liens is not a divesting of property without due process of law. Provident Savings v. Mayor, 113 U. S. 506.

Municipal ordinances—Arbitrary power—Discrimination.—Municipal ordinances which confer upon municipal authorities arbitrary power to give or withhold consent, as to places or persons, for the carrying on of lawful business, are void. The administration of an ordinance, though it be fair on its face and impartial in appearance, so as practically to make unjust and illegal discriminations between persons in similar circumstances, is within the prohibition of the fourteenth amendment. Yick Wo v. Hopkins, 118 U. S. 356; Henderson v. Mayor of New York, 92 U. S. 259; Chy Lung v. Freeman, 92 U. S. 275; Ex parte Virginia, 100 U. S. 339; Neal v. Delaware, 103 U. S. 370; Soon Hing v. Crowley, 113 U. S. 703; Barbier v. Connolly, 113 U. S. 27; 1 Beach Pub. Corp., § 507.

Ordinances which operate on all alike, under the same circumstances, passed in the exercise of police power, though they relate to certain occupations and not to others, are not within the inhibitions of the constitution. The discriminations which are open to objection are those where persons engaged in the same business are subject to different restrictions, or are entitled to different privileges under the same conditions. Soon Hing v. Crowley, 113 U. S. 703; Barbier v. Connolly, 113 U. S. 27; Powell v. Pennsylvania, 127 U. S. 678; Minneapolis Railway Co. v. Beckwith, 129 U. S. 26; In re Ah Kit, 45 Fed. Rep. 793.

If all persons are treated alike under the law under the same circumstances, no person is deprived of equal protection of the laws. Leeper v. Texas, 139 U. S. 462; In re Converse, 137 U. S. 624; Caldwell v. Texas, 137 U. S. 692.

An ordinance which prohibits the carrying on of washing and ironing of clothes in public laundries and wash-houses, within certain prescribed limits of the city, from ten o'clock at night until six o'clock in the morning of the following day, is purely a police regulation within the competency of any municipality possessed of the ordinary powers belonging to such bodies. Barbier v. Connolly, 113 U. S. 27; Soon Hing v. Crowley, 113 U. S. 703; Minneapolis, etc., R. Co. v. Beckwith, 129 U. S. 26.

An ordinance assuming to regulate public laundries which confers upon municipal authorities arbitrary power to grant or withhold consent, as to persons or places, or which unjustly discriminates between different races, is within the inhibitions of the fourteenth amendment. Yick Wo v. Hopkins, 118 U. S. 356.

An ordinance, authorized by statute, which prohibits any person from visiting any gambling place within certain limits, in the city and county of San Francisco, does not conflict with any provision of the fourteenth amendment. In re Ah Kit, 45 Fed. Rep. 793.

A municipal ordinance of the city and county of San Francisco which declares it "to be unlawful for any Chinese to locate, reside or carry on business within the limits of the city and county, except in that district of said city and county hereinafter provided for their location," etc., is discriminating, against the Chinese, and unequal in its operation as between them and others, and is an arbitrary confiscation of their homes and property, a depriving of them of it, without due process or any process of law; such ordinance is void as being in conflict with the constitution, treaties and statutes of the United States. In re Lee Sing, In re Sing Too Quan, 43 Fed. Rep. 359; In re Sam Kee, 31 Fed. Rep. 680.

Ordinance regulating rate for gas—Federal question.—A suit to restrain the enforcement of an ordinance, the enforcement of which will practically deprive a gas company of its property without due process of law, and also deprive it of the equal protection of the laws by compelling it sell artificial gas without any return therefor in the way of profit, presents a federal question. Of such a suit a federal court has jurisdiction, though both parties to the suit are citizens of the same state. Indianapolis Gas Co. v. City of Indianapolis, 82 Fed. Rep. 245.

Ordinance—Natural gas rates.—Where an ordinance of a city authorized the use of the streets, alleys and public grounds of the city for the purpose of supplying the city and its inhabitants with natural gas for heating and illuminating purposes for a term of twenty years, reserving to the common council the right to fix the rate and price to be charged for gas after the expiration of ten years from the date of the passage of the ordinance, the acceptance of such ordinance by a company created a valid contract, and under such contract, at the expiration of ten years, the common council had the right to fix the rate and price to be charged for gas, and its action fixing the rate was conclusive upon the company and the courts in the absence of a showing of bad faith or fraud. Logansport, etc., Gas Co. v. City of Peru, 89 Fed. Rep. 185.

Under such contract, at the expiration of ten years, in fixing the rate or price to be charged for gas, the common council may take into consideration the earnings of the company in the past ten years. Logansport, etc., Gas Co. v. City of Peru, 89 Fed. Rep. 185.

Ordinances fixing water rates.—Where individuals, companies or corporations are engaged in the business of furnishing water to the public under the provisions of the constitution and statutes of a state, subject to the right on the part of the public instrumentalities to fix the rates at which the water shall be furnished, the paramount provision of the fourteenth amendment of the United States in effect declares that such rates shall not be so fixed as to deprive the person furnishing the water of his property without just compensation. San Diego, etc., Co. v. Jasper, 89 Fed. Rep. 274.

In such case what the person or company is entitled to ask is a fair return upon the value of that which it employs and furnishes for the public use and convenience. On the other hand, the public is entitled to demand that no more be exacted from it than that which is furnished is reasonably worth. For elements to be taken into consideration in determining the value and the rate to be fixed, see San Diego, etc., Co. v. Jasper, 89 Fed. Rep. 274; Smyth v. Ames, 169 U. S. 466, 546.

Ordinance reducing street car fare—Due process of law.—An ordinance which provides that tickets shall be sold by a street car company, good for one fare, including one transfer, "in packages of six for twenty-five cents, and twenty-five for the sum of one dollar," making a reduction of the regular five-cent rate to all who purchase tickets, is unreasonable in a city where the current rate on mortgage investments is 6 per cent., and the company is only making 3.3 per cent. to 4.5 per cent. on its bona fide

investment and is paying 5 per cent. interest upon its bonds. Such ordinance deprives the company of its property without due process of law and is void under the fourteenth amendment. Milwaukee Electric R. & L. Co. v. City of Milwaukee, 87 Fed. Rep. 577; see Smyth v. Ames, 169 U. S. 466.

Where the municipality has the power to regulate fares it is subject to the limitations: (1) That there is reasonable need on the part of the public, considering the nature and extent of the service, of lower rates and better terms than those existing; (2) That the rates and terms fixed by the ordinance are not clearly unreasonable, in view of all the conditions. Milwaukee Electric R. & L. Co. v. City of Milwaukee, 87 Fed. Rep. 577; Covington & Lexington, etc., Co. v. Sandford, 164 U. S. 578.

Ordinance regulating public grounds.—The fourteenth amendment does not have the effect of creating a particular and personal right in the citizen to use public property in defiance of the constitution and laws of the state, and an ordinance of a city prohibiting the use of public grounds for the purpose of making public addresses, without permit from the mayor, does not violate any right guaranteed by the amendment, and is a valid exercise of police power. Davis v. Massachusetts, 167 U. S. 43.

Markets.—The regulation and control of markets for the sale of provisions, including the places and distances from each other at which they may be kept, are matters of municipal police, and may be intrusted by the legislature to a city council, to be exercised as in its discretion the public health and convenience may require. Natal v. Louisiana, 139 U. S. 621; 2 Beach Pub. Corp., § 1267.

An ordinance of the city of New Orleans prohibiting the keeping of a private market within six squares of any public market of the city, under penalty of a fine of twenty-five dollars, and of imprisonment for not more than thirty days, does not violate the fourteenth amendment. Natal v. Louisiana, 139 U. S. 621.

Ordinance providing for the removal of dead animals.—An ordinance granting an exclusive privilege for the removal of all dead animals from the city limits, when the owners do not desire to remove them, is a valid exercise of police power. Such ordinance is not open to the objection of creating a monopoly, or of depriving persons of their property without due process of law. National Fertilizer Co. v. Lambert, 48 Fed. Rep. 458.

Dogs—Statutes and ordinances.—It is within the discretion of the legislature to say how far dogs shall be recognized as property, and under what restrictions they shall be permitted to roam the streets. A statute providing "that no dog shall be entitled to the protection of the law unless the same shall have been placed upon the assessment rolls" for taxation, is not unconstitutional; and an ordinance of a city which provides that "no dog shall be permitted to run or be at large upon any street, alley, highway, common or public square within the limits of the city," etc., provided that such provision "shall not apply to any dog to which a tag, obtained from the treasurer, is attached," is valid. Dogs are not property in the fullest sense, and are subject to the exercise of the police power. Sentell v. New Orleans & C. R. Co., 166 U. S. 698.

Intoxicating liquors—Regulation—Prohibition.—The legislation by a state prohibiting the manufacture within her limits of intoxicating liquors, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege, or immunity secured by the constitution of the United States. Mugler v. Kansas, 123 U. S. 623; License Cases, 5 How. 504; Bartemeyer v. Iowa, 18 Wall. 129; Beer Co. v. Massachusetts, 97 U. S. 25; Foster v. Kansas, 112 U. S. 201; Kidd v. Pearson, 128 U. S. 1; Gray v. Connecticut, 159 U. S. 74.

There is no inherent right in a citizen to sell intoxicating liquors by retail; it is not a privilege of a citizen of the state or of a citizen of the United States. The police power of the state may be exercised to regulate the business—to mitigate its evils or to suppress it entirely. Crowley v. Christensen, 137 U. S. 86.

The right to sell intoxicating liquors is not one of the privileges and immunities of a

citizen of the United States. Jacobs Pharmacy Co. v. City of Atlanta, 89 Fed Rep. 244; Bartemeyer v. Iowa, 18 Wall. 129.

Due process of law.—Prohibiting the manufacture and sale of intoxicating liquors is not taking property without due process of law. Mugler v. Kansas, 123 U. S. 623.

Municipal courts.—A person is not denied the equal protection of the laws, and deprived of his liberty without due process of law, when, at the time of the trial and sentence the court in which he was tried was a court *de jure*, and the judge who tried and sentenced him was at least a judge *de facto*. In re Manning, 139 U. S. 504.

Jury trials.—The right to trial by jury in actions at common law is not a privilege or immunity which the states are forbidden to abridge by the fourteenth amendment. Walker v. Sauvinent, 92 U. S. 90; Church v. Kelsey, 121 U. S. 282.

Carrying dangerous weapons.—A state law forbidding the carrying of dangerous weapons, and authorizing the arrest without warrant of any person violating such law, does not abridge the privileges and immunities of citizens of the United States. Miller v. Texas, 153 U. S. 535.

Judgments for damages by mob.—The owner of a judgment for damages sustained by a mob has no such vested right in the taxing power of a city as to render its diminution by the state to a degree affecting the present collection of the judgment a deprivation of property in the sense of the constitutional prohibition. Louisiana v. Mayor of New Orleans, 109 U. S. 285.

CONSTITUTION OF STATE OF INDIANA.

1851.

ART.

1. Bill of Rights.
2. Suffrage and Elections.
3. Distribution of Powers.
4. Legislative.
6. Administrative.
7. Judicial.
10. Finance.
11. Corporations.
13. Municipal Debt.
15. Miscellaneous.

R. S. 1894, § 235. Schedule.

ARTICLE 1.—BILL OF RIGHTS.

SEC.

5. Unreasonable search or seizure.
6. Courts shall be open.
7. No person twice in jeopardy.
8. Excessive bail and punishment prohibited.
9. Offenses bailable.
10. Trial by jury inviolate in civil cases.
11. Compensation for services and property.
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13. Privileges and immunities equal.
14. Laws impairing contracts.

5. Unreasonable search or seizure.—11. The right of the people to be secure, in their persons, houses, papers and effects, against unreasonable search or seizure shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized. R. S. 1894, § 56.

Procuring search warrant—Common law.—The provision of this section, declaring that "no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized," is but an affirmance of the rights of the citizens in that particular, as the same existed in common law. Carey v. Sheets, 67 Ind. 375.

Papers—Criminal actions.—Parties can not be compelled to produce private papers to be used against them in actions of a criminal or penal nature. Boyd v. United States, 116 U. S. 616.

City ordinance—Pawnbrokers—License—Examination of goods.—An ordinance of a city making it unlawful for any person to carry on the business of pawnbroker without having first procured a license, and making it the duty of every person engaged as a licensed pawnbroker to keep at his place of business a book in which he shall enter a description of the personal property pawned, etc., and providing that such book and such personal property shall be subject to the inspection of the police power of the city, is not a violation of the right of the people to be secure in their persons, houses, papers

and effects against unreasonable searches and seizures, as the business of the pawnbroker is subject to the police power of the state. Shuman v. City of Ft. Wayne, 127 Ind. 109.

6. Courts shall be open.—12. All courts shall be open; and every man, for injury done to him in his person, property or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay. R. S. 1894, § 57.

See *ante*, § 3, and *post*, §§ 11, 13 and notes.

Due course of law—Assessments for street and sewer improvements, etc.—Notice.—A law which authorizes an assessment against property, but makes no provision for notice to the owner, and gives him no opportunity to be heard in respect to the correctness of the charges, lacks the essential element of "due process of law" and is unconstitutional.

Kind of notice and hearing required.—The notice and hearing need only be such as are adapted to the nature of the assessment proposed, and such as afford the property owner an opportunity to show that, according to the method prescribed for making the assessment, the amount charged against him is not correct.

Suit to enforce assessment.—If the statute or ordinance under which the assessment is made provides that the lien of the assessment shall be enforced in a suit in a court of competent jurisdiction, as such action can be commenced only in pursuance of notice to the owner of the pendency thereof, the statute or ordinance, though it does not provide for any other notice of the assessment, does not tend to deprive the owner of his property without due course or process of law. In such case, the property owner has his day in court, and may make defense in the suit to enforce the lien, and the statute or ordinance will not be invalid for want of notice of the assessment. For statutes and ordinances of this character held constitutional, see Garvin v. Daussman, 114 Ind. 429; Kizer v. Town of Winchester, 141 Ind. 694; Law v. Johnston, 118 Ind. 261; Johnson, etc., v. Lewis, 115 Ind. 490; McEneney v. The Town of Sullivan, 125 Ind. 407; Barber Asphalt Paving Co. v. Edgerton, 125 Ind. 455; Killian v. Andrews, 130 Ind. 579; Kuntz v. Sumption, etc., 117 Ind. 1; Swain v. Fulmer, 135 Ind. 8; Campbell v. Dwiggins, etc., 83 Ind. 473.

Due course of law—Due process of law—Equal protection of the law—Tax law.—The general tax law of 1891 is held a valid enactment, and does not deny to property owners "due course of law," or "due process of law" or "the equal protection of the law." For discussion of these terms and their interpretation as found in the state and federal constitutions, see the following: Cleveland, etc., Ry. Co. v. Backus, 133 Ind. 513, 541; Pittsburg, etc., Ry. Co. v. Backus, 133 Ind. 635, 652; Evansville, etc., R. R. Co. v. West, 139 Ind. 254; Pittsburg, etc., Ry. Co. v. Backus, 154 U. S. 421; Cleveland, etc., Ry. Co. v. Backus, 154 U. S. 445; Indianapolis, etc., Ry. Co. v. Backus, 133 Ind. 609.

Street—Vacation—Obstruction to lot owner's easement of access—Remedy.—A remedy for recovery of damages for the obstruction by vacation or otherwise of a lot owner's easement of access to lot from the street is guaranteed by this section.

When the obstruction is not upon the lot owner's fee and is remote from the lot front, if, nevertheless, it renders access to the lot impossible, or impairs it in a substantial manner at the point where it abuts on the street, the property right of the owner is invaded and he may recover; but, if the lot owner, by reason of such remote obstruction, suffers only an injury which is the same in kind, though it may differ in degree, from that suffered by the community in general, then his property right is not invaded, the obstruction is *damnum absque injuria* and he can not recover. Dantzer v. Indianapolis Union Ry. Co., 141 Ind. 604; Pennsylvania Co. v. Stanley, 10 App. 421; Haines

v. Thomas, 7 Ind. 38; Tate v. Ohio R. R. Co., 7 Ind. 479; Decker v. Evansville Ry. Co., 133 Ind. 493; Terre Haute, etc., R. Co. v. Bissell, 108 Ind. 113; Sohn v. Cambern, 106 Ind. 302; Dwenger v. Chicago, etc., Ry. Co., 98 Ind. 153.

7. No person twice in jeopardy.—14. No person shall be put in jeopardy twice for the same offense. No person, in any criminal prosecution, shall be compelled to testify against himself. R. S. 1894, § 59.

Jeopardy.—Jeopardy attaches only after the jury has been sworn, or, if trial is by the court, after trial has been entered upon. Haase v. State, 8 App. 488.

Matter in abatement—Jeopardy.—That another prosecution is pending against the defendant for the same offense can not constitute matter in abatement until the defendant has been placed in jeopardy in the other action. Haase v. State, 8 App. 488.

Different jurisdictions—City—State.—Prior to the enactment of R. S. 1894, § 1709 (see *post*, § 1383), the same act might be made punishable by both the state and municipal authorities; if a person had been prosecuted criminally for an act done, and convicted and punished, still he could not claim the constitutional protection of "once in jeopardy" in a suit brought against him for the same act as a violation of a city ordinance, and this for the reason that one was a criminal and the other a civil action; and because, also, while a party can not be punished twice for the same act, under the same jurisdiction, he may under different jurisdictions. City of Hammond v. New York, etc., Ry. Co., 5 App. 526, 535; Ambrose v. State, 6 Ind. 351; Waldo v. Wallace, 12 Ind. 569; Williams v. City of Warsaw, 60 Ind. 457; City of Indianapolis v. Huegele, 115 Ind. 581; State v. Kirk, 44 Ind. 401, 407.

Liquor license.—It is not an offense against the laws of the state to sell intoxicating liquors without a city or town license, and hence R. S. 1894, § 1709 (see *post*, § 1383), does not prohibit the recovery of a penalty for the violation of a city or town ordinance on this subject. Zeller v. City of Crawfordsville, 90 Ind. 262; Clevenger v. Town of Rushville, 90 Ind. 258; City of Frankfort v. Aughe, 114 Ind. 77.

Civil and criminal actions for same act—Jeopardy.—The legislature may provide for the recovery of punitive damages, in cases where injury is caused by an illegal act, notwithstanding the same illegal act may subject the defendant to a criminal action, and such proceedings do not operate to put the defendant twice in jeopardy. State v. Schoonover, 135 Ind. 526; State v. Roby, 142 Ind. 168, 188.

Keeping a gambling room—Common gambler—Mayor.—A conviction before the mayor upon an affidavit charging the defendant with keeping a gambling-room is no bar to a subsequent prosecution under R. S. 1894, § 2180, for being a common gambler. DeHaven v. State, 2 App. 376.

Procuring conviction—Not jeopardy.—Where a person procures his own conviction before the mayor for keeping a gambling-room, for the purpose of preventing action by the grand jury in the same matter, he is not thereby put in jeopardy, and can not plead his conviction in bar of an indictment for being a common gambler. DeHaven v. State, 2 App. 376; Watkins v. State, 68 Ind. 427; Halloran v. State, 80 Ind. 586.

Plea of guilty—Withdrawal of plea—Effect.—Where a plea of guilty is entered and accepted by the court, jeopardy attaches as much as if there had been a trial by jury and a verdict of guilty returned; but when the defendant voluntarily withdraws his plea with the consent and permission of the court, he waives the defense of former jeopardy the same as he would by moving to set aside a verdict of guilty, and for a new trial. Ledgerwood v. State, 134 Ind. 81.

8. Excessive bail and punishment prohibited.—16. Excessive bail shall not be required. Excessive fines shall not be imposed. Cruel and unusual punishment shall not be inflicted. All penalties shall be proportioned to the nature of the offense. R. S. 1894, § 61.

Excessive punishment.—This provision of the constitution has reference to the statute fixing the puishment, and not to the punishment assessed by the jury within the limits fixed by the statute. Shields v. State, 149 Ind. 395; Siberry v. State, 149 Ind. 684.

If the punishment fixed is legal, the supreme court can not interfere on account of its severity. McCulley v. State, 62 Ind. 428; Murphy v. State, 97 Ind. 579.

It is neither cruel nor unusual punishment to adjudge the abatement of a nuisance. McLaughlin v. State, 45 Ind. 338.

9. Offenses bailable.—17. Offenses, other than murder and treason, shall be bailable by sufficient sureties. Murder or treason shall not be bailable when the proof is evident or the presumption strong. R. S. 1894, § 62.

Defects do not invalidate—Forfeiture—Mayor.—Although a recognizance taken by the mayor of a city, for the appearance before him of one charged with felony, be, by mistake, made payable to the city instead of to the state, and to answer a charge of having violated "an ordinance of said city," instead of a statute of the state, it is valid and binding, and, upon forfeiture, may be enforced by the state. R. S. 1894, §§ 1235–1784; State v. Soudriette, 105 Ind. 306, 310; Evansville, etc., R. R. Co. v. West, 139 Ind. 254.

10. Trial by jury inviolate in civil cases.—20. In all civil cases, the right of trial by jury shall remain inviolate. R. S. 1894, § 65.

Civil actions.—The provision of the constitution relating to trials by jury in civil actions has reference to what were termed civil actions at the common law. Allen v. Anderson, 57 Ind. 388; McMahan v. Works, 72 Ind. 19; Lake Erie, etc., R. Co. v. Heath, 9 Ind. 558; Helm v. First Nat. Bank, 91 Ind. 44; Baltimore, etc., R. Co. v. Ketring, 122 Ind. 5.

City, tax-payer.—A tax-payer of a city is incompetent, if objected to, to serve as a juror where a judgment for the recovery of money may be rendered against such city. Hearn v. City of Greensburg, 51 Ind. 119; City of Goshen v. England, 119 Ind. 368; Williams v. City of Warsaw, 60 Ind. 457; Board, etc., v. Loeb, 68 Ind. 29.

Eminent domain—Property for public use.—It is within the power of the legislature to deny a jury trial in proceedings for the seizing of private property for public use. Dronberger v. Reed, 11 Ind. 420; Hymes v. Aydelott, 26 Ind. 431; Evansville, etc., R. R. Co. v. Miller, 30 Ind. 209; Anderson v. Caldwell, 91 Ind. 451; Baltimore, etc., R. Co. v. Ketring, 122 Ind. 5; Elliott Roads and Streets, p. 149; 3 Elliott Railroads, § 951.

Jury trial.—"Violation of municipal by-laws proper, such as fall within the description of municipal police regulations, as, for example, those concerning markets, streets, water-works, city officers, etc., and which relate to acts and omissions that are not embraced in the general criminal legislation of the state, the legislature may authorize to be prosecuted in a summary manner, by and in the name of the corporation, and need not provide for a trial by jury." 1 Dillon Munc. Corp., § 433; Callan v. Wilson, 127 U. S. 540; Natal v. Louisiana, 139 U. S. 621; 1 Beach Pub. Corp., § 535, *et seq.*

The legislature may provide for the trial of suits for the collection of drainage assessments by the court and not by the jury. Laverty v. State, 109 Ind. 217; Anderson v. Caldwell, 91 Ind. 451; Baltimore, etc., R. Co. v. Ketring, 122 Ind. 5.

Street improvement assessment.—In an action to foreclose a street improvement assessment the parties are not entitled to a jury trial. Bozarth v. McGillicuddy, 19 App. 26.

11. Compensation for services and property.—21. No man's particular service shall be demanded without just compensation. No

man's property shall be taken by law without just compensation; nor, except in case of the state, without such compensation first assessed and tendered. R. S. 1894, § 66.

See *ante*, § 4, and *post*, § 13.

Officers—Fees and salaries.—The services of officers entitled to fees or salaries fixed by law are not "particular services" within the meaning of the constitution. Falkenburgh v. Jones, 5 Ind. 296; Turpen v. Board, etc., 7 Ind. 172; Board, etc., v. Blake, 21 Ind. 32; Board, etc., v. Templer, 34 Ind. 322; Noble v. Board, etc., 101 Ind. 127; Dills v. State, 59 Ind. 15.

Same—Cum onere.—Officers take their offices *cum onere*, and they may be required to perform services for which no specific compensation is provided. Turpen v. Board, etc., 7 Ind. 172; Board, etc., v. Blake, 21 Ind. 32; Board, etc., v. Johnson, 31 Ind. 463; Falkenburgh v. Jones, 5 Ind. 296; Taylor v. Board, etc., 110 Ind. 462; Ex parte Harrison, 112 Ind. 329.

Eminent domain.—The right of eminent domain is limited only by the constitution; and the only limitation in this state is that no man's property shall be taken by law without just compensation; nor, except in case of the state, without such compensation first assessed and tendered. Consumers', etc., Co. v. Harless, 131 Ind. 446; Elliott Roads and Streets, p. 143.

The right of eminent domain is not conferred, but limited by the constitution, and the limit is not upon the amount of the estate to be taken, but it only requires just compensation. Water Works Co. v. Burkhart, 41 Ind. 364; 3 Elliott Railroads, § 950.

The right to seize private property by virtue of the eminent domain must be conferred by statute upon municipal corporations; the right to seize property under the eminent domain does not necessarily exclude the right to acquire property by contract. Leeds v. City of Richmond, 102 Ind. 372; 3 Elliott Railroads, § 951.

Eminent domain.—The right of eminent domain can not be exercised except upon condition that just compensation shall be made to the owner, and it is the duty of the state, in the conduct of the inquest by which the compensation is ascertained, to see that it is just, not merely to the individual whose property is taken, but to the public which is to pay for it. Searl v. School District, 133 U. S. 553; Garrison v. New York, 21 Wall. 196; Bauman v. Ross, 167 U. S. 548.

Uses for which property may be taken.—Private property may be taken in the exercise of eminent domain only for public uses, but these may include the taking of property for a water supply, opening of streets, parks, public squares, drains and sewers, and other purposes. 2 Dillon Munc. Corp., 4th ed., §§ 595–599.

Specific property—Taxing power.—It is only the taking of specific pieces of property of an individual, by virtue of the right of eminent domain, that is prohibited by the constitution, without compensation. The prohibition does not extend to the taxing power. City of Aurora v. West, 9 Ind. 74; City of Logansport v. Seybold, 59 Ind. 225; Board, etc., v. State, 147 Ind. 476.

Annexation.—Annexation of territory to a city is not the exercise of eminent domain, and does not deprive a person of property within the meaning of the constitution. Taggart, etc., v. Claypool, 145 Ind. 590; Stilz v. City of Indianapolis, 55 Ind. 515; Kelly v. Pittsburgh, 104 U. S. 78.

General laws authorizing common councils of cities and boards of trustees of towns, by resolution, without notice to any one, to annex contiguous territory which has been platted into lots, and the plat recorded, are upheld. Paul v. Town of Walkerton, 150 Ind. 565.

Due process of law—Assessments—Taxation—Notice.—If a person have an opportunity to appear before a court or tribunal and contest proceedings which lay a tax or assessment on his property, or appropriate such property, such proceedings are due process of law. Davidson v. New Orleans, 96 U. S. 97; Lent v. Tillson, 140 U. S. 316;

Palmer v. McMahon, 133 U. S. 660; Huling v. Kaw Valley R. Co., 130 U. S. 559; Kentucky R. R. Cases, 115 U. S. 321; Swain v. Fulmer, 135 Ind. 8; Campbell v. Dwiggins, etc., 83 Ind. 473; United States v. Cruikshank, 92 U. S. 542; Leeper v. Texas, 139 U. S. 462; Chicago, etc., R. Co. v. Chicago, 166 U. S. 226; Bauman v. Ross, 167 U. S. 548; Fallbrook v. Bradley, 164 U. S. 112.

Compensation.—There can be no "due process of law" in the taking of private property for public use without compensation. Elliott Roads and Streets, p. 178, *et seq.*

A law which authorizes an assessment against property, but makes no provision for notice to the owner, and gives him no opportunity to be heard in respect to the correctness of the charge, lacks the essential element of "due process of law," and is unconstitutional. Garvin v. Daussman, 114 Ind. 429; Elliott Roads and Streets, pp. 151, 152, 154; 2 Beach Pub. Corp., § 1185.

Applies to street improvement proceedings.—Proceedings for street improvements, where the cost is to be apportioned among those benefited, although somewhat of a summary character, are within the rule which requires notice and a hearing in order that a charge may be imposed by "due process of law." Garvin v. Daussman, 114 Ind. 429; Kuntz v. Sumption, 117 Ind. 1; Law v. Johnston, 118 Ind. 261; McEneney v. Town of Sullivan, 125 Ind. 407; Barber, etc., Co. v. Edgerton, 125 Ind. 455.

Constitution of 1816.—Under the constitution of 1816 pre-payment of compensation was not required. Prather v. Jeffersonville, etc., R. Co., 52 Ind. 16, 41, and cases.

Highways and streets.—The appropriation of land for a highway is a taking by the state, and compensation need not be first assessed and tendered Dronberger v. Reed, 11 Ind. 420; Anderson v. Caldwell, 91 Ind. 451, 453.

Where a city desires to appropriate the real property of a citizen to the purposes of a street, the city must first comply with the provisions of the law, as to the assessment and tendering of damages to the owner. City of Lafayette v. Bush, 19 Ind. 326. See City of Lafayette v. Shultz, 44 Ind. 97.

Streets.—The legislature may authorize the taking of private property for use as streets and other public highways. McCormick v. President, etc., 1 Ind. 48; Snyder v. President, etc., 6 Ind. 237; Rassier v. Grimmer, 130 Ind. 219; Ray v. City of Jeffersonville, 90 Ind. 567; Palmer v. Stumph, 29 Ind. 329.

Compensation for property taken for public use may be made by accruing benefits, and this section does not necessarily require that compensation be made in money. Rassier v. Grimmer, etc., 130 Ind. 219; Hagaman v. Moore, 84 Ind. 496; McIntyre v. State, 5 Blackf. 384; Forsyth v. Wilcox, 143 Ind. 144.

Though land appropriated for a highway is taken for a presumably permanent use, only an easement is acquired, the title and all consistent uses remaining in the owner or occupant. Hagaman v. Moore, 84 Ind. 496.

A railroad company which lays its tracks in a street or highway acquires the right to do so subject to the easement in the public. A street railway is entitled to the use of the easement, and the laying and extending of its tracks in the street or highway across the railroad tracks, though this may be a burden and hindrance to the free and unobstructed use of the steam railway, do not constitute a taking of the private property of the steam railway company. Chicago, etc., R. Co. v. Whiting, etc., R. Co., 139 Ind. 297.

Streets—Property taken for—Compensation—Benefits and damages.—Where private property is taken for a highway or street the owner is entitled to receive the value of what he has been deprived of and no more. Where part only of a parcel of land is taken for a highway the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered. Both special and general benefits from the laying out of a street may be set off against the value of the part taken, as well as against the damages to the remainder. Bauman v. Ross, 167 U. S. 548.

The assessment of lands for the cost of the construction of a public work which does

not benefit the owner or the land is in conflict with this provision of the constitution. Parke County Coal Co. v. Campbell, 140 Ind. 28.

Improvement of streets—Change of grade—Consequential damages—Not a taking, etc.—The improvement of streets by a municipal corporation, though it causes consequential damages to abutting property, is not a taking of private property for public use. In the absence of constitutional or statutory provisions making the municipality liable for such consequential damages, it is not liable therefor; such liability did not exist at common law. Transportation Co. v. Chicago, 99 U. S. 635; Chicago v. Taylor, 125 U. S. 161; Smith v. Corporation of Washington, 20 How. 135; 2 Dillon Munic. Corp., 4th ed., § 990.

Encroachments—Permanent flooding, etc.—Where the real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the constitution. Pumpelly v. Green Bay Co., 13 Wall. 166.

Change of street grade.—Consequential injuries resulting from a change in the grade of a street do not constitute a taking of private property for a public use within the meaning of the constitution, and a property owner can only claim damages for such injuries in cases where the right to damages is given by statute. Weis v. City of Madison, 75 Ind. 241, 245; City of Kokomo v. Mahan, 100 Ind. 242, 246; Snyder v. President, etc., 6 Ind. 237; City of Lafayette v. Bush, 19 Ind. 326; City of Delphi v. Evans, 36 Ind. 90; City of Lafayette v. Spencer, 14 Ind. 399.

Indianapolis charter.—The act of March 6, 1891, commonly called the charter of the city of Indianapolis, repeals R. S. 1894, § 3508 (see *post*, § 91), as to cities of more than one hundred thousand population and provides for no liability for damages for changing the grade of a street after it has once been established, nor does it make it obligatory upon the city to have such damages assessed and tendered. Hirth v. City of Indianapolis, 18 App. 673.

Abutting owner.—The abutting owner has a property right in the street, which can not be taken from him without compensation paid or tendered; nor can an additional burden be laid upon the fee without compensation paid or tendered; nor can a street be diverted from the use to which it was dedicated. Lostutter v. City of Aurora, 126 Ind. 436; Ross v. Thompson, 78 Ind. 90, 94; Common Council v. Croas, 7 Ind. 9; Haynes v. Thomas, 7 Ind. 38; City of Indianapolis v. Kingsbury, 101 Ind. 200.

Damages, assessment.—Where the right of appeal is given, as it is in proceedings to establish a system of water-works (R. S. 1894, § 4254, see *post*, § 1065), a statute authorizing a municipal corporation to appoint commissioners to assess damages in proceedings under the right of eminent domain is constitutional, and is not an infringement on the right of a citizen to have his compensation assessed by impartial men chosen by disinterested parties. Ray v. City of Jeffersonville, 90 Ind. 567, 572; Weaver v. Templin, 113 Ind. 298, 301; Maxwell v. Board, 119 Ind. 20, 25; Bass v. City of Ft. Wayne, 121 Ind. 389, 391.

Appeal, paying assessment.—A statute allowing an entry upon the land pending appeal from the assessment of damages, on payment to the clerk of the court of the amount of the damages assessed for the benefit of the land-owner, is valid, such payment being equivalent to a tender; but a statute directing the clerk to hold such money until the case on appeal is determined is unconstitutional. Consumers', etc., Co. v. Harless, 131 Ind. 446, 452.

Property devoted to public use—Eminent domain.—State regulation of property devoted to a public use is not the taking of property for a public purpose within the meaning of this section of the constitution, nor is it an interference with the guaranteed rights of the citizens in private property. Hockett v. State, 105 Ind. 250, 258.

Telephone.—In legal contemplation all the instruments and appliances used by a

telephone company in the prosecution of its business are devoted to a public use, and property thus devoted to public use becomes a legitimate subject of legislative regulation. A statute regulating the maximum price which a telephone company shall charge for the use of its telephones is constitutional and valid. Hockett v. State, 105 Ind. 250.

A city ordinance providing penalties for permitting water from an overflowing well or spring to flow on any street or alley is not in conflict with the bill of rights which provides that no man's property shall be taken by law without just compensation. Skaggs v. City of Martinsville, 140 Ind. 476.

Municipal aid to railroads.—Incorporating acts of cities which confer power upon the municipalities to subscribe for stock in aid of railroads are not in conflict with §§ 1, 21, 24 or 25 of the bill of rights; but such statutes are strictly construed. Thompson v. City of Peru, 29 Ind. 305; City of Aurora v. West, 9 Ind. 74; City of Mt. Vernon v. Hovey, 52 Ind. 563; Mayor, etc., v. State, 57 Ind. 152; Indiana, etc., R. Co. v. City of Attica, 56 Ind. 476; Brocaw v. Board, etc., 73 Ind. 543; Pittsburg, etc., R. Co. v. Harden, 137 Ind. 486; Hainer's Municipal Securities, §§ 138, 141; 2 Elliott Railroads, §§ 814–826.

Intoxicating liquors.—Laws and ordinances regulating and restricting the sale of intoxicating liquors and requiring licenses to be taken out do not conflict with the provisions of this section. Davis v. Fasig, 128 Ind. 271; Decker v. Sargeant, 125 Ind. 404; Haggart v. Stehlin, 137 Ind. 43; Welsh v. State, 126 Ind. 71; Wiley v. Owens, 39 Ind. 429; Thomasson v. State, 15 Ind. 449; Moore v. City of Indianapolis, 120 Ind. 483; Bush v. City of Indianapolis, 120 Ind. 476.

The power to restrict and regulate does not authorize cities to pass ordinances prohibiting the sale of intoxicating liquors. Loeb v. City of Attica, 82 Ind. 175; Sweet v. City of Wabash, 41 Ind. 7; Duckwall v. City of New Albany, 25 Ind. 283; Steffy v. Town of Monroe City, 135 Ind. 466; Herman v. State, 8 Ind. 545.

12. Exemption—No imprisonment for debt.—22. The privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale for the payment of any debt or liability hereafter contracted; and there shall be no imprisonment for debt, except in case of fraud. R. S. 1894, § 67.

Elections, penalty, imprisonment.—The act approved March 9, 1889, to secure the purity and freedom of the ballot, giving to the voter who has been hired, bought or induced to vote or refrain from voting, by the means therein specified, a right of action on the liability thereby created, is constitutional. Such liability is not a debt, but is a penalty for a tortious act, and the act is not in violation of article 1, § 22, of the bill of rights, abolishing imprisonment for debt, except in case of fraud. State v. Schoonover, 135 Ind. 526, 530.

Ordinances—Penalty.—A penalty for the violation of a municipal ordinance is not a debt, in the sense of the constitution. Hardenbrook v. Town of Ligonier, 95 Ind. 70; 1 Beach Pub. Corp., § 507 (b).

Fines and costs are not within the meaning of the above provision, prohibiting imprisonment for debt. McCool v. State, 23 Ind. 127.

The provisions of this section apply only to debts growing out of contract, express or implied. Lower v. Wallick, 25 Ind. 68; Turner v. Wilson, 49 Ind. 581.

13. Privileges and immunities equal.—23. The general assembly shall not grant to any citizen, or class of citizens, privileges or im-

munities which, upon the same terms, shall not equally belong to all citizens. R. S. 1894, § 68.

See *ante*, §§ 3 and 4.

Citizens—Non-residents. This provision has no application to non-residents or persons who are not citizens of this state and who are doing business in the state. Sears v. Board, etc., 36 Ind. 267. See Graffty v. City of Rushville, 107 Ind. 502, 510.

Colored children—Schools.—This provision does not prohibit the state from providing separate schools for colored and white children. Cory v. Carter, 48 Ind. 327; State v. Gray, 93 Ind. 303; State v. Grubb, 85 Ind. 213.

Officers, selection from classes.—The legislature can not divide citizens into classes, such as a residence for a certain period of time, or that of being a member of a political party, and require that certain officers shall be selected from such classes. City of Evansville v. State, 118 Ind. 426, 435; State v. Denny, 118 Ind. 449, 478; State v. Blend, 121 Ind. 514, 522.

Intoxicating liquors.—The act of 1895 (Burns' Supp. 1897), § 3541, amending section 53 of the general act for the incorporation of cities by authorizing cities to restrict the sale of intoxicating liquors to business portions of the city (see *post*, § 124), is not void as being in conflict with this section. Shea v. City of Muncie, 148 Ind. 14.

Ordinances—Discrimination.—Municipal ordinances placing restrictions upon lawful conduct, or lawful use of property, must, in order to be valid, specify the rules and conditions to be observed in such conduct or business, and must admit of the exercise of the privilege by all citizens alike, who will comply with such rules and conditions, and must not admit of the exercise, or of an opportunity for the exercise, of any arbitrary discrimination by the municipal authorities between citizens who will comply. City of Richmond v. Dudley, 129 Ind. 112; Bills v. City of Goshen, 117 Ind. 221; Yick Wo v. Hopkins, 118 U. S. 356; City of Newton v. Belger, 143 Mass. 598; City of Plymouth v. Schultheis, 135 Ind. 339; Bessonies v. City of Indianapolis, 71 Ind. 189; Graffty v. City of Rushville, 107 Ind. 502.

Ordinances must be general in their nature and impartial in their operation. Citizens', etc., Co. v. Town of Elwood, 114 Ind. 322; Indianapolis Cable, etc., Co. v. Citizens', etc., Co., 127 Ind. 369; Crowder v. Town of Sullivan, 128 Ind. 489.

Ordinance—Discrimination.—A city ordinance, requiring a hawker or peddler, who is not a resident of the city, and who proposes to sell goods, wares or merchandise which are not grown or manufactured in the county in which such city is situated to procure a license and pay a fee therefor before he may lawfully follow his calling in such city, discriminates against the citizens and products of other communities, and is unconstitutional and void. Graffty v. City of Rushville, 107 Ind. 502; 2 Beach Pub. Corp., § 1257.

Exclusive privileges—Use of streets.—A municipal corporation can not grant to a private corporation the exclusive privilege of using its streets for the purpose of supplying the corporation, or its citizens, with light, water, fuel, transportation or the like. Indianapolis, etc., R. R. Co. v. Citizens' R. R. Co., 127 Ind. 369; Crowder v. Town of Sullivan, 128 Ind. 486; City of Rushville v. Rushville, etc., Co., 132 Ind. 575; Citizens', etc., Co. v. Town of Elwood, 114 Ind. 322; City of Vincennes v. Citizens', etc., Co., 132 Ind. 114; Elliott Roads and Streets, pp. 566–569.

Monopolies, when unlawful.—As a general rule neither the state nor a municipal corporation can grant or create a monopoly. The clause in the constitution forbidding the granting of "privileges or immunities which upon the same terms shall not equally belong to all the citizens," does not declare all monopolies unlawful. That clause applies only to such things as are of common right, and is merely to be applied to such things as are in their nature a monopoly. Citizens', etc., Co. v. Town of Elwood, 114 Ind. 332, 336; Indianapolis, etc., Co. v. Citizens', etc., Co., 127 Ind. 369, 388.

Annexation of territory to cities by ordinance—Appeal—Sections 3808 and 3809, R. S. 1894.—Prior to the amendment of said sections by the act of 1895, said sections authorizing the annexation of contiguous territory to cities by ordinance, but restricting the right of appeal from the annexation proceedings to resident freeholders of the territory annexed, did not violate this section of the constitution and were valid. Taggart v. Claypool, 145 Ind. 590; Pittsburg, etc., R. Co. v. City of Indianapolis, 147 Ind. 292; Paul v. Town of Walkerton, 150 Ind. 565. For said sections as amended see *post*, §§ 418, 419.

14. Laws impairing contracts.—24. No *ex post facto* law, or law impairing the obligation of contracts, shall be passed. R. S. 1894, § 69.

See *ante*, § 2 and notes.

The phrase *ex post facto* is technical, and has relation only to criminal laws; it does not embrace statutes respecting private rights or civil remedies. Andrews v. Russell, 7 Blackf. 474.

Construction—Ex post facto law defined.—The provision in the constitution, that no *ex post facto* law shall be made, means that the legislature shall not pass any law, after a fact done by a citizen, which shall have relation to that fact, so as to punish that which was innocent when done; or to add to the punishment of that which was criminal; or to increase the malignity of a crime; or to alter the rules of evidence so as to make conviction more easy. Strong v. State, 1 Blackf. 193; Moore v. City of Indianapolis, 120 Ind. 483; Dinckerlocker v. Marsh, 75 Ind. 548.

Ordinance—Sale of intoxicating liquors—Not ex post facto.—A law can only be said to be retrospective or retroactive, or *ex post facto*, when it makes acts which were committed antecedent to its enactment criminal, or when it is to be applied to past transactions so as to create a new duty or impair vested property rights acquired under existing laws; therefore, an ordinance declaring that all sales of intoxicating liquors thereafter made by persons failing to comply with its provisions shall be unlawful, is not an *ex post facto* law. Moore v. City of Indianapolis, 120 Ind. 483, 494.

Contracts—Vested rights—Law—Remedies.—There are no vested rights in the law generally, nor in legal remedies, and it is competent for the legislature to make changes in these so long as they do not affect the obligation of contracts. Edwards v. Johnson, 105 Ind. 594; Davis v. Rupe, 114 Ind. 588; Webb v. Moore, 25 Ind. 4; Ralston v. Lothain, 18 Ind. 303; State v. Bennett, 24 Ind. 383; Bryson v. McCreary, 102 Ind. 1; Goodbub v. Hornung, 127 Ind. 181.

If a contract, when made, is valid by the laws of the state, as then expounded by all the departments of its government, and administered in its courts of justice, its validity can not be impaired by any subsequent act of the legislature, or decision of its courts altering the construction of the law. Stephenson v. Boody, 139 Ind. 60.

Both the constitution of the United States and that of the state forbid the passage of any law impairing the obligation of contracts, and these provisions apply to municipal ordinances or by-laws. Crawford v. Hedrick, 9 App. 356; 1 Beach Pub. Corp., § 506.

After a lien has been acquired by an assessment under a valid law for the repair of a public drain, the right to enforce the same can not be taken away by an amendment or repeal of the law. Crawford v. Hedrick, 9 App. 356.

A party who seeks to overthrow a statute, as impairing the obligation of a contract, must affirmatively establish that the same impairs his contractual rights and is prejudicial thereto. Currier v. Elliott, 141 Ind. 394.

Municipal charters.—Municipal charters are not in the nature of contracts; both general and special municipal charters may be amended or repealed by the legislature at its pleasure. Sloan v. State, 8 Blackf. 361; City of Indianapolis v. The Indianapolis

Home, etc., 50 Ind. 215; Lucas v. Board, etc., 44 Ind. 524; Eichels v. Evansville, etc., 78 Ind. 261; Warren v. City of Evansville, 106 Ind. 104; Corporation, etc., v. Studebaker, 106 Ind. 129; City of Evansville v. Summers, 108 Ind. 189; Wiley v. Corporation of Bluffton, 111 Ind. 152; State v. Kolsem, 130 Ind. 434; City of Evansville v. Bayard, 39 Ind. 450; 1 Dillon Munic. Corp., 4th ed., § 54; 2 Beach Conts., § 1659.

Clarksville—Statute.—The act of June 17, 1852, amendatory of the charter of Clarksville, so far as it authorizes the new trustees provided for by it to sue for and receive the funds derived from the sale of lots under the charter of 1783, granted by Virginia, does not impair the obligation of any contract, and is valid. Frisbie v. Fogg, 78 Ind. 269, 275.

Offices—Not contracts—Salaries.—Offices are neither grants nor contracts, nor obligations which can not be changed or impaired. In the absence of constitutional restrictions the term of an office may be shortened, the duties of the office increased and the compensation lessened by the legislative will. State v. Hyde, 129 Ind. 296; Coffin v. State, 7 Ind. 157; Gilbert v. Board, etc., 8 Blackf. 81; Walker v. Peelle, etc., 18 Ind. 264; Walker v. Dunham, etc., 17 Ind. 483; Board, etc., v. Chapman, Ind. App. Ct., Oct. 5, 1898.

Where one lawfully holding public office has rendered official service pertaining to the office, under a lawful regulation fixing the rate of his compensation for such services, he may claim such compensation at such rate upon principles of contract, and a lawful change in such rate during his term can not operate retrospectively. The perfected obligation to pay can not be impaired by a change in the law, resolution, order or ordinance regulating the rate of compensation. Board, etc., v. Chapman, Ind. App. Ct., Oct. 5, 1898.

Municipal corporation—Vested right in office or public property.—A municipal corporation is not clothed with any vested right in a public office, nor does it possess a vested right in public property; and in transferring property and authority from one class of officers to another no vested right of the municipality is invaded. State v. Kolsem, 130 Ind. 434; Meriwether v. Garrett, 102 U. S. 472; Board of School Com'rs v. Center Tp., 143 Ind. 391.

Statute vesting school property of school township in school city—Annexed territory.—A statute vesting in a school city to which territory of a school township is annexed, the school property in the annexed territory, without providing compensation to such township, is not invalid as destroying or interfering with vested rights, as the township holds the title only as trustee, and the state may change the trustee. Board, etc., v. Center Tp., 143 Ind. 391.

Assessment lien—Priority of—Mortgage lien.—The legislature has the power to enact that assessment liens shall take precedence over other pre-existing liens, upon the theory that the improvement enhances the value of the security. Murphy v. Beard, 138 Ind. 560; State v. Ætna Life Ins. Co., 117 Ind. 251; Pierce v. Ætna Life Ins. Co., 131 Ind. 284.

Mortgage—Vested right.—A mortgage is a contract which confers on the mortgagee a vested right which the legislature can not afterward diminish. Sherwood v. City of Lafayette, 109 Ind. 411, 413; McGlothlin v. Pollard, 81 Ind. 228.

Police power.—Sovereigns may make contracts which, under our constitution, will preclude them from impairing vested rights by subsequent legislation, but this result never follows the exercise of a purely police power. The right to legislate for the promotion and security of the public safety, morals and welfare, can not be surrendered or bartered away by the legislature. McKinney v. Town of Salem, 77 Ind. 213.

Police power is the right of the state functionaries to prescribe regulations for the good order, peace, protection, comfort and convenience of the community, which do not encroach on the like power vested in congress by the federal constitution. Walker v. Jameson, 140 Ind. 591.

Police Power—Liquor license—Contract.—A license to sell liquors is not a contract,

but a mere permit or tax, and is at all times within the control of the legislature. McKinney v. Town of Salem, 77 Ind. 213, 215; State v. Bonnell, 119 Ind. 494, 495; Moore v. City of Indianapolis, 120 Ind. 483, 491; Hedderich v. State, 101 Ind. 564; Haggart v. Stehlin, 137 Ind. 43, 54; Shea v. City of Muncie, 148 Ind. 14; Nelson v. State, 17 App. 403; State v. Gerhardt, 145 Ind. 439.

Relief of public officer.—A legislative act seeking to release a township trustee and his bondsmen from liability on a judgment rendered against them on account of public funds lost in a failing bank, is void as impairing the obligation of a contract, and for the additional reason that the legislature has no power to reimburse a public officer for money lost by him in his official capacity. McClelland v. State, 138 Ind. 321.

An act to release a county treasurer and the sureties on his official bond, under like circumstances, is void as impairing the obligation of a contract. Johnson v. Board, etc., 140 Ind. 152.

ARTICLE 2.—SUFFRAGE AND ELECTIONS.

SEC.
15. Elections free.
16. Qualifications of electors.
17. Soldiers—Seamen—Marines.
18. Residence.
19. Bribery a disqualification for office.
20. Challenge to duel.
21. Disfranchisement.
22. Effect of holding lucrative offices.
23. Defaulters not eligible.
24. *Pro tempore* appointments.
25. Electors free from arrest.
26. Method of election.

15. Elections free.—1. All elections shall be free and equal. R. S. 1894, § 83.

16. Qualifications of electors.—2. In all elections not otherwise provided for by this constitution, every male citizen of the United States, of the age of twenty-one years and upward, who shall have resided in the state during the six months, and in the township sixty days, and in the ward or precinct thirty days, immediately preceding such election, and every male of foreign birth, of the age of twenty-one years and upwards, who shall have resided in the United States one year, and shall have resided in this state during the six months, and in the township sixty days, and in the ward or precinct thirty days, immediately preceding such election, and shall have declared his intention to become a citizen of the United States, conformably to the laws of the United States on the subject of naturalization, shall be entitled to vote in the township or precinct where he may reside, if he shall have been duly registered according to law. [As amended March 14, 1881.] R. S. 1894, § 84.

Qualification of voters.—The legislature can not change the qualification of voters as fixed by the constitution, and municipal corporations can not do so by ordinance or other corporate act. Morris v. Powell, 125 Ind. 281; Quinn v. State, 35 Ind. 485; Brewer v. McCleland, 144 Ind. 423; 1 Beach Pub. Corp., § 382; 1 Dillon Munc. Corp., 4th ed., § 195.

If an elector does not choose to indicate his choice in the manner prescribed by law, he can not complain if his ballot is not counted. Parvin v. Wimberg, 130 Ind. 561.

The legislature can not classify voters and impose on one class burdens not borne by others, as by requiring registration of one class when similar restrictions are not imposed on others. Brewer v. McCleland, 144 Ind. 423. See 1 Beach Pub. Corp., § 383.

A person can have but one place of residence at a time; and to lose his residence in one place he must acquire a residence in another. Green v. Simon, 17 App. Ct. 360; Culbertson v. Board, etc., 52 Ind. 361; Astley v. Capron, 89 Ind. 167.

Suffrage.—The right of suffrage is not a natural right, but a political privilege. It does not exist except as given by the constitution and written laws of the state. Gougar v. Timberlake, 148 Ind. 38.

The right of suffrage is not given by the federal constitution, but by the state. Gougar v. Timberlake, 148 Ind. 38.

Woman suffrage.—Under the present constitution the right of suffrage can not be extended to women. Gougar v. Timberlake, 148 Ind. 38.

17. Soldiers—Seamen—Marines.—3. No soldier, seaman, or marine, in the army or navy of the United States, or of their allies, shall be deemed to have acquired a residence in the state, in consequence of having been stationed within the same; nor shall any such soldier, seaman, or marine have the right to vote. R. S. 1894, § 85.

18. Residence.—4. No person shall be deemed to have lost his residence in the state by reason of his absence, either on business of this state or of the United States. R. S. 1894, § 86.

Section 13 of the act of 1889 (Acts 1889, p. 157), requiring voters absenting themselves from the state to do certain things to retain their residence is invalid. Morris v. Powell, 125 Ind. 281.

19. Bribery a disqualification for office.—6. Every person shall be disqualified for holding office during the term for which he may have been elected, who shall have given or offered a bribe, threat, or reward to secure his election. R. S. 1894, § 87.

Provision self-executing.—The above provision is self-executing and needs no legislative enactment to carry it into effect and operation. Carroll v. Green, 148 Ind. 362.

The term "disqualified," as used in the above provision, means the same thing as the word "ineligible" as used in the statute relating to election contests. Carroll v. Green, 148 Ind. 362.

The hiring, buying or offering to buy, directly or indirectly, any person to vote for any person for a public office, amounts to bribery. Heilman v. Shanklin, 60 Ind. 424.

Evidence that contestee offered to purchase the vote of a witness at a general election at which he was a candidate is admissible in the trial of an election contest on the ground of the ineligibilty of contestee. Carroll v. Green, 148 Ind. 362.

20. Challenge to duel.—7. Every person who shall give or accept a challenge to fight a duel, or who shall knowingly carry to another person such challenge, or who shall agree to go out of the state to fight a duel, shall be ineligible to any office of trust or profit. R. S. 1894, § 88.

21. Disfranchisement.—8. The general assembly shall have power to deprive of the right of suffrage, and to render ineligible any person convicted of an infamous crime. R. S. 1894, § 89.

22. Effect of holding lucrative offices.—9. No person holding a lucrative office or appointment under the United States, or under this state, shall be eligible to a seat in the general assembly; nor shall any person hold more than one lucrative office at the same time, except as by this constitution expressly permitted: *Provided*, That officers [offices] in the militia to which there is attached no annual salary, and the office of deputy postmaster, where the compensation does not exceed ninety dollars per annum, shall not be deemed lucrative: *And*

Provided, also, That counties containing less than one thousand polls may confer the office of clerk, recorder and auditor, or any two of said offices, upon the same person. R. S. 1894, § 90.

Lucrative office defined.—An office to which there is attached a compensation for services rendered is a lucrative office; but an office which is wholly municipal in its character is not a lucrative office within the meaning of this section. State v. Kirk, 44 Ind. 401.

Every office for which there is compensation provided by law for the performance of duties is a lucrative office. Dailey v. State, 8 Blackf. 329; Foltz v. Kerlin, 105 Ind. 221.

Councilman.—The office of councilman in a city, although a lucrative office in the ordinary sense of the words, is not a lucrative office within the meaning of this section of the constitution, he having no duties to perform under the general laws of the state. State v. Kirk, 44 Ind. 401.

City clerk.—The office of city clerk is not an office under the state. Mohan v. Jackson, 52 Ind. 599.

One can not hold two lucrative offices under the state at the same time. Wood v. State, 130 Ind. 364; Chambers v. State, 127 Ind. 365.

Mayor.—The office of mayor of a city incorporated under the general law of 1867 is a judicial office, and therefore the incumbent thereof is ineligible to the office of prison director during the term for which he was elected mayor, both offices being lucrative offices. The election of one who is such director to the office of mayor, and his acceptance thereof, will vacate his office of director. Howard v. Shoemaker, etc., 35 Ind. 111; Waldo v. Wallace, 12 Ind. 569; Gulick v. New, 14 Ind. 93.

The following offices have been held to be lucrative:

Recorder of county. Dailey v. State, 8 Blackf. 329.

County commissioner. Dailey v. State, 8 Blackf. 329.

Township trustee. Bishop v. State, 149 Ind. 223; Creighton v. Piper, 14 Ind. 182; Foltz v. Kerlin, 105 Ind. 221.

Colonel of volunteers. Kerr v. Jones, 19 Ind. 351.

Reporter of supreme court. Kerr v. Jones, 19 Ind. 351.

School trustees. Chambers v. State, 127 Ind. 365; Wood v. State, 130 Ind. 364.

Deputy county treasurer. Lucas v. Shepard, 16 Ind. 368.

Trustee of state benevolent institutions. Chambers v. State, 127 Ind. 365.

Postmaster, when salary exceeds ninety dollars per annum. Bishop v. State, 149 Ind. 223.

The acceptance of a second lucrative office will, *ipso facto*, terminate the right or title to the first. When an officer has been once inducted, under his election or appointment, into the second office, his subsequent resignation of the latter will not serve to restore his right or title to the first office. Where a public office once becomes vacant, a former incumbent can not be restored by his own act. Bishop v. State, 149 Ind. 223; Yonkey v. State, 27 Ind. 236; Howard v. Shoemaker, 35 Ind. 111; Gosman v. State, 106 Ind. 203.

23. Defaulters not eligible.—10. No person who may hereafter be a collector or holder of public moneys shall be eligible to any office of trust or profit until he shall have accounted for and paid over, according to law, all sums for which he may be liable. R. S. 1894, § 91.

Eligibility, meaning of.—The words "eligible to any office," as used in this section, mean "eligible to hold the office," and do not refer to the election; if a person is eligible to hold the office when the time for induction into office arrives, he may take the office, though not eligible to hold the office when elected. Shuck v. State, 136 Ind. 63;

Brown v. Goben, 122 Ind. 113; Smith v. Moore, 90 Ind. 294, 303; Voegel v. State, 107 Ind. 374–380.

Proceedings to test the eligibility of one elected to an office can not be commenced properly until the time for his induction into the office. Brown v. Goben, 122 Ind. 113; Smith v. Moore, 90 Ind. 294.

24. Pro tempore appointments.—11. In all cases in which it is provided that an office shall not be filled by the same person more than a certain number of years continuously, an appointment *pro tempore* shall not be reckoned a part of that term. R. S. 1894, § 92.

One appointed sheriff in the place of the officer regularly elected for a second term of two years, who died after qualifying, is not ineligible to hold after the end of such term. State v. Linkhauer, 142 Ind. 94.

25. Electors free from arrest.—12. In all cases, except treason, felony, and breach of the peace, electors shall be free from arrest in going to elections, during their attendance there, and in returning from the same. R. S. 1894, § 93.

If a person is arrested when he is free from arrest, he may be discharged on a writ of habeas corpus. Crocker v. Duncan, 6 Blackf. 278.

26. Method of election.—13. All elections by the people shall be by ballot; and all elections by the general assembly, or by either branch thereof, shall be *viva voce*. R. S. 1894, § 94.

Numbering ballots.—A statute requiring the numbering of ballots is unconstitutional. Williams v. Stein, 38 Ind. 89.

Tie vote.—A statute which provides that where an election results in a tie vote for opposing candidates the judges of election shall determine by lot the person entitled to the office, is not in conflict with the constitutional provision that all elections shall be by ballot. Johnston v. State, 128 Ind. 16; Kimerer v. State, 129 Ind. 589.

ARTICLE 3.—DISTRIBUTION OF POWERS.

SEC.

27. Three departments.

27. Three departments.—1. The powers of the government are divided into three separate departments: the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this constitution expressly provided. R. S. 1894, § 96.

See *post*, § 40 and notes.

Independence of the three departments.—The power of the three great departments of the state are not merely equal, but they are exclusive in respect to the duties assigned to each, and they are absolutely independent of each other; one of them can not inquire into the motives controlling the action of another. Langenberg v. Decker, 131 Ind. 471; Wright v. Defrees, 8 Ind. 298.

The departments are equal, co-ordinate and independent. Lafayette, etc., R. Co. v. Geiger, 34 Ind. 185.

One department of the government can not invade the province of either of the other two. Hovey v. State, 127 Ind. 588; State v. Noble, 118 Ind. 350; State v. Denny, 118 Ind. 449.

The legislature can not exercise judicial power; its interpretation of statutes is not binding on the courts. Guckien v. Rothrock, 137 Ind. 355.

Local self-government—Right of the people—Legislature may not appoint local municipal officers.—The right of the people to govern themselves, as to matters which are purely local, through the medium of local municipal governments and officers chosen by themselves, was not surrendered upon the adoption of the constitution, but is still vested in them, and it can not be taken away by the legislature. The legislature has no power under the constitution to appoint local municipal officers. State v. Denny, 118 Ind. 382; City of Evansville v. State, 118 Ind. 426; State v. Denny, 118 Ind. 449; State v. Kolsem, 130 Ind. 434.

Mayor—Executive, administrative and judicial duties.—Under the act of 1857, for the incorporation of cities, the executive and administrative duties of the mayor of a city are not within the executive and administrative departments of the state government, as established by the constitution. In respect to such duties the mayor is merely an officer of a municipal corporation, and he may discharge such duties and his judicial functions at the same time, without violating § 1, art. 3 of the constitution.

The judicial duties of the mayor are not incidental to his municipal office, but separate and independent of it; for he is clothed, in this respect, with general power to administer, judicially, the laws of the state. When acting as mayor of a city he is not a state officer, and in acting both as mayor and city judge he acts in two capacities. Though he acts in two capacities or offices, but one of them is an office under the state. A statute conferring judicial powers on the mayor of a city is not unconstitutional. Waldo v. Wallace, 12 Ind. 569. As to the act of 1867, see Howard v. Shoemaker, 35 Ind. 111.

Fire department.—The right to provide and maintain a fire department in towns and cities is vested in the inhabitants of the respective municipalities, as an element of local self-government, and is not subject to legislative interference, except in so far as the general assembly may prescribe rules to aid the people in the exercise of such right. An act creating a board of metropolitan police and fire department in cities having a certain population, providing for the election of the first commissioners by the legislature, and giving them exclusive control of the police and fire departments of such cities and of matters connected therewith, is void, in so far as it relates to the fire department, as being in violation of the right of local self-government; and as the provisions of the act (act of March 7, 1889; Acts 1889, p. 222), in relation to the police department are so connected with and dependent upon its other provisions as to be practically inseparable, the whole act falls. State v. Denny, 118 Ind. 449; City of Evansville v. State, 118 Ind. 426.

Constabulary—Municipal board of police—Appointment.—The selection of peace officers is not a local matter. The legislature has power to provide for the appointment of a municipal board of police, and the act of 1891 (Acts 1891, p. 90) is constitutional. (See §§ 3717, 3727, R. S. 1894.) In providing for the appointment of officers connected with the constabulary of the state, there is no invasion of the right of local self-government, but simply the exercise of the power to provide for the selection of peace officers of the state. State v. Kolsem, 130 Ind. 434; State v. Blend, 121 Ind. 514; City of Evansville v. State, 118 Ind. 426; State v. Denny, 118 Ind. 449; State v. City of Terre Haute, 130 Ind. 434.

Board of public works.—The act of March 8, 1889, assuming to give the exclusive control of streets, alleys, sewers, lights, water supply, etc., in cities of more than fifty thousand inhabitants, to boards of public works, to be chosen by the legislature from residents of the cities affected, is void, as denying the right of local self-government. State v. Denny, 118 Ind. 382.

City commissioners—Act of 1875 valid.—The act of 1875, R. S. 1894, § 3629 (see *post*, § 224), providing that the circuit court shall appoint city commissioners to hear and determine the matters appertaining to the acquisition, the opening, laying out, altering and straightening of streets, etc., is not void as an attempt to confer executive power upon the judiciary. City of Terre Haute v. Evansville, etc., R. Co., 149 Ind. 174.

Contempt—Power to punish for, who may exercise.—Only the courts and the general assembly can punish for contempt; and the power to do so can not be conferred upon any other official or board of officials. Langenberg v. Decker, 131 Ind. 471.

Tax commissioners.—So much of the tax law of 1889 as attempts to confer upon the state board of tax commissioners power to fine and imprison for contempt is unconstitutional. Langenberg v. Decker, 131 Ind. 471.

Appointment to office—Legislative power.—The appointment to an office which is in no manner connected with the discharge of legislative duties, involves the exercise of executive functions, and is prohibited to the legislature by section 1, of article 3 of the constitution, except in so far as the power of appointment is reserved to it by section 1 of article 15. State v. Denny, 118 Ind. 382.

ARTICLE 4.—LEGISLATIVE.

SEC.
28. Local laws forbidden.
SEC.
29. Laws must be general.

28. Local laws forbidden.—22. The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * For laying out, opening, and working on, highways, and for the election or appointment of supervisors; vacating roads, town plats, streets, alleys, and public squares; * * * R. S. 1894, § 118.

See *post*, §§ 29, 38 and notes.

Special laws.—A special law, within the meaning of § 22, article 4, of the constitution, is such an act as at common law the courts would not have taken notice of, unless specially pleaded and proved, as any other fact. Hingle v. State, 24 Ind. 28.

Where special laws are not forbidden by the constitution they may be enacted; the constitution does not prohibit the enactment of special, where general laws can not be made applicable. State v. Kolsem, 130 Ind. 434.

Municipal corporations—General incorporating acts.—General acts for the incorporation of municipal corporations, based upon a classification according to population, are not void on the ground of being local or special legislation. 1 Dillon Munic. Corp., 4th ed., § 41 and notes.

The legislature has power to enact laws applicable only to a particular class of cities which may reasonably be thought to require rules or regulations different from those of other classes. Waite v. City of Santa Cruz, 89 Fed. Rep. 619.

General law, what is.—A law which applies generally to a particular class of cases is not a local or special law. The constitution does not require that the operation of a law shall be uniform other than the operation shall be the same in all parts of the state under the same circumstances. Consumers, etc., Co. v. Harless, 131 Ind. 446; Hazelett v. Butler University, 84 Ind. 230.

Prospective in operation.—Sections 22 and 23 of art. 4 of the constitution are prospective in their terms and do not affect past special or local laws then in force. Davidson v. Koehler, 76 Ind. 398.

General law—Legislative discretion.—Whether an act relating to a subject not enumerated in § 22 of art. 4 can or can not be made general law as required by section 23 of art. 4 of the constitution, is a question to be determined exclusively by the legislature and not by the courts. City of Indianapolis v. Navin, Ind. Sup. Ct., June 11, 1897; Gentile v. State, 29 Ind. 409; Woods v. McCay, 144 Ind. 316; Mode v. Beasley, 143 Ind. 306; Pennsylvania Co. v. State, 142 Ind. 428; Young v. Board, etc., 137 Ind. 323; Bell v. Maish, 137 Ind. 226; State v. Kolsem, 130 Ind. 434; Hovey v. Foster, 118 Ind. 502; City of Evansville v. State, 118 Ind. 426; Wiley v. Bluffton, 111

Ind. 152; Warren v. City of Evansville, 106 Ind. 106; Johnson v. Board, etc., 107 Ind. 15; Kelley v. State, 92 Ind. 236; Mount v. State, 90 Ind. 29; Vickery v. Chase, 50 Ind. 462; State v. Tucker, 46 Ind. 355; Clem v. State, 33 Ind. 418; Board, etc., v. State, 147 Ind. 476; Schneck v. City of Jeffersonville, Sup. Ct., December 20, 1898; Bank of Commerce, etc., v. Wiltsie, Ind. Sup. Ct., May 23, 1899; Hainer's Municipal Securities, § 17.

Power to regulate existing corporations.—The power of the legislature to regulate existing corporations, either by amendment or independent act, is limited only by § 22 of art. 4 of the constitution. That part of the act of 1897 (Burns' Supp. 1897, § 5458), fixing the fare to be charged and collected by street railroad companies, even if local and special, is not in violation of said § 22 of art. 4 of the constitution, because that subject is not included in the enumeration found in said last mentioned section. City of Indianapolis v. Navin, 151 Ind. 139.

Section 71 of the general act for the incorporation of cities.—Said section (*post*, § 223) of the general act for the incorporation of cities, directing the manner of sale of property for a street improvement, is not in conflict with the above provision of the constitution prohibiting special legislation. Brookbank v. City of Jeffersonville, 41 Ind. 406.

Special charter—Amendment.—Where, prior to November 1, 1851, a municipal corporation was created and organized under a special act, and such act was continued in force by the constitution of 1851, the general assembly has power, by special act, to amend the act of incorporation, so as to enlarge the jurisdiction of the municipality territorially or otherwise. Wiley v. Corporation of Bluffton, 111 Ind. 152.

General laws—Uniform system of schools.—A system that secures to all the various subdivisions of the state equal and uniform rights and privileges, leaving only to the local authorities the right, under the law, to govern the local school affairs, is a general and uniform system, and a law providing such a system is a general law within the meaning of the constitution. Robinson, etc., v. Schenck, 102 Ind. 307.

Fees and salaries—Laws not of uniform operation.—The act of March 9, 1891, attempting to create a system of fees and salaries for county offices and officers, including treasurers, but omitting to provide any compensation, either by way of fees or salary, for the treasurer of one county, is void in so far as it relates to the office of county treasurer, as being in contravention of the provisions of §§ 22 and 23 of art. 4 of the constitution. State v. Boice, etc., 140 Ind. 506.

The amendment of said act curing such omission is valid. Walsh, etc., v. State, 142 Ind. 357.

The fee and salary act of 1891 is not unconstitutional as being special and local, in that it does not include in its provisions persons who were elected to office prior to the time it took effect. State v. Krost, 140 Ind. 41; Henderson, etc., v. State, 137 Ind. 552.

Salaries of officers may be based upon the population of counties. State v. Reitz, 62 Ind. 159.

Fees and salaries.—The fee and salary law of 1895 providing for salaries for all county officers in full for their services, and that the fees collected by them shall belong to their respective counties, and that certain officers shall receive as salary only an amount equal to the fees turned in to the county treasury, is not in conflict with this provision of the constitution. Legler v. Paine, 147 Ind. 181; Harmon v. Board, etc., Madison County, Ind. Sup. Ct., June 16, 1899.

Removal of county seat.—An act for the relocation of a county seat is not within the prohibition of the provisions of the constitution against local legislation. Mode v. Beasley, 143 Ind. 306; Gentile v. State, 29 Ind. 409; Board, etc., v. State, 147 Ind. 476.

Taxation—Assessment.—Taxes may be assessed within prescribed limits for the purpose of constructing public highways and other public improvements. State v. Needham, 32 Ind. 325; Marks v. Trustees, etc., 37 Ind. 155; Gilson v. Board, 128 Ind. 65.

It is only necessary that the rate of assessment and taxation shall be uniform throughout the locality in which the tax is levied. Bright v. McCullough, 27 Ind. 223; Palmer v. Stumph, 29 Ind. 329; Gilson v. Board, etc., 128 Ind. 65.

Property within the limits of a city can not be taxed for purely township purposes, in which the residents of the city have no part. Kerlin v. Reynolds, 142 Ind. 460; Taggart, etc., v. State, 142 Ind. 668, 673.

School taxes.—The statute empowering the school trustees of cities to levy a tax for tuition purposes is constitutional. Robinson, etc., v. Schenck, 102 Ind. 307.

29. Laws must be general.—23. In all the cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the state. R. S. 1894, § 119.

See *ante*, § 28 and *post*, § 38.

Laws—Uniform operation—General.—A law which operates in all parts of the state in a similar manner where the same circumstances and conditions exist, is a law of uniform operation within the meaning of this section. City of Indianapolis v. Navin, 151 Ind. 139; Bell v. Maish, 137 Ind. 226; Young v. Board, etc., 137 Ind. 323; Gilson v. Board, etc., 128 Ind. 65; Elder v. State, 96 Ind. 162; Heanley v. State, 74 Ind. 99; State v. Reitz, 62 Ind. 159; Hanlon v. Board, etc., 53 Ind. 123; Groesch v. State, 42 Ind. 547; Pennsylvania Co. v. State, 142 Ind. 428; Hazelett v. Butler University, 84 Ind. 230; Board, etc., v. Davis, 136 Ind. 503, 543; Consumers', etc., Co. v. Harless, 131 Ind. 446; Mode v. Beasley, 143 Ind. 306.

Municipal corporations.—It is not necessary, under the provisions of this section, that legislation concerning cities should operate uniformly on all the cities in the state. It is sufficient if it operates alike upon all cities under the same circumstances and conditions. City of Indianapolis v. Navin, 151 Ind. 139.

A law which applies to cities having a population of 100,000 or more (Burns Supp. 1897, § 5458), when there is but one such city, but is so framed as to operate on all other cities in the state as they acquire the necessary population, is a general law, because it operates upon all cities alike under the same circumstances. City of Indianapolis v. Navin, 151 Ind. 139; Pennsylvania Co. v. State, 142 Ind. 428. See 1 Dillon Munic. Corp., 4th ed., § 41.

It is not necessary that a law concerning the fare to be collected by street railroad companies shall operate uniformly on all street railroads in the state. It is sufficient if it operates alike upon all such companies under the same circumstances and conditions. Such a law is general within the meaning of the constitution. City of Indianapolis v. Navin, 151 Ind. 139; Pennsylvania Co. v. State, 142 Ind. 428. *Contra*, Central Trust Co. of New York v. Citizens' St. R. Co., 82 Fed. Rep. 1.

When a statute provides that all cities or towns of a named population, "according to the United States census," or "according to the last preceding United States census, shall be governed by the provisions of the act," then all cities or towns as they acquire the requisite population, as shown by any census thereafter taken, will be governed by the act, the same as if they had the required population, as shown by the preceding census when the law was enacted. City of Indianapolis v. Navin, 151 Ind. 139.

It is competent for the legislature to classify municipal corporations, and legislation which is applicable to a class in general is valid, though there may be at the time but one city in that class. Fellows v. Walker, 39 Fed. Rep. 651.

A general law, regulating the operations of corporations occupying the streets of cities of a certain class is not a private or local law, although it may happen that such companies are all located in one or more cities of the state. People v. Squire, 107 N. Y. 593.

Section 3541, Burns' Supp., 1897, amending § 53 of the general act for the incorporation of cities (*post*, § 124), and authorizing cities to restrict the sale of intoxicating liquors to the business portion of the city, is not in conflict with the above and preceding section of the constitution. Shea v. City of Muncie, 148 Ind. 14.

ARTICLE 6.—ADMINISTRATIVE.

SEC.
30. Residence of municipal officers.
31. Impeachment of officers.
SEC.
32. Vacancies, how filled.

30. Residence of municipal officers.—6. All county, township and town officers shall reside within their respective counties, townships, and towns; and shall keep their respective offices at such places therein, and perform such duties as may be directed by law. R. S. 1894, § 156.

Cities—Towns.—The word "town" as used in the constitution of the state, and in some statutes, is generic, and includes cities. City of Indianapolis v. Higgins, 141 Ind. 1; Flinn v. State, 24 Ind. 286; State v. Craig, 132 Ind. 54; State v. Denny, 118 Ind. 449; Harvey v. Osborn, 55 Ind. 535; Muhler v. Hedekin, 119 Ind. 481, 484.

A town is not always a city; but it is said that a city is always a town. Harvey v. Osborn, 55 Ind. 535.

Residence—Removal—Abandonment of office.—Removal of residence operates as an abandonment of office; any voluntary act of an officer, which permanently disables him to perform the duties of his office, such as enlistment in the military service of the United States in time of war, will amount to an abandonment of office; but if a person leave his place of residence temporarily, on business or otherwise, but with the intention of returning, he does not thereby lose his domicile. State v. Allen, 21 Ind. 516; Yonkey v. State, 27 Ind. 236; Gosman v. State, 106 Ind. 203, 208; Relender v. State, 149 Ind. 283.

Where an office has been abandoned by the removal of the officer to another state, it can not be resumed by the officer returning to the state. Relender v. State, 149 Ind. 283.

31. Impeachment of officers.—8. All state, county, township and town officers may be impeached, or removed from office, in such manner as may be prescribed by law. R. S. 1894, § 158.

Provisions construed.—Sections 7 and 8 of article 6 of the constitution should be construed together, and thus construed they authorize the general assembly to provide by law for the impeachment or removal from office of county, township or town officers for crime, incapacity or negligence. The act of March 11, 1875 (§ 8088, R. S. 1894), providing for the removal from office of any public officer for voluntary intoxication in the business hours of his office, or for habitual intoxication, is not repugnant to or in conflict with any provision of the constitution, state or federal, and is valid. McComas v. Krug, 81 Ind. 327; Gurley, etc., v. Butler, 83 Ind. 501.

Defalcation—Vacation of office.—Where an officer becomes a defaulter, flees the state, leaves no one to care for the public affairs, and indicates a settled purpose to abandon the office, it may be deemed vacated without a judicial determination. Osborne v. State, 128 Ind. 129.

The term "town" is generic, and includes cities. State v. Denny, 118 Ind. 449, 463; Flinn v. State, 24 Ind. 286; City of Indianapolis v. Higgins, 141 Ind. 1, and cases; Muhler v. Hedekin, 119 Ind. 481, 484.

Removal of officers.—This section imposes the duty upon the legislature to make provision for the removal, for just cause, of all town officers, which means city officers as well. An officer can be removed only for some specified neglect or violation of duty imposed or defined by law. Muhler v. Hedekin, 119 Ind. 481.

32. Vacancies, how filled.—9. Vacancies in county, township and town offices shall be filled in such manner as may be prescribed by law. R. S. 1894, § 159.

ARTICLE 7—JUDICIAL.

SEC.
33. Judicial powers.
34. Conservators of the peace.
SEC.
35. Ineligibility of judges.

33. Judicial powers.—1. The judicial power of the state shall be vested in a supreme court, in circuit courts, and in such other courts as the general assembly may establish. [As amended March 14, 1881.] R. S. 1894, § 161.

All judicial powers are, by force of this provision, vested in the courts of the state, and the legislature has no authority to invest any other tribunals or officers than the courts with judicial powers. The legislature can not exercise judicial powers. Shoultz v. McPheeters, 79 Ind. 373; Pressley v. Lamb, 105 Ind. 171; Gregory v. State, 94 Ind. 384; State v. Noble, 118 Ind. 350; Vandercook v. Williams, 106 Ind. 345, 357.

State board—Tax commissioners—Not a judicial tribunal.—The tax law of March 6, 1891 (R. S. 1894, § 8408, *et seq.*), is not invalid as conferring judicial powers upon the state board of tax commissioners, the constitution requiring that judicial officers shall be elected by the people, and the law providing that two members of said board shall serve by appointment, and the other members being executive and administrative state officers. Indianapolis, etc., R. Co. v. Backus, 133 Ind. 609, 613; Evansville, etc., R. Co. v. West, 139 Ind. 254.

The state board of tax commissioners is not a judicial tribunal in the meaning of the constitution, but has only such *quasi*-judicial powers as has every public officer vested with discretionary power, and the members of such board, whom the law provides shall be appointed by the governor, are not administrative state officers, as that, by the constitution, they are required to be elected by the people, and the other *ex officio* members of said board, being state officers, are eligible to become members of such board. Cleveland, etc., R. Co. v. Backus, 133 Ind. 513, 547; Pittsburgh, etc., R. Co. v. Backus, 133 Ind. 625, 658; Evansville, etc., R. Co. v. West, 139 Ind. 254; Pittsburgh, etc., R. Co. v. Backus, 154 U. S. 421; Cleveland, etc., R. Co. v. Backus, 154 U. S. 445.

County boards of review—State board of tax commissioners—Judicial powers—Not controllable by courts.—County boards of review and the state board of tax commissioners are clothed with *quasi*-judicial powers in bringing about uniformity and equality of taxation. The acts of these boards are judicial in their character, and their judgments are not open to collateral attack. Errors or irregularities committed must be corrected in the mode pointed out by the statute; and if not so corrected, they are conclusive. Biggs v. Board, etc., 7 App. 142.

34. Conservators of the peace.—15. All judicial officers shall be conservators of the peace in their respective jurisdictions. R. S. 1894, § 175.

35. Ineligibility of judges.—16. No person elected to any judicial office shall, during the term for which he shall have been elected, be eligible to any office of trust or profit under the state, other than a judicial office. R. S. 1894, § 176.

Municipal officers.—City and town officers, other than those who have judicial or police duties, are not officers "under the state" within the meaning of the constitution. State v. Kirk, 44 Ind. 401; Mohan v. Jackson, 52 Ind. 599; Waldo v. Wallace, 12 Ind. 569; Gulick v. New, 14 Ind. 93; Howard v. Shoemaker, 36 Ind. 111; Chambers v. State, 127 Ind. 365.

Judicial officers.—All judicial officers are ineligible to any office, other than a judicial office, during the term for which they shall have been elected. Waldo v. Wallace,

12 Ind. 569; Gulick v. New, 14 Ind. 93; Smith v. Moore, 90 Ind. 294; Vogel v. State, 107 Ind. 374.

Mayor.—The office of mayor of a city incorporated under the general law of 1867 is a judicial office. Howard v. Shoemaker, etc., 35 Ind. 111; Waldo v. Wallace, 12 Ind. 569; Gulick v. New, 14 Ind. 93.

A person holding a judicial office may be elected during his term to an office not judicial, when the term of the latter office does not begin until after the expiration of the term of the judicial office. Smith v. Moore, 90 Ind. 294; Vogel v. State, 107 Ind. 374; Brown v. Goben, 122 Ind. 113.

But if the term of the latter office begins on the same day that the former ends such person is ineligible to hold the latter office. Vogel v. State, 107 Ind. 374.

If a person elected to a judicial office does not accept such office, he is not rendered ineligibile to hold other offices. Smith v. Moore, 90 Ind. 294.

A person elected to a judicial office is not ineligible to hold a municipal office not judicial during the term of the judicial office. Mohan v. Jackson, 52 Ind. 599; Chambers v. State, 127 Ind. 365.

The word eligible in this section means legally qualified. Smith v. Moore, 90 Ind. 294; State v. Bemenderfer, 96 Ind. 374; Gosman v. State, 106 Ind. 203, 207.

The term "eligible" relates to the capacity of holding, as well as to the capacity of being elected. Carson v. McPhetridge, 15 Ind. 327.

Votes cast for ineligible candidate.—Votes cast for a person not eligible to an office can not be counted against the opposing candidate who is eligible; and such candidate, though receiving a less number of votes, is duly elected and entitled to the office. State v. Gallagher, 81 Ind. 558; State v. Johnson, 100 Ind. 489; Copeland v. State, 126 Ind. 51; Vogel v. State, 107 Ind. 374; Gulick v. New, 14 Ind. 93.

ARTICLE 10.—FINANCE.

SEC.
36. Assessment and taxation.
SEC.
37. State can not assume municipal debt.

36. Assessment and taxation.—1. The general assembly shall provide, by law, for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only, for municipal, educational, literary, scientific, religious, or charitable purposes, as may be specially exempted by law. R. S. 1894, § 193.

This section does not confer power of taxation, but is rather a limitation upon the power to tax. State Board, etc., v. Holliday, 150 Ind. 216.

Municipal taxation.—This section has no reference to municipal taxation. Hamilton v. City of Ft. Wayne, 40 Ind. 491; City of Richmond v. Scott, 48 Ind. 568; Bank, etc., v. City of New Albany, 11 Ind. 139; Anderson v. Kerns Draining Co., 14 Ind. 199; Thomasson v. State, 15 Ind. 449.

But see cases cited in subsequent notes.

Under § 26 of the act on the subject of incorporation of cities, cities were given two modes of ascertaining the value of real estate within their limits for the purpose of taxation: First, by adopting the appraisement made under the law for general taxation; and, second, by causing it to be appraised; both provisions were constitutional. Jones v. City of Columbus, 62 Ind. 421.

Uniform and equal rate.—The provision of the constitution requiring a uniform and equal rate of assessment and taxation does not mean that the rate of assessment shall be uniform and equal for all purposes throughout the state, but does require a uniform

rate throughout the locality in which the particular tax is levied; if for state purposes, then in all parts of the state alike; if for county purposes, in the entire county; and so in township, town or city, for the local purposes of each. Loftin, etc., v. Citizens' National Bank, 85 Ind. 341, 346; Robinson, etc., v. Schenck, 102 Ind. 307; Bright v. McCullough, 27 Ind. 223; Gilson v. Board, etc., 128 Ind. 65; Palmer v. Stumph, 29 Ind. 329; Lafayette, etc., R. Co. v. Geiger, 34 Ind. 185.

Taxation--Just valuation—Act of March 29, 1881.—Section 64, act March 29, 1881 (Acts 1881, p. 611), does not provide for an exemption in contravention of the provision of the constitution, article 10, § 1, that the law-making power shall prescribe such regulations as shall secure a just valuation for taxation of all property. Florer v. Sheridan, 137 Ind. 28, 35.

Taxation—Uniform.—Said section providing that a person may deduct from his credits the amount of his bona fide debts, is not unconstitutional as not providing for a uniform taxation. Florer v. Sheridan, 137 Ind. 28, 35.

General system—Act constitutional.—The act of March 6, 1891 (R. S. 1894, § 8408, *et seq.*), relating to taxation, provides a general system for the assessment and valuation of property; the method of ascertaining the valuation and assessing each class and kind of property applies alike to all persons holding and owning the same class of property; it applies alike to all persons under like circumstances and conditions, and it does not deny to railway companies the equal protection of the law, and is not in conflict with the constitution of the United States. Cleveland, etc., R. Co. v. Backus, 133 Ind. 513, 531; Pittsburgh, etc., R. Co. v. Backus, 133 Ind. 625, 642; Evansville, etc., R. Co. v. West, 139 Ind. 254; Pittsburgh, etc., R. Co. v. Backus, 154 U. S. 421, 447; Cleveland, etc., R. Co. v. Backus, 154 U. S. 445.

Uniform and equal rate.—The provision of the state constitution, providing "for a uniform and equal rate of assessment and taxation," is complied with when the same basis of assessment is fixed for all property, and the same rate of taxation is fixed within the district subject to taxation; and the provision of the state constitution requiring that the legislature "shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal," is complied with when the legislature provides that "railroad track" and "rolling stock" of railway companies shall be assessed by the state board of tax commissioners, while all other property shall be assessed by local boards and officers. Cleveland, etc., R. Co. v. Backus, 133 Ind. 513, 536; Pittsburgh, etc., R. Co. v. Backus, 133 Ind. 625, 647; Evansville, etc., R. Co. v. West, 139 Ind. 254; Pittsburgh, etc., R. Co. v. Backus, 154 U. S. 421; Cleveland, etc., R. Co. v. Backus, 154 U. S. 445.

Power of taxation—Equal and uniform—Class legislation.—The taxing power of the state can not be made the means of levying municipal taxes upon a fraction of a class, and of bestowing taxes so levied upon a small fraction of the citizens. Henderson, etc., v. London, etc., Co., 135 Ind. 23.

Fireman's fund—Insurance.—The act of March 9, 1881 (Acts 1881, p. 415), for the creation of a fireman's pension fund, etc., is unconstitutional as not providing for a uniform and equal rate of taxation, and applying to a portion of a class only. Henderson, etc., v. London, etc., Co., 135 Ind. 23.

Tax by city or town on property of non-resident for school purposes.—The act of March 8, 1873 (R. S. 1894, § 5975, *et seq.*), authorizing a city or incorporated town to assess and collect a tax for the payment of a debt contracted by the city or town in constructing or completing a school building, upon the property of persons who, residing and having their property outside of the city or corporate limits, have, whether transferred or not, sent their children to a school taught within the city or corporate limits in such school building, is constitutional. Kent v. Town of Kentland, 62 Ind. 291; Robinson, etc., v. Schenck, 102 Ind. 307. See *post*, § 1518.

Indirect taxes—License.—Indirect taxes, imposed not merely for the purposes of

revenue, but in restraint of a particular business or calling or as a license on particular pursuits, or as mere police regulations, do not come within the spirit or meaning of this section of the constitution. Bright v. McCullough, etc., 27 Ind. 223; Thomasson v. State, 15 Ind. 449.

A city ordinance, passed under authority of a statute requiring dealers in intoxicating liquors within the city to procure a license to retail and to pay therefor, is not unconstitutional; that the same license fee, as a tax, is not required by all the cities in the state, is no valid objection to the law conferring the power on the common council to pass such ordinance, or to the ordinance itself; for, though taxes must be uniform throughout the city levying them, they need not be the same thoughout different cities. Wiley v. Owens, 39 Ind. 429.

Assessments—Local taxation.—There is no constitutional prohibition upon local taxation for objects in themselves local. The constitution recognizes a distinction between taxation for general purposes and assessments for improvements resulting in special benefit to property. The only limit upon the legislative exercise of the power of assessment in any given case is, that the subject-matter for which the assessment is made shall result in local benefit to property within some special district, as distinguished from a more general good accruing to the people as citizens, and that the assessment shall be uniform and equal upon all property receiving such special benefit. Anderson v. Kerns, etc., Co., 14 Ind. 199; Law v. Madison, etc., Co., 30 Ind. 77; Goodrich v. Winchester, etc., Co., 26 Ind. 119; Elliott Roads and Streets, p. 370.

Same—Streets—Highways.—Streets and highways are both equally proper subjects for the application of the principle of assessment. Law v. Madison, etc., Co., 30 Ind. 77; Rykers, etc., Co. v. Scott, 32 Ind. 37; State v. Needham, 32 Ind. 325; Palmer v. Stumph, 29 Ind. 329.

Exemptions.—The general policy of the state is to subject all private property to the burden of taxation, and hence statutes exempting property from taxation must be strictly construed. City of Indianapolis v. Grand Master, 25 Ind. 518; Trustees, etc., v. Ellis, 38 Ind. 3; Read v. Yeager, etc., 104 Ind. 195; Conklin v. Town of Cambridge City, 58 Ind. 130; City of South Bend v. University, etc., 69 Ind. 344; State v. City of Indianapolis, 69 Ind. 375; Common Council, etc., v. McLain, 8 Ind. 328.

Widow's exemption.—A clause of a statute which exempts property to the amount of five hundred dollars, of a widow or unmarried female, is unconstitutional and void. Such exemption is not for "charitable purposes" within the meaning of the above provisions of the constitution. State v. City of Indianapolis, 69 Ind. 375; Warner v. Curran, 75 Ind. 309.

Exemptions—Farm land.—Statutes exempting farm lands from municipal taxation are held not to be in conflict with this section of the constitution. Hamilton v. City of Ft. Wayne, 40 Ind. 491.

Education—Private property.—The intention of this provision of the constitution was to leave the legislature at liberty to encourage the establishment of institutions of learning, by exempting them from the usual burden of taxation, whether the enterprise might be undertaken on public or private account. Private property used for educational purposes may be exempted from taxation. City of Indianapolis v. Sturdevant, 24 Ind. 391.

Lands owned by one person, and used by another for school purposes, are subject to taxation. Travelers' Ins. Co. v. Kent, 151 Ind. 349.

Schools—Taxation by cities and towns.—The legislature may empower the school trustees of cities to levy a tax for tuition purposes. Robinson, etc., v. Schenck, 102 Ind. 307. See City of Lafayette v. Jenners, 10 Ind. 70; Lima Tp. v. Jenks, 20 Ind. 301.

37. State can not assume municipal debt.—6. No county shall subscribe for stock in any incorporated company, unless the same be

paid for at the time of such subscription, nor shall any county loan its credit to any incorporated company, nor borrow money for the purpose of taking stock in any such company; nor shall the general assembly ever, on behalf of the state, assume the debts of any county, city, town, or township, nor of any corporation whatever. R. S. 1894, § 198.

Railroad aid laws.—Statutes authorizing counties, townships, cities and towns to subscribe for stock in railroad companies, or to make donations thereto, are constitutional; but such statutes are strictly construed. Unless express authority is conferred by statute such power does not exist. City of Aurora v. West, 9 Ind. 74; Thompson v. City of Peru, 29 Ind. 305; Mayor, etc., v. State, 57 Ind. 152: Indiana, etc., R. Co. v. City of Attica, 56 Ind. 476; Brocaw v. Board, etc., 73 Ind. 543; Pittsburg, etc., R. Co. v. Hardin, 137 Ind. 486; Lafayette, etc., R. Co. v. Geiger, 34 Ind. 185; State v. Wheadon, 39 Ind. 520; Scott v. Hansheer, 94 Ind. 1; Bittinger v. Bell, 65 Ind. 445; Hainer's Municipal Securities, §§ 138, 141; 2 Elliott Railroads, § 814, *et seq.*; Elliott Roads and Streets, p. 63; 2 Beach on Conts., §§ 1178–1180.

Incorporated city within township limits—Part of township.—For the purpose of a township tax in aid of a railroad, an incorporated city within the limits of a civil township is a part of such township, the qualified voters of the city are voters of the township, and the taxable property within the city is also taxable property within the township and is subject to taxation for township purposes. Scott v. Hansheer, 94 Ind. 1.

Railroad property—Taxation of in aid of railroad.—The property of a railroad company within a township which has voted a donation to aid in the construction of another and rival railroad therein, to be raised by a tax upon the property within the township, is subject to its share of the burden thus imposed. Pittsburg, etc., R. Co. v. Hardin, 137 Ind. 486.

ARTICLE 11.—CORPORATIONS.

SEC.
38. General laws.

38. General laws.—13. Corporations, other than banking, shall not be created by special act, but may be formed under general laws. R. S. 1894, § 212.

See *ante*, §§ 28 and 29.

Provisions construed.—Section 13 of article 11 of the constitution means that after it took effect on November 1, 1851, the legislature should have no power or authority to create, or regulate, or bring into existence by special act, a new corporation, where none had previously existed. City of Indianapolis v. Navin, 151 Ind. 139; Wiley v. Corp. of Bluffton, 111 Ind. 152. See Bank of Commerce v. Wiltsie, Ind. Sup. Ct., May 23, 1899.

This provision applies to municipal charters. Corporation of Bluffton v. Studabaker, 106 Ind. 129, 131. See 1 Dillon Munic. Corp., 4th ed., § 46.

Power to create and power to regulate corporations.—When a corporation has been created, a special act regulating it, without changing the organization of the corporate body, is not within the prohibition of the above section of the constitution. City of Indianapolis v. Navin, 151 Ind. 139; Wilkins v. State, 113 Ind. 514.

By the act of March 6, 1897 (Burns' Supp. 1897, § 5458), amending section 9 of the act for the incorporation of street railroad companies of June 4, 1861, no new corporate power or franchise was created. The provision in said act respecting the fare to be charged and collected is a mere regulation of an existing corporation. Even if said act were local and special, it is not in conflict with the above section of the constitution.

Even if said act were local, it is not special. Said act of 1897 by amending § 9 of the

act of 1861, for the incorporation of street railroad companies, did not render said last named act either local or special. City of Indianapolis v. Navin, 151 Ind. 139. *Contra*, Central Trust Co. of New York v. Citizens' St. Ry. Co., 82 Fed. Rep. 1. See *post*, § 1341.

Municipal corporation—Special charter—Amendment.—Where, prior to November 1, 1851, a municipal corporation was created and organized under a special act, and such act was continued in force by the present constitution, the general assembly has power, by special act, to amend the act of incorporation, so as to enlarge the jurisdiction of the municipality territorially or otherwise. Wiley v. Corporation of Bluffton, 111 Ind. 152; Wilkins v. State, 113 Ind. 514, 518.

Power of legislature over.—Except as limitations are placed upon it by the constitution the legislature's power over municipal corporations is supreme. It may change, divide or abolish them at pleasure. 1 Dillon Munic. Corp., 4th ed., § 54.

ARTICLE 13.—MUNICIPAL DEBT.

SEC.
39. Indebtedness limited—Excess void.

39. Indebtedness limited—Excess void.—1. No political or municipal corporation in this state shall ever become indebted, in any manner or for any purpose, to an amount, in the aggregate exceeding two per centum on the value of the taxable property within such corporation, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness; and all bonds or obligations, in excess of such amount, given by such corporation, shall be void: *Provided*, That in time of war, foreign invasion, or other great public calamity, on petition of a majority of the property owners, in number and value, within the limits of such corporation, the public authorities, in their discretion, may incur obligations necessary for the public protection and defense to such an amount as may be requested in such petition. [Amendment, in lieu of four old sections. Adopted March 14, 1881.] R. S. 1894, § 220.

Provision construed.—Under this provision, every indebtedness incurred "in any manner, or for any purpose," is within the prohibition. City of La Porte v. Gamewell, etc., Co., 146 Ind. 466; Hainer's Municipal Securities, § 43.

Indebtedness—What constitutes—Payment in installments—Indebtedness not created for aggregate sum.—When a municipal corporation contracts for a usual and necessary thing, such as water or light, and agrees to pay for it annually or monthly, as furnished, the contract does not create an indebtedness for the aggregate sum of all the installments, since the debt for each year or month does not come into existence until it is earned. The earning of each year's or month's compensation is essential to the existence of a debt. If the city can pay such indebtedness when it comes into existence without exceeding the constitutional limit, there is no indebtedness, and therefore no violation of the constitution. But if the indebtedness of the city already equals or exceeds the constitutional limit, and the current revenues are not sufficient to pay such indebtedness when it comes into existence, including other expenses for which the city is liable, an indebtedness is thereby created, and there is a violation of the constitution. City of Laporte v. Gamewell, etc., Co., 146 Ind. 466; Crowder v. Town of Sullivan, 128 Ind. 486; Foland v. Town of Frankton, 142 Ind. 546; City of Valparaiso v. Gardner, 97 Ind. 1; Seward v. Town of Liberty, 142 Ind. 551; 1 Dillon Munic. Corp., 4th ed., § 136a; Hainer's Municipal Securities, § 43; 2 Beach Conts., §§ 1171, 1194.

Where the constitution of a state limits the amount of indebtedness which may be incurred by a municipal corporation, it is not within the power of the legislature to dispense with such limitation, either directly or indirectly. Lake County v. Graham, 130

U. S. 675; Lake County v. Rollins, 130 U. S. 662; Doon Tp. v. Cummins, 142 U. S. 366; Buchanan v. Litchfield, 102 U. S. 278; Hainer's Municipal Securities, §§ 37, 38.

Prohibited indebtedness incapable of ratification.—Indebtedness sought to be created by a municipal corporation in violation of a constitutional or statutory prohibition can not be ratified or validated by the corporation by resolution or otherwise. City of La Porte v. Gamewell, etc., Co., 146 Ind. 466; City of Indianapolis v. Wann, 144 Ind. 175; Hainer's Municipal Securities, § 339.

Power of legislature to ratify.—When the legislature has the power to authorize the issue of bonds, and they have been issued by the municipal corporation without authority, the legislature may validate the same, and may, by retroactive act, cure all irregularities in the issue of bonds issued under authority of law; but it can not validate bonds issued in violation of constitutional provisions. Schneck v. City of Jeffersonville, Ind. Sup. Ct., Dec. 20, 1898; Marks v. Trustees Purdue University, 37 Ind. 155; Hainer's Municipal Securities, §§ 321, 329, and cases; 2 Beach Conts., § 1178. —

An act of the legislature legalizing an issue of bonds by a city has the same effect upon the validity of the bonds as if the authority had been conferred before the bonds were issued. If the bonds were issued prior to the constitutional amendment of 1881, and when power to issue the same might have been conferred by the legislature, but had not been, an act after 1881 legalizing the issue of bonds is valid, and does not create a debt prohibited by the constitution, though the debt created by such issue of bonds is in excess of the two per centum of the value of taxables. Schneck v. City of Jeffersonville, Ind. Sup. Ct., Dec. 20, 1898.

Current revenue—Current expenses—Corporate debt—Limitation.—The items of expense essential to the maintenance of corporate existence, such as light, water, labor and the like, constitute current expenses, payable out of current revenues. Where the current revenues are sufficient to discharge all current expenses without increasing the indebtedness, there is no corporate debt incurred for such expenses. City of Valparaiso v. Gardner, 97 Ind. 1; City of La Porte v. Gamewell, etc., Co., 146 Ind. 466; Foland v. Town of Frankton, 142 Ind. 550; 2 Beach Conts., § 1171.

Water supply—Creation of debt.—While the power of a city to contract for a supply of water for public use is, in a general sense, a discretionary one, it can not be so exercised as to create a corporate debt beyond that limited by law, nor to surrender or suspend legislative power; but the limitation in the constitution to the indebtedness of any political or municipal corporation does not apply to water to be paid for as the water is furnished, provided the contract price can be paid from the current revenues as the water is furnished, without increasing the corporate indebtedness beyond the constitutional limit, or encroaching upon funds set apart to other purposes. City of Valparaiso v. Gardner, 97 Ind. 1; Quill v. City of Indianapolis, 124 Ind. 292; City of New Albany v. McCullock, 127 Ind. 500.

A municipal corporation may contract for a supply of water or gas, or a like necessary, and may stipulate for the payment of an annual rental for the gas or water furnished each year, notwithstanding the aggregate of its rentals during the life of the contract may exceed the amount of the indebtedness limited by the charter. Walla Walla City v. Walla Walla Water Co., 172 U. S. 1.

Fire alarm telegraph—Indebtedness—Limitation.—The constitutional limitation of indebtedness is not violated by a city purchasing a fire alarm telegraph, when there is money on hand and appropriated for fire purposes sufficient to pay the cost thereof, although the city is already indebted for more than the constitutional amount, and it may not be a wise thing for the common council to expend the fire appropriation in this way. Brashear v. City of Madison, 142 Ind. 685.

Same.—Where a municipal corporation at the time of entering into a contract for a fire alarm telegraph system was indebted in excess of the constitutional limit, and had not sufficient money in the treasury, either at the time of entering into said contract, or

at the time of the completion and acceptance of the work, to pay for the same, such contract was in violation of the constitution and the indebtedness invalid. City of La Porte v. Gamewell, etc., Co., 146 Ind. 466.

Contracts for future supplies.—Cities are not prohibited by the constitutional provision limiting indebtedness, from entering into contracts for the furnishing of necessary articles to the city in the future and which are to be paid for as furnished, out of the current revenues, although the aggregate amount to be paid for such articles will exceed the limit of indebtedness. City of Valparaiso v. Gardner, 97 Ind. 1, 9.

Current expenses—Injunction.—A city, being indebted to an amount equal to two per centum of its taxable property, is prohibited from issuing an order on its treasurer even for current expenses, where there are no funds in the treasury which may be applied to its payment, and may be enjoined from issuing such an order when one is about to be issued and no provision has been made for its payment. Sackett v. City of New Albany, 88 Ind. 473, 476; 2 Beach Conts., § 1171.

Injunction—Insufficient complaint.—A complaint alleged that a city had agreed to pay five thousand dollars for a fire-alarm system; that its indebtedness already exceeded the two per cent. limit fixed by constitution, article 13, § 220, R. S. 1894; that it had been compelled to borrow money to pay current expenses; that the revenue from taxes for the current year would not exceed fifty thousand dollars; that, of this sum, appropriations of forty-four thousand dollars had been made, including an item, "fire, six thousand dollars;" and that twenty-two thousand dollars of the appropriations had been expended. Such complaint failed to show that there was not money in the treasury, or to be received from the taxes, out of which the five thousand dollars could be paid as a current expense, without becoming an indebtedness in violation of the constitutional limitation. Brashear v. City of Madison, 142 Ind. 685.

For services rendered.—Although the debt of a city may be as much as allowed by the constitution, yet such fact will not invalidate a contract made with the city for services to be rendered in compromising or contesting any part of such indebtedness. City of Logansport v. Dykeman, 116 Ind. 15, 21.

Constitutional and statutory limitations distinguished.—The rule which applies to a constitutional limitation is not usually applicable when the limitation is only statutory. When the limitations are imposed by the constitution it may not be within the power of the legislature to dispense with them by the creation of a ministerial commission whose findings shall be taken in lieu of the facts; but, when the limitations are imposed by the statute only, the legislature being the source of the limitation, may create a board authorized to determine the questions of fact upon which the limitation depends, and its findings will be conclusive in favor of bona fide purchasers of bonds. Chilton v. Town of Gratton, 82 Fed. Rep. 873; Sherman Co. v. Simons, 109 U. S. 735; Lake Co. v. Graham, 130 U. S. 674; Board of Comm'rs v. Howard, 83 Fed. Rep. 296; 1 Dillon Munic. Corp., 4th ed., §§ 523–529a; 2 Elliott Railroads, § 888.

Limitation of indebtedness—Bonds.—Bonds issued in violation of a constitutional limitation upon the power of a municipal corporation to incur indebtedness are void; the legislature can not confer upon a municipal corporation power to contract indebtedness which is expressly forbidden by the constitution. Buchanan v. Litchfield, 102 U. S. 278; 1 Dillon Munic. Corp., § 529a.

A constitutional provision that no city, etc., "shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of its taxable property," forbids the incurring of any pecuniary liability, in any manner, for any purpose, by bonds, notes or express or implied promises, in excess of the per centum stated. Holders of bonds issued in violation of such provision can not recover the proceeds thereof received and enjoyed by the city, either by a suit in equity nor by an action at law for money had and received. Litchfield v. Ballou, 114 U. S. 190.

While recitals in bonds issued under legislative authority may estop the municipality from disputing their validity, as against a bona fide holder for value, when the municipal bonds are issued in violation of a constitutional provision, no such estoppel can arise by reason of any recitals contained in the bonds. Hedges v. Dixon County, 150 U. S. 182; Lake Co. v. Rollins, 130 U. S. 662; Lake Co. v. Graham, 130 U. S. 674; Sutliff v. Commissioners, 147 U. S. 230; Nesbit v. Riverside Independent Dist., 144 U. S. 611; 1 Dillon Munic. Corp., 4th ed., § 529a; 2 Elliott Railroads, § 888.

Municipal bonds issued in violation of a constitutional limitation upon indebtedness are void. When the constitution provides that no political or municipal corporation shall be allowed to become indebted to an amount in the aggregate exceeding a certain per centum of the value of the taxable property within such corporation, etc., purchasers of bonds are bound to take notice of the value of the taxable property. Nesbit v. Riverside Independent Dist., 144 U. S. 611; Buchanan v. Litchfield, 102 U. S. 278; North Bank v. Porter Township, 110 U. S. 608; Dixon County v. Field, 111 U. S. 83.

May issue funding bonds.—The constitutional provision limiting the power of cities to create indebtedness does not prohibit cities from issuing bonds to fund the indebtedness and interest thereon that existed at the time of the adoption of such provision. Powell v. City of Madison, 107 Ind. 106, 114; City of Logansport v. Dykeman, 116 Ind. 15, 22; Myers v. City of Jeffersonville, 145 Ind. 431; Schneck v. City of Jeffersonville, Ind. Sup. Ct., Dec. 20, 1898.

The only effect which the adoption of article 13 of the state constitution, § 220, R. S. 1894, had upon §§ 4199,4200, R. S. 1894 (*post*, §§ 1001, 1002), which provide for the funding of the indebtedness of cities and towns, was to limit their application to debts contracted prior to March 14, 1881, and to such as have been since incurred, not in excess of the two per centum limit upon the value of their taxable property. Powell v. City of Madison, 107 Ind. 106, 114.

If a municipal corporation owes a valid and enforcible indebtedness, refunding bonds issued under authority of an act of the legislature for the purpose of taking up such enforcible indebtedness, are not invalid because they may exceed the per cent. limitation. Ætna Life Ins. Co. v. Lyon County, 44 Fed. Rep. 329; Coffin v. City of Indianapolis, 59 Fed. Rep. 221.

Bonds for school-house.—A town can not under this provision of the constitution issue bonds to obtain funds with which to rebuild a school-house when the issuance of the bonds will create a debt in excess of two per centum of the taxable value of the property within the corporate limits of the town. Town of Winamac v. Huddleston, 132 Ind. 217; Wilcoxon v. City of Bluffton, Ind. Sup. Ct., June 14, 1899.

Contract for school-house.—If a town contract for the building of a school-house, and the contract price raise the indebtedness beyond the constitutional limit, the excess of indebtedness is void, but so much of the contract price as is within the constitutional limit is valid. School Town of Winamac v. Hess, 151 Ind. 229.

Street improvement bonds.—The bonds authorized to be issued under the act of March, 1889, § 4296, R. S. 1894 (*post*, § 1115), to raise money to pay for street improvements are not debts of a corporation within the meaning of the provision of the constitution limiting the amount of indebtedness of municipal corporations. Quill v. City of Indianapolis, 124 Ind. 292.

Obligation—Payable out of particular fund.—Obligations payable out of a particular fund, and for which the fund only, and not the corporation, is liable, are not within the inhibition of the constitution. Board, etc., v. Harrell, 147 Ind. 500; City of La Porte v. Gamewell, etc., Co., 146 Ind. 466; Quill v. City of Indianapolis, 124 Ind. 292; Strieb v. Cox, 111 Ind. 299; Hainer's Munic. Securities, § 43.

Streets—Repairs—Indebtedness—Injuries.—In an action to recover for an injury in consequence of a defective sidewalk, an answer alleging that the city was indebted up to the constitutional limit, and had no funds available for the repair of its streets and

sidewalks, presents no defense, since a city has power under §§ 3624, 3627, 3628, R. S. 1894 (*post*, §§ 219, 222, 223), to repair its streets and sidewalks at the expense of adjacent property owners. City of New Albany v. McCulloch, 127 Ind. 500, 503.

Assessment for street improvement.—The question whether a city is liable for its proportion of cost of a street improvement when it is already indebted beyond the constitutional limit does not affect the liability of a property holder in a suit to enforce payment of his share of the assessment. Hughes v. Parker, 148 Ind. 692.

City and township—Separate corporations—Township aid to railroads.—The city is an integral part of the township in which it is situated, but it is not the township, nor is the township the city. They are distinct corporations. It is no impediment to granting aid to a railroad by a township that it includes a city which is in debt to the extent permitted by the constitution. Irwin v. Lowe, 89 Ind. 540.

ARTICLE 15.—MISCELLANEOUS.

SEC.
40. Official appointments.
41. Duration of office.
42. Officer holding over.
43. Official oath.
44. Public grounds.

40. Official appointments.—1. All officers whose appointments are not otherwise provided for in this constitution shall be chosen in such manner as now is, or hereafter may be, prescribed by law. R. S. 1894, § 223.

See *ante*, § 27.

Municipal corporations—Local self-government—Appointment to office—Power of legislature.—The right of local self-government in towns and cities was not surrendered upon the adoption of the constitution, but is still vested in the people of the respective municipalities, and the legislature can not appoint officers to administer municipal affairs, its power ending with the enactment of laws prescribing the manner of the section and the duties of the officers. State v. Denny, 118 Ind. 449; State v. Denny, 118 Ind. 382; City of Evansville v. State, 118 Ind. 426; State v. Kolsem, 130 Ind. 434. See State v. Peelle, 121 Ind. 495; State v. Gorby, 122 Ind. 17; French v. Harley, 141 Ind. 618; Hovey v. State, 119 Ind. 395; State v. Hyde, 121 Ind. 20; State v. Haworth, etc., 122 Ind. 462; State v. Mount, 151 Ind. 679.

This section is to be construed in the light of the laws in force at the time the constitution was adopted, and seems to limit the power of the legislature to such appointments as it might make under those laws. The power to provide by law the manner or mode of making an appointment to a new office created by the legislature does not include the power to make the appointment itself. State v. Denny, 118 Ind. 382; State v. Hyde, 121 Ind. 20, 36; State v. Gorby, 122 Ind. 17, 23.

Appointment when no vacancy.—An appointment to fill a vacancy in an office is void when there is no vacancy. Kimberlin v. State, 130 Ind. 120, 126.

Officers—Selection from classes.—The legislature can not divide citizens into classes, such as a residence for a certain period of time, or that of being a member of a political party, and require that certain officers shall be elected from such classes. City of Evansville v. State, 118 Ind. 426; State v. Denny, 118 Ind. 449; State v. Blend, 121 Ind. 514.

Board of public works.—The act of March 8, 1889 (Acts 1889, p. 247), assuming to give the exclusive control of streets, alleys, sewers, lights, water supply, etc., in cities of more than fifty thousand inhabitants, to boards of public works to be chosen by the legislature from residents of the cities affected, is void, as denying the right of local self-government. State v. Denny, 118 Ind. 382.

Fire department.—The right to provide and maintain a fire department in towns and cities is vested in the inhabitants of the respective municipalities, as an element of local self-government, and is not subject to legislative interference, except in so far as the general assembly may prescribe rules to aid the people in the exercise of such right. State v. Denny, 118 Ind. 449, 469.

Police and fire department.—The act of March 7, 1889 (R. S. 1894, § 3701, *et seq.*), creating a board of metropolitan police and fire department in cities having a certain population, providing for the election of the first commissioners by the legislature, and giving them exclusive control of the police and fire departments of such cities and of matters connected therewith, is void, in so far as it relates to the fire department, as being in violation of the right of local self-government; and as the provisions of the act in relation to the police department are so connected with and dependent upon its other provisions as to be practically inseparable, the whole act falls. State v. Denny, 118 Ind. 449, 476.

Police and fire commissioners.—The power to appoint certain officers of the state is reserved to the legislature, but that department has no authority to appoint local officers, whether county, township, city or town, and the act of March 7, 1889 (Acts 1889, p. 222), assuming to confer upon it the authority to appoint police and fire commissioners for cities, is void. City of Evansville v. State, 118 Ind. 426.

Board of police—Constabulary.—In providing for the appointment of officers connected with the constabulary of the state, there is no invasion of the right of local self-government, but simply the exercise of the power to provide for the selection of peace officers of the state. State v. Blend, 121 Ind. 514; State v. Kolsem, 130 Ind. 434,436; City of Evansville v. State, 118 Ind. 426; State v. Denny, 118 Ind. 449.

Municipal board of police.—The legislature has the power to provide for the appointment of a municipal board of police, and the act of 1891 (Acts 1891, p. 90) is constitutional. State v. Kolsem, 130 Ind. 434.

The act of the legislature of 1883 (R. S. 1894, § 3717, *et seq.*), creating a board of metropolitan police in all cities of twenty-nine thousand inhabitants or more, and providing for the appointment of such board by the governor and certain other state officers is valid, except in so far as it makes a residence of three years in the city a condition of eligibility, and provides for the appointment of officers named in § 2 equally from the two leading political parties. State v. Blend, 121 Ind. 514.

41. Duration of office.—2. When the duration of any office is not provided for by this constitution, it may be declared by law; and if not so declared, such office shall be held during the pleasure of the authority making the appointment. But the general assembly shall not create any office the tenure of which shall be longer than four years. R. S. 1894, § 224.

Creation of office—Tenure.—It is not the tenure of more than four years that is prohibited by this provision of the constitution, but it is the creation of an office the tenure of which shall be longer than four years. The forbidden act is the creation of an office of the particular description given as much as the inhibition of more than four years tenure. The creation of an office with a tenure of more than four years is void. Indianapolis Brewing Co. v. Claypool, 149 Ind. 193.

The provision of this section that "the general assembly shall not create any office, the tenure of which shall be longer than four years," has no application to a case where an office is created of which no tenure is fixed. Clem v. State, 33 Ind. 418.

This provision can not be construed so as to prevent an officer from holding over until his successor is elected and qualified pursuant to the provisions of the following section. State v. Harrison, 113 Ind. 434. See Aikman v. State, Ind. Sup. Ct., May 18, 1899.

The legislature may fix the time for the commencement of a term of office when the

same is not fixed by the constitution. Scott v. State, 151 Ind. 556; State v. Harris, Ind. Sup. Ct., Dec. 16, 1898.

42. Officer holding over.—3. Whenever it is provided in this constitution, or in any law which may be hereafter passed, that any officer, other than a member of the general assembly, shall hold his office for any given term, the same shall be construed to mean, that such officer shall hold his office for such term, and until his successor shall have been elected and qualified. R. S. 1894, § 225.

Office—Termination of—Vacancy—Holding over.—The term of an officer ends when his successor qualifies, whether he actually assumes the duties of the office or not. Steinback v. State, 38 Ind. 483.

A person is not "elected and qualified" to succeed his predecessor in office until the time fixed by law arrives when his term is to begin, though he may have given bond and taken the oath of office. Scott v. State, 151 Ind. 556.

Where an officer is lawfully elected and in the possession of an office, his right to hold over continues, as a general rule, until a qualified successor has been elected. Kimberlin v. State, 130 Ind. 120; State v. Bogard, 128 Ind. 480; State v. Harrison, 113 Ind. 434; Baker v. Kirk, 33 Ind. 517; Elam v. State, 75 Ind. 518; Gosman v. State, 106 Ind. 203; School Town of Milford v. Powner, 126 Ind. 528; Koerner v. State, 148 Ind. 158; Scott v. State, 151 Ind. 556; State v. Harris, Ind. Sup. Ct., Dec. 16, 1898.

Where one is elected to an office, qualifies by taking the oath required by law, and dies before his term begins, his predecessor can not hold over. State v. Bemenderfer, 96 Ind. 374; Gosman v. State, 106 Ind. 203, 206.

The word "vacancy," as applied to an office, has no technical meaning, but an office is vacant or not according to whether it is occupied by one who has a legal right to hold it and to exercise the powers and perform the duties pertaining thereto. State v. Harrison, 113 Ind. 434.

This provision of the constitution applies to officers elected by the legislature as well as to those elected by the people. State v. Harrison, 113 Ind. 434.

The provision of § 2, art. 15 of the constitution, that "the general assembly shall not create any office the tenure of which shall be longer than four years," does not affect the right of an officer, elected by the general assembly for a term of four years to an office of legislative creation, to hold over as provided in this section. State v. Harrison, 113 Ind. 434.

No vacancy occurs in an office where the person elected to fill it dies before he qualifies, or dies after the polls are closed and before the result is ascertained. In such case the predecessor holds over. Kimberlin v. State, 130 Ind. 120.

If a person has held an office for the time that one person can successively hold under the constitution, he can not hold over at the end of such time. Gossman v. State, 106 Ind. 203.; Aikman v. State, Ind. Sup. Ct., May 18, 1899.

But where the office is not a constitutional office, but the creature of the legislature, under the provisions of the act of March 11, 1889 (R. S. 1894, §§ 8066, 8067), a person who had held the office of township trustee for two terms consecutively at the date of a township election, was entitled to hold over until his successor was duly elected and qualified, though ineligible to hold the office by virtue of a new election. State v. Bogard, 128 Ind. 480.

43. Official oath.—4. Every person elected or appointed to any office under this constitution shall, before entering on the duties thereof, take an oath or affirmation to support the constitution of this

state and of the United States, and also an oath of office. R. S. 1894, § 226.

44. Public grounds.—9. The following grounds owned by the state, in Indianapolis, namely: The state house square, the governor's circle, and so much of out-lot numbered one hundred and forty-seven as lies north of the arm of the central canal, shall not be sold or leased. R. S. 1894, § 231.

R. S. 1894, § 235. SCHEDULE.

SEC.
45. When constitution takes effect.

CLAUSES.
1. Laws continued.
4. Municipal acts continued.
16. Clarksville.

45. When constitution takes effect.—This constitution, if adopted, shall take effect on the first day of November, in the year one thousand eight hundred and fifty-one, and shall supersede the constitution adopted in the year one thousand eight hundred and sixteen. That no inconvenience may arise from the change in government, it is hereby ordained as follows:

1. Laws continued.—All laws now in force, and not inconsistent with this constitution, shall remain in force until they shall expire or be repealed.

* * * * * * * * * * *

4. Municipal acts continued.—All acts of incorporation for municipal purposes shall continue in force under this constitution until such time as the general assembly shall, in its discretion, modify or repeal the same.

* * * * * * * * * * *

16. Clarksville.—The general assembly may alter or amend the charter of Clarksville, and make such regulations as may be necessary for carrying into effect the objects contemplated in granting the same; and the funds belonging to said town shall be applied according to the intention of the grantor. R. S. 1894, § 235.

Municipal charters—Continuance of—Modification and repeal.—Under the fourth clause of this section all acts for the incorporation of cities and towns in force at the time of the adoption of the constitution were continued in full force after the constitution took effect; but full power and authority were conferred on the general assembly to either modify or repeal such acts of incorporation. Corporation of Bluffton v. Studabaker, 106 Ind. 129; Warren v. City of Evansville, 106 Ind. 104.

Under this clause municipal charters may be amended or modified so as to enlarge the corporate powers. Warren v. City of Evansville, 106 Ind. 104; Wiley v. Corporation of Bluffton, 111 Ind. 152.

Special charters.—May be amended by special or general acts. City of Evansville v. Summers, 108 Ind. 189; Eichels v. Evansville, etc., Co., 78 Ind. 261; City of Evansville v. Bayard, 39 Ind. 450; Wiley v. Corporation of Bluffton, 111 Ind. 152; Warren v. City of Evansville, 106 Ind. 104; Corporation of Bluffton v. Studabaker, 106 Ind. 129.

Clarksville—The right to re-incorporate.—The right given to towns to re-incorporate, by R. S. 1894, § 4338 (see *post*, § 1181), is still effective as to the town of Clarks-

ville, notwithstanding the act of March 3, 1883, repealing certain amendatory acts of the charter of said town, and pertaining to the incorporation of towns on the out-lots of Clarksville. State v. Hertsch, 136 Ind. 293, 296.

The statutes of Virginia and the patent for "Clarke's Grant" are set out in the first edition of 1 Blackford, in the appendix, p. 443. See also Hughes v. Trustees of Clarksville, 6 Peters 369.

For the historical facts concerning the grant, see, also, Carr v. McCampbell, 61 Ind. 97; Henthorn v. Doe, 1 Blackf. 157; Ewing v. Trustees, etc., 61 Ind. 129; Frisbie v. Trustees, etc., 78 Ind. 269; Davis v. Fogg, 78 Ind. 301.

Incorporation of part of town—Town of Ohio Falls—Case overruled.—Under the act of June 17, 1852, amendatory of the charter of the town of Clarksville, etc., it was incompetent for any portion of the town of Clarksville to organize itself into an independent town; and therefore the organization of part of such town under the corporate name of the Town of Ohio Falls was void. **St. Clair v. Kelley, 50 Ind. 535, overruled;** Carr v. McCampbell, 61 Ind. 97.

CONSTITUTIONAL AND STATUTORY INTERPRETATION.

General Notes.

Statutes.—A statute may be unconstitutional in part and valid as to the residue. Taggart v. Claypool, 145 Ind. 590; City of Indianapolis v. Bieler, 138 Ind. 30.

Same—Elimination.—If the unconstitutional portions of a statute can be stricken out, and still leave a complete statute, the unconstitutional portions must be regarded eliminated, and the remainder of the statute must be enforced. State v. Bland, 121 Ind. 514; Taggart v. Claypool, 145 Ind. 590; City of Indianapolis v. Bieler, 138 Ind. 30; State v. Gorby, 122 Ind. 17; County Board, etc., v. State, 148 Ind. 675.

Where any provision of an act is invalid it may be stricken out, but courts have otherwise no right to add to or take from the law as it is written, or to extend the meaning of the law beyond that which is written, when the meaning is clear. Questions of policy and political morals are matters for the consideration of the legislature, and are not for the courts. County Board, etc., v. State, 148 Ind. 675.

"A municipality is a governmental agency; its functions are for the public good, and the powers given to it, and to be exercised by it, must be construed with reference to that good and to the distinctions which are recognized as important in the administration of public affairs." Citizens' Street R. Co. v. Detroit R., 171 U. S. 48.

Rules governing adjudication.—Courts are reluctant to declare acts of the legislature unconstitutional, and, in passing upon such a question, are governed by the following rules: (1) A court will never decide a question involving the constitutionality of a statute, if the merits of the case in which it is involved can be determined without such decision; and (2), a court will never declare a statute unconstitutional where there is any doubt upon the subject. Parker v. State, 133 Ind. 178, 190; Harmon v. Board, etc., Madison County, Ind. Sup. Ct., June 16, 1899.

Statutes must be upheld if possible.—A statute must be construed so as to uphold it, if that be fairly possible; and if it be of doubtful constitutionality, the doubts are to be resolved in favor of the enactment. McComas v. Krug, 81 Ind. 327, 332; Campbell v. Dwiggins, 83 Ind. 473, 480; Warren v. Britton, 84 Ind. 14, 22; Hays v. Tippy, 91 Ind. 102, 105; Robinson v. Schenck, 102 Ind. 307, 319; Riggs v. State, 104 Ind. 261, 264; Phenix Ins. Co. v. Burdett, 112 Ind. 204, 206; Wilkins v. State, 113 Ind. 514, 516; State v. Insurance Co., 115 Ind. 257; State v. Denny, 118 Ind. 382, 394, 412.

Amending an amendment.—An act professing to amend a section of a statute which has already been superseded by amendment is unconstitutional and void. Brocaw v. Board, etc., 73 Ind. 543, 550; Lawson v. DeBolt, 78 Ind. 563, 566; McIntyre v. Marine, 93 Ind. 193, 199; Hall v. Craig, 125 Ind. 523, 529; Eversole v. Chase, 127 Ind. 297, 300.

Amendment supersedes original.—Where a statute, or an act, has been amended or repealed, it no longer exists and is superseded by the amended section or act. Feible-

man v. State, 98 Ind. 516, 518; Fuller v. Cox, 135 Ind. 46, 47; Robinson v. City of Valparaiso, 136 Ind. 616, 622; State v. Brugh, 5 App. 592, 594.

Unconstitutional statute—Injunction.—Courts of equity have jurisdiction to hear the complaint of those who assert that their lands are about to be assessed and subjected to liens by a board or commission, acting in pursuance of the provisions of a statute which has been enacted under the forms of law, but which is unconstitutional, and therefore does not avail to confer the powers sought to be exercised. Craighill v. Lambert, 168 U. S. 611; Dows v. Chicago, 11 Wall. 108; Railway Co. v. Cheyenne, 113 U. S. 516; Ogden City v. Armstrong, 168 U. S. 224; 2 Dillon Munic. Corp., 4th ed., § 922.

Constitutionality of statute—Waiver.—In an action for the enforcement of a statutory lien, where an appeal is taken to the supreme court, and the question as to the constitutionality of the statute is not raised in that court, and the appeal is transferred by that court to the appellate court, the question as to the constitutionality of the statute is deemed waived. Lewis v. Albertson, Ind. App. Ct., May 24, 1899.

INDIANA STATUTES.

CHAPTER 1.

CITIES.

ART.

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ARTICLE 1.—INCORPORATION AND ORGANIZATION.

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[1869 S., p. 30. In force April 28, 1869.]

46. Petition—Order for census.—1. Whenever one-third of the voters of any incorporated town, so far as the number can be estimated, shall petition the board of trustees thereof or common council of any incorporated city to be incorporated as a city under this act, such board of trustees or common council, by an order or resolution to that effect entered on their order book, shall direct the marshal or other officer thereof by a proper warrant, furnishing him with the necessary forms, to take the census of all persons who were residents within the corporate limits of such city or town at least forty days anterior to the date of such order: *Provided, however*, That if it shall appear to said board of trustees or common council, by the last census of this state or of the United States, or by any enumeration made by the order of the board of trustees or common council of said city or town within two years from the date of the receipt of such petition, that said town or city had two thousand five hundred inhabitants, said board of trustees or common council shall be at liberty to proceed in all respects as though the said census had been taken in the manner provided by this act. R. S. 1894, § 3462.

The act in reference to the incorporation of cities, approved March 14, 1867 (of which this section is an amendment), repealed the act of December 20, 1865, though in the repealing section the year in which the act repealed is said to have been approved is given as 1863 instead of 1865, the title of the act repealed being correctly recited. McNulty v. Connew, 50 Ind. 569.

Act constitutional.—The general law of 1857 for the incorporation of cities was not unconstitutional for want of uniformity in the mode of organization. City of Lafayette v. Henners, 10 Ind. 70.

Amendment—Repeal.—The charter of a municipal corporation may be amended or repealed at the pleasure of the legislature. Sloan v. State, 8 Blackf. 361; City of Indianapolis v. Indianapolis Home, etc., 50 Ind. 215; Lucas v. Board, etc., 44 Ind. 524; Eichels v. Evansville, etc., 78 Ind. 261, 263; Warren v. City of Evansville, 106 Ind. 104, 107; Corporation, etc., v. Studabaker, 106 Ind. 129, 131; City of Evansville v. Summers, 108 Ind. 169; Wiley v. Corporation of Bluffton, 111 Ind. 152, 156; State v. Kolsem, 130 Ind. 434, 437; 1 Beach Pub. Corp., § 92, *et seq.*; 1 Dillon Munic. Corp., 4th ed., § 63; 2 Beach Conts., § 1133.

Special charters may be amended by either general or special acts. City of Evansville v. Summers, 108 Ind. 189; City of Evansville v. Bayard, 39 Ind. 450; Eichels v. Evansville, etc., R. Co., 78 Ind. 261; Wiley v. Corporation of Bluffton, 111 Ind. 152; Warren v. City of Evansville, 106 Ind. 104; Corporation of Bluffton v. Studabaker, 106 Ind. 129.

Intention.—Where the intention of the legislature is to apply an act to cities organized under special charters as well as to those incorporated under general laws, that intention will govern, and the act will be deemed the law, not only of one class, but of all. Eichels v. Evansville, etc., Co., 78 Ind. 261.

Legalizing act—Irregularities in the organization of cities may be cured by legalizing acts. Mullikin v. City of Bloomington, 72 Ind. 161.

Municipal corporation defined.—A municipal corporation is a body corporate and politic, created by the law and invested with special powers relating particularly to the government of its own local affairs. Vaughtman v. Town of Waterloo, 14 App. 650; 1 Dillon's Munic. Corp., 4th ed., § 20.

Cities—Towns.—The word "town," as used in the constitution of the state, and in some statutes, is generic, and includes cities. City of Indianapolis v. Higgins, 141 Ind. 1; Flinn v. State, 24 Ind. 286; State v. Craig, 132 Ind. 54; State v. Denny, 118 Ind. 449; Harvey v. Osborn, 55 Ind. 535.

A town is not always a city, but it is said that a city is always a town. Harvey v. Osborn, 55 Ind. 535.

Corporation—What constitutes.—The inhabitants of the territory embraced within the corporate limits, and not the officers, constitute the corporation. City of Valparaiso v. Gardner, 97 Ind. 1, 6; Strosser v. City of Ft. Wayne, 100 Ind. 443, 449; Baumgartner v. Hasty, 100 Ind. 575, 585; Platter v. Board, etc., 103 Ind. 360, 381; Vogel v. Brown Tp., 112 Ind. 299, 300; Citizens', etc., Co. v. Elwood, 114 Ind. 332, 336.

Sovereign powers—Legislative and judicial.—For the purposes of its creation, a municipal corporation is a government with sovereign powers, legislative and judicial, to a limited extent. Exercise of such powers, within the limits prescribed by law creating them, is within the discretion of the properly constituted authorities of such corporation; and error in exercising, or failure to exercise such powers, does not render a corporation liable to a suit. Brinkmeyer v. City of Evansville, 29 Ind. 187; City of Lafayette v. Timberlake, 88 Ind. 330; Falkner v. City of Aurora, 85 Ind. 131; Sweet v. City of Wabash, 41 Ind. 7, 18; Kistner v. City of Lafayette, 100 Ind. 210.

A municipal corporation is not liable for failure to exercise governmental powers, as for failure to enforce the state laws or its own ordinances; to provide appliances for extinguishing fires; to supply an adequate force of police officers; to undertake a municipal work, such as supplying a system of drainage, etc. City of Lafayette v. Timberlake, 88 Ind. 330; Robinson v. City of Evansville, 87 Ind. 334.

Vested right in office or property.—A municipal corporation is not clothed with any vested right in a public office, nor does it possess a vested right in public property; and in transferring property and authority from one class of officers to another no vested right of the municipality is invaded. State v. Kolsem, 130 Ind. 434, 437.

Charter—Rules of construction.—The charter or statute by which a municipal corporation is created or governed is its organic law, and the rules applicable to the interpretation of constitutions may be used in the construction thereof. Newcomb v. City of Indianapolis, 141 Ind. 451.

Though municipal charters are to be construed strictly, yet they are so to be construed as to carry into effect every power clearly intended to be conferred on the municipality and every power necessary to be implied for the complete exercise of the powers granted. Smith v. City of Madison, 7 Ind. 86; City of Crawfordsville v. Braden, 130 Ind. 149; City of Lafayette v. Cox, 5 Ind. 38.

Municipal corporations are to be held strictly within the limits prescribed by statute, but within these limits they are favored by the courts. Kyle v. Malin, 8 Ind. 34; City of Crawfordsville v. Braden, 130 Ind. 149; Carr v. Town of Fowler, 74 Ind. 590.

Quo warranto.—The validity of the organization of a municipal corporation can be tested only by *quo warranto* proceedings. Mullikin v. City of Bloomington, 72 Ind. 161; Smelser v. Wayne, etc., Co., 82 Ind. 417; State v. Town of Tipton, 109 Ind. 73; Willard v. Albertson, App. Ct., No. 2785, May 24, 1899; Willard v. Albertson, App. Ct., No. 2786, May 24, 1899; 1 Beach Pub. Corp., § 55; 2 Dillon Munic. Corp., § 890, *et seq.*

Requisites of quo warranto.—An information in the nature of a *quo warranto* by a private citizen, to test the legality of a city organization, must show (1) that the relator is interested in the subject-matter, (2) that he did not, by his vote or otherwise, concur in the proceedings of which he complains, and (3) that, where there is no fraud or intentional violation of law, no public or private interest will be seriously affected by the granting of the relief demanded. State v. Town of Tipton, 109 Ind. 73, 78.

Incorporation, presumption as to.—It is presumed, when the contrary is not shown, that all cities are incorporated under the general laws. City of Logansport v. Wright, 25 Ind. 512; Town of Brazil v. Kress, 55 Ind. 14; State v. Hauser, 63 Ind. 155; Loeb v. City of Attica, 82 Ind. 175; House v. City of Greensburgh, 93 Ind. 533; City of Logansport v. Dick, 70 Ind. 65; City of Brazil v. McBride, 69 Ind. 244; Lowrey v. City of Delphi, 55 Ind. 250; City of South Bend v. Paxon, 67 Ind. 228; Stultz v. State, 65 Ind. 492; Hilgenberg v. Wilson, etc., 55 Ind. 210; Hopewell v. State, App. Ct., June 9, 1899.

Prescription, waiver of irregularities.—The exercise of corporate powers for twenty years over a defined territory, with the knowledge of the public, no question having been made as to its authority, will be deemed a waiver of irregularities in the organization of the corporation. Worley v. Harris, 82 Ind. 493; Strosser v. City of Ft. Wayne, 100 Ind. 443, 450.

Judicial notice.—Courts take judicial notice of the fact and date of the incorporation of cities. Stultz v. State, 65 Ind. 492; City of Huntington v. State, 66 Ind. 600; Town of Albion v. Hetrick, 90 Ind. 545; Pennsylvania Co. v. Horton, 132 Ind. 189.

Same—Location—Boundaries.—While courts take judicial notice of the existence and names of cities and towns, and, in some general sense, of their locations, they do not take notice of their exact limits or boundaries. Whether a given location or described territory is within the limits of any town or city in the state, is a matter of averment and proof. Grusenmeyer v. City of Logansport, 76 Ind. 549, 552; Strosser v. City of Ft. Wayne, 100 Ind. 443; City of Indianapolis v. McAvoy, 86 Ind. 587; Shea v. City of Muncie, 148 Ind. 14. See Johnson v. Common Council, etc., 16 Ind. 227; Louisville, etc., R. Co. v. Hixon, 101 Ind. 337.

Courts will not take judicial notice of the number of wards or councilmen in a city. Baker v. Tobin, 40 Ind. 310; Moberry v. City of Jeffersonville, 38 Ind. 198.

As to whether the courts will take judicial notice of the population of a particular city see Kalbrier v. Leonard, 34 Ind. 497.

Power of courts—Private rights.—The act for the incorporation of cities does not take from the courts authority to decide legal controversies concerning personal or property rights, and does not vest in the common councils of cities the power to determine such controversies. Williams v. Citizens' R. Co., 130 Ind. 71, 73.

[Acts 1875, p. 30. In force August 24, 1875.]

47. Marshal's assistants—Return.—2. Such marshal or other officer, with the concurrence of such board or council, may appoint assistants, and shall, within sixty days from the time of receiving such warrant, make full returns, under oath, to said board or council, of the resident population in such town or city as aforesaid. R. S. 1894, § 3463.

[Acts 1867, p. 33. In force March 14, 1867.]

48. Notice of election.—3. If the return shall show a population of two thousand persons or more, the trustees or common council, within ten days thereafter, shall publish a notice to the voters of such town or city, as in other corporations, stating that on a day, at a place named, a poll will be opened to determine whether such town or city shall be incorporated as a city. R. S. 1894, § 3464.

[Acts 1867, p. 33. In force March 14, 1867.]

49. Election board.—4. The trustees or common council shall appoint three reputable voters in each ward, one to act as inspector and two as judges of elections therein; and the persons thus appointed shall choose a clerk of such election. Such trustees or council shall also procure and deliver to such inspector, at least one day prior to such election, a ballot-box, which shall thereafter be retained for the use of such ward. If such inspector or judges, or either of them, or the clerk, after appointment and acceptance thereof, neglect or refuse to serve, such inspector or clerk shall forfeit and pay for the use of such city any sum not exceeding forty dollars, which shall be recoverable in an action at law; and the electors, being met on the day appointed, may choose, by voice, such inspector or judges as may be necessary to organize the board; and the inspector or judges so chosen may elect the clerk. R. S. 1894, § 3465.

Inspector's duties.—The inspectors of an election are officers under this section. Their duties, as such, are ministerial, not judicial. Kisler v. Cameron, 39 Ind. 488.

Mandate will lie to compel the election board to perform the duties prescribed by the statute. Kisler v. Cameron, 39 Ind. 488; Johnston v. State, 128 Ind. 16; Enos v. State, 131 Ind. 560.

50. Manner and return of election.—5. Such election shall be governed by the same rules as other corporation elections. And the ballots of the voters shall have thereon the word "yes" or the word "no;" and if a majority of the ballots given at such election have thereon the word "no," the voters of such town or city shall be deemed not to have consented to its incorporation as a city, and no further proceedings shall be had in relation thereto; but if a majority of such ballots shall have thereon the word "yes," the inspector shall make a statement showing the number of votes given having the word "yes" and the number having the word "no" thereon; and such statement shall have attached thereto the affidavit of such trustees or of the mayor of such city, verifying the truth of the same, and, within five days after such election, shall be filed in the office of the clerk of the circuit court of the proper county. The clerk shall make a record thereof, for which he shall receive the same fees as are paid him for like services in other cases. R. S. 1894, § 3466.

Adoption of city charter.—It is sufficient if a majority of the legal voters who vote at an election held in an incorporated town to determine whether a city charter shall be adopted agree to the change, and an averment in an information to test the legality of the city organization, that a majority of the legal voters of the town did not vote in favor of the change, is insufficient. When nothing is shown to the contrary, it will be presumed that the inspector of such election certified to the clerk of the circuit court a proper statement of the votes cast, and that the clerk made a record of the statement in his office, as required by law. State v. Town of Tipton, 109 Ind. 73.

51. Town becomes city—Record conclusive.—6. Such town shall thereafter be deemed an incorporated city, with the powers and franchises appertaining thereto, and the record in the office of the clerk, as aforesaid, shall be held in all courts as conclusive evidence of such

incorporation in any suit pending therein. But nothing in this act contained shall preclude any person interested from showing that a majority of the legal voters of any such town or city had not agreed to such change. R. S. 1894, § 3467.

Clerk's record conclusive.—The record made and filed, as required by this section, is conclusive evidence of the regularity of all previous proceedings, except as to whether a majority of the votes cast favored the adoption of a city charter. State v. Town of Tipton, 109 Ind. 73.

52. Notice of election.—7. The trustees or common council of such town or city shall, within five days after the filing of such statement, divide the city into not less than three wards, but no ward shall contain less than three hundred inhabitants, and they shall also, within the time aforesaid, cause to be given to the voters thereof ten days' notice, by publication in one or more newspapers printed in such city, or county in which the same is situated, and by posting copies of the same in three public places in each ward, that an election will be held in each of the several wards on a day and at the places therein named, for the election of the city officers specified in such notice. R. S. 1894, § 3468.

Statute construed—Election.—This provision is for a special election to fill offices for a newly created town or city. State v. Winter, 148 Ind. 177.

Section 3469, R. S. 1894, was repealed by the act of March 4, 1891, and it is omitted. Swindell v. State, 143 Ind. 153, 161.

[Acts 1891, p. 83. In force March 4, 1891.]

53. Wards, division of cities into—Voting precincts.—1. The common council of all cities organized under the general laws of the state, shall have the power and are hereby invested with the authority to divide the said cities into wards and voting precincts and to redistrict the cities for ward and voting precinct purposes and for the purpose of holding city elections whenever in their judgment it is expedient to do so. Such wards shall contain, as nearly as possible, an equal number of voters and be composed of compact and contiguous territory.

Provided, however, That whenever practicable, the common council shall adopt the division into voting precincts as made by the board of county commissioners; *Provided, further,* That no division into wards and precincts or redistricting for ward purposes shall be made oftener than once in two years. [As amended, Acts 1895, p. 173. In force March 8, 1895.] Burns' Supp. 1897, § 3470.

The creation of additional wards, thus occasioning a vacancy in the office of councilman, which the council can fill by appointment, under the act of February 26, 1891, R. S. 1894, § 3484 (see *post,* § 67), is within the power of the council, under this section. Swindell, etc., v. State, 143 In 153.

Wards—Judicial notice.—Courts will not take judicial notice of the number of wards or councilmen in a city. Baker v. Tobin, 40 Ind. 310; Moberry v. City of Jeffersonville, 38 Ind. 198.

54. Ordinance creating wards—Notice.—2. The common councils of cities shall, when changing the boundaries of wards and voting pre-

cincts, do so by ordinance, and shall give notice of such action by at least three publications for three successive weeks, and at least one month before any election, in two papers of opposite politics published in said city. [As amended, Acts 1895, p. 173. In force March 8, 1895.] Burns' Supp. 1897, § 3471.

[Acts 1867 S., p. 33. In force March 14, 1867.]

55. Old cities may adopt this act.—80. Any city heretofore incorporated under a law of this state may, by a resolution of the common council, adopted by a majority vote thereof and entered upon their record book, become a municipal corporation under this act. The same shall be deemed a surrender of the charter of such city, with all the rights and franchises therein contained; and no such city shall be entitled to any provisions of this act without adopting the whole act. R. S. 1894, § 3472.

56. Acquired rights—Interest on orders.—81. No rights acquired or liabilities incurred in favor of or against the city, and no suit or prosecution of any kind pending, shall be affected by the surrender thereof, as provided in the preceding section, but the same shall remain and be in progress as if no change had been made; and all property, real and personal, of any kind whatever, belonging to any town or city before its acceptance of this act, shall be and remain the property of such city from and after its adoption of this act. Cities shall, in all cases, be liable to pay interest on their orders or other liabilities payable on demand from and after such demand, which shall be indorsed on the same by the treasurer when presented. R. S. 1894, § 3473.

57. Old officers and ordinances.—87. Officers of any city coming under this act shall remain and continue in their respective offices subject to the provisions of this act, and perform the duties herein required, until the expiration of the term for which they were elected, and until their successors are chosen and qualified, under the oaths of office already taken and under the official bonds already filed: *Provided,* That this section shall not extend to any office or officer not recognized by this act. All by-laws, ordinances, and regulations not inconsistent with this act shall remain and continue in full force until altered or repealed by the common council of such city. R. S. 1894, § 3474.

58. Duties of common council in towns.—90. In those incorporated towns which have a common council instead of a board of trustees in their organization, the duties of this act required to be performed by the board of trustees shall be performed by the common council: *Provided,* That this act shall be in force from and after its passage in all the cities which previous thereto have been organized and acting under the several acts hereby repealed without any further acceptance or proceedings on the part of any such city. R. S. 1894, § 3475.

[Acts 1877, p. 12. In force March 6, 1877.]

59. City officers.—8. The officers of such city shall consist of a mayor, two councilmen from each ward, a city clerk, treasurer, civil engineer, street commissioner, chief of the fire department, health officer, marshal and (if the common council deem it expedient) a city attorney and a city judge. The city attorney, the street commissioner, the civil engineer, the chief engineer of the fire department and the health officer shall be appointed by the common council: *Provided*, That the common council may dispense with the street commissioner and require the marshal to perform his duties. All such officers shall hold their respective offices for four (4) years, and until their successors are elected or appointed and qualified, those who are appointed by the common council being subject to removal by the council at its pleasure, after the first general election on the first Tuesday in May. Said officers shall respectively hold their offices as follows: The mayor, city judge, clerk, marshal and treasurer, four years each: *And provided*, That the term of office of the aforesaid officers shall commence on the first Monday in September following the general election in May, and that the terms of office shall be four years from such Monday in September: *And, provided further*, That the mayor, clerk, treasurer, civil engineer, street commissioner, marshal, city attorney, city judge, chief engineer of the fire department and health officer now in office, and whose terms expire in May and September, 1893, or at any other time, shall hold their respective offices until the first Monday in the month of September, 1894, and that all and each of such officers as shall so hold shall procure from their sureties a written consent to the aforesaid extension, or give a new bond to the satisfaction of the council, otherwise their term of office shall terminate in May or September of the original term for which they were elected or appointed, or at such time as their terms now expire. And the councilmen shall be elected by the legal voters of their respective wards; and the councilmen from each ward whose terms will expire in May, 1893, is hereby continued in office, and his term extended until May, 1894, and the councilmen of each ward whose term would expire in May, 1894, is hereby continued in office and his term extended until May, 1896; and hereafter when two councilmen are chosen at the same time from the same ward it shall be determined by lot at the first regular meeting of the council after their election who shall hold his office for two years, and who for four years, and biennially thereafter one councilman shall be elected by the legal voters of each ward. The term of councilmen shall be four years, and they shall be elected biennially. The successors of those whose terms are extended until May, 1894, shall then be elected and their terms continued four years, and the successors of those whose terms are extended until May, 1896, shall then be elected and their terms continued four years; and all of said officers shall hold their respective offices during their respective terms, and until their successors are elected and qualified. The said clerk, treasurer and marshal, with the consent of the common coun-

cil, may appoint one or more deputies when necessary: *Provided further*, That the common council of a city governed by this act may order the election of an auditor, who shall be elected as other city officers are elected, and shall hold his office for the term of four years, and until his successor is elected and qualified; and the common council shall have power to prescribe the manner of qualifying for such office, and to prescribe the powers and duties thereof, which shall in nowise conflict with the provisions of this act: *And provided further*, That no person shall hold the office of councilman unless at the time of his election he is a resident of the ward from which he was elected; and in case of the removal of any councilman from the ward from which he was elected, the common council shall have the power to declare his office vacant and to elect his successor to fill such vacancy as provided by law. All officers who are not specifically named herein whose terms expire prior to the first Tuesday in May, 1894, at which date the first election under this amendment shall be held, are hereby continued in office until said time, and until their successors are elected and qualified, they to give new bond as the council may direct. [As amended, Acts 1893, p. 50. In force February 21, 1893.] R. S. 1894, § 3476.

By § 254 of act of 1891 (R. S. 1894, § 8672), the office of city assessor was abolished; and by act of 1885 (R. S. 1894, § 3744), the offices of city assessor and city treasurer in cities of over 70,000 population are abolished. See *post*, §§ 216 and 354.

Power of legislature.—The legislature has no power under the constitution to appoint local municipal officers. State v. Denny, 118 Ind. 382; State v. Denny, 118 Ind. 449; City of Evansville v. State, 118 Ind. 426; State v. Blend, 121 Ind. 514.

The legislature may provide for the appointment of police boards and officers. Such officers are not municipal officers; they are state officers. In providing for their appointment the legislature does not invade the right of local self-government. State v. Kolsem, 130 Ind. 434; State v. Blend, 121 Ind. 514, 520.

Offices—Not contracts.—Offices are neither grants nor contracts, nor obligations which can not be changed or impaired. In the absence of constitutional restrictions the term of an office may be shortened, the duties of the office increased, and the compensation lessened by the legislative will. State v. Hyde, 129 Ind. 296; Coffin v. State, 7 Ind. 157; Gilbert v. Board, etc., 8 Blackf. 81; Walker v. Peelle, 18 Ind. 264; Walker v. Dunham, 17 Ind. 483.

Officers' salaries—Allowances.—An officer is entitled only to the fees allowed by the statute, and before any allowance is made him he must point out the particular statute authorizing the allowance. Legler v. Paine, 147 Ind. 181; Stiffler v. Board, etc., 1 App. 368; Noble v. Board, etc., 101 Ind. 127; Wood v. Board, etc., 125 Ind. 270.

Officers—Duties and liabilities.—Public officers having ministerial duties to perform, in which private individuals have a direct interest, are liable to such individuals for an injury sustained by them in consequence of the failure to perform such duties. Stephenson v. Monmouth, etc., Co., 84 Fed. Rep. 114; Amy v. Supervisors, 11 Wall. 136, 138.

City officers, other than those who have judicial or police duties, are not officers "under the state" within the meaning of the constitution. State v. Kirk, 44 Ind. 401; Mohan v. Jackson, 52 Ind. 599; Waldo v. Wallace, 12 Ind. 569; Gulick v. New, 14 Ind. 93; Howard v. Shoemaker, 35 Ind. 111; Chamberlain v. State, 127 Ind. 365.

Election, validity—Quo warranto.—The validity of the election of a city officer,

and his eligibility to hold the office, may be tested by *quo warranto* proceedings. Parsons v. Durand, 150 Ind. 203; Gass v. State, 34 Ind. 425; Griebel v. State, 111 Ind. 369; State v. Meyer, 60 Ind. 288; Brown v. Goben, 122 Ind. 113; Mannix v. State, 115 Ind. 245.

If a person is legally entitled to an office of which he is not in possession, it is his property, and he can not be restricted to the compensation provided therefor, but may demand the office itself. City of Madison v. Korbly, 32 Ind. 74; Glascock v. Lyons, 20 Ind. 1.

The legality or validity of the election or appointment of a person to a city office may be inquired into in any proceeding by mandamus instituted to compel other persons to recognize the claimant's title to the office, or when he seeks to enter it or otherwise asserts his rights to act as a duly elected officer. Swindell v. State, 143 Ind. 153, 157.

Injunction—Jurisdiction of officers.—Injunction is the proper remedy to prevent city officers from exercising their powers outside the city limits. Stultz v. State, 65 Ind. 492.

Mandamus.—Mandamus is the proper remedy to coerce an officer to discharge a public duty, and if it is a matter in which the people in general are interested it is not required that the applicant show any legal or special interest in the result sought to be obtained. It is only necessary that he be a citizen, interested in common with other citizens in the execution of the law. Wampler v. State, 148 Ind. 557.

When the title to the office is involved, *quo warranto* is the proper remedy; but when it is sought to prevent the intrusion of one claimant into the office against one occupying the office upon a claim of right, injunction is the proper remedy. Parsons v. Durand, 150 Ind. 203; City of Huntington v. Cast, 149 Ind. 255.

Removal.—The city officers appointed by the council under above section may be removed at the pleasure of the council by a majority vote. City of Madison v. Korbly, 32 Ind. 74; City of Madison v. Kelso, 32 Ind. 79; City of Logansport v. Crockett, 64 Ind. 319; Muhler v. Hedekin, 119 Ind. 481; State v. Wilson, 142 Ind. 102; Goodwin v. State, 142 Ind. 117. See 1 Beach Pub. Corp., § 198. But as to city attorney and city civil engineer, see next section, (Acts 1899, p. 562).

The common council may remove corporate officers, whether appointed by the council or not, for cause, upon a two-thirds vote. Muhler v. Hedekin, 119 Ind. 481; City of Madison v. Korbly, 32 Ind. 74.

Upon an adoption of a resolution by the common council removing an officer, the yeas and nays thereon must be taken and entered of record. City of Logansport v. Crockett, 64 Ind. 319.

The common council can not decide upon the legal rights of adverse claimants to an office, and enforce its decision by the short method of ejecting the incumbent. Parsons v. Durand, 150 Ind. 203.

If an officer is wrongfully removed by the council, without authority, he may be reinstated by mandamus. Muhler v. Hedekin, 119 Ind. 481, 485; City of Madison v. Korbly, 32 Ind. 74; Swindell v. State, 143 Ind. 153, 157.

Councilmen—Moving into another ward.—When a councilman is elected from a certain ward, and after his election he moves into and becomes a resident of another ward, he does not by such action vacate his office, for he is not an officer of the ward from which he is elected, but an officer of the entire city. State v. Craig, 132 Ind. 54.

Notice.—When notice must be given by a city to terminate a contract, one given by a councilman, without authority from the common council, is not sufficient. City of Indianapolis v. Bly, 39 Ind. 373.

City treasurer.—The city treasurer can not, under this act, appoint a deputy except by the consent of the common council. Humphreys v. Stevens, 49 Ind. 491; City of Ft. Wayne v. Lehr, 88 Ind. 62.

Same—Vacancy—How filled.—Vacancies in the office of treasurer are not filled by election, but by appointment of the common council. State v. Winter, 148 Ind. 177.

One elected to the office of city treasurer at a time not provided by law has no title to the office. State v. Winter, 148 Ind. 177.

Street commissioner.—The common council of a city, while the street commissioner remains in office, can not direct that his duties be performed by any other officer. Mitchell v. Wiles, 59 Ind. 364.

The common council may, by a majority vote, remove and dispense with the street commissioner and require the marshal to perform his duties. City of Madison v. Kelso, 32 Ind. 79; City of Madison v. Korbly, 32 Ind. 74; State v. Sohn, 97 Ind. 101.

An order of the common council dispensing with the services of the street commissioner is a removal from office. When this is done for one year, and said officer is then reappointed, his term of office commences from the time of his reappointment. State v. Sohn, 97 Ind. 101.

Councilmen—Liability.—The members of a common council of a city are not liable either civilly or criminally for acts done by them as such in the exercise of a discretion confided to them by law, unless they act corruptly. Walker v. Hallock, 32 Ind. 239; Baker v. State, 27 Ind. 485; Newman v. Sylvester, 42 Ind. 106.

Officers—Statutory powers—Notice.—All persons dealing with officers exercising statutory powers, and whose authority is limited by statute, are charged with notice of the scope of such officer's authority. Hamilton v. City of Shelbyville, 6 App. 538; Julian v. State, 140 Ind. 581; Smith v. Board of Commissioners, 6 App. 153; 1 Dillon Munic. Corp., 4th ed., §§ 445, 447; 1 Beach Pub. Corp., §§ 195, 202, 242; 2 Beach Conts., § 1136.

Duty of officers—Presumption.—Until the contrary appears, the officers of a municipal corporation are presumed to have done their duty. Cummins v. City of Seymour, 79 Ind. 491; Enos v. State, 131 Ind. 560; Lostutter v. City of Aurora, 126 Ind. 436; State v. Wenzel, 77 Ind. 428; Adams v. Davis, 109 Ind. 10, 13.

The contrary not being alleged, it will be presumed that city officers were lawfully elected. Stultz v. State, 65 Ind. 492.

Officers—Presumption of rightful conduct.—It can not be presumed that a wrong was committed by the officers of a public corporation. It must be presumed that they rightfully performed their duty. The burden is on the party complaining to rebut the presumption by bringing forward countervailing facts, not by pleading bare conclusions or recitals. Lostutter v. City of Aurora, 126 Ind. 436, 437.

Power conferred in permissive terms.—The exercise of power conferred by statute on public officers, affecting the rights of individuals, may be enforced as a duty, though the language of the statute be permissive. City of Indianapolis v. McAvoy, 86 Ind. 587; Board, etc., v. Benson, 83 Ind. 469.

It is not necessary that a statute should in direct terms declare the duty of an officer, in order to make it an imperative one. The duty may be deduced from the general provisions and the scope of the statute, regard being had to the evil intended to be remedied, and the object sought to be accomplished. State v. Haworth, 122 Ind. 462.

A municipal corporation is bound by the declarations of its officers, where such declarations accompany, and are explanatory of, an act done by the officer in the scope of his authority. Los Angeles City Water Co. v. City of Los Angeles, 88 Fed. Rep. 720; 1 Dillon Munic. Corp., 4th ed., § 237, n. p. 321.

Officer de facto—Validity of acts of.—Where one is elected to an office under an unconstitutional statute, he is an officer *de facto*, and his acts performed before ouster are, as to the public, as valid as the acts of an officer *de jure*. The public is not to suffer because those discharging the functions of an officer may have a defective title, or no title at all. Parker v. State, 133 Ind. 178; Mowbray v. State, 88 Ind. 324; Baker v. Wambaugh, 99 Ind. 312.

As to who are *de facto* officers, the validity of their acts, their rights and liabilities, etc., see 1 Beach Pub. Corp., §§ 182, 183, 184, 186; 1 Dillon Munic. Corp., § 276.

[Acts 1899, p. 562. In force March 6, 1899.]

59a. City attorney—City engineer—Removal.—1. That the various city attorneys and city civil engineers, elected by the common council of the various cities of the state of Indiana, where the population of such city does not exceed thirty-five thousand, as shown by the last preceding census, shall not be removed from office for the term for which they are, or were, elected, excepting for cause.

[Acts 1867, p. 33. In force March 14, 1867.]

60. Oath of election boards.—9. Before the opening of the polls on the day of such election, the inspector and judges thus appointed, and the clerk, shall each and severally be sworn, by an officer authorized to administer oaths, to the faithful discharge of their respective duties as officers of such election. R. S. 1894, § 3477.

61. Law of city elections.—10. All elections of such cities shall be governed by the laws in force regulating township and other elections; and the voters therein shall have the like qualifications and be subject to the same restrictions and liabilities. R. S. 1894, § 3478.

See *post*, § 978, *et seq.*

See R. S. 1894, § 6261.

For general election law, see R. S. 1894, § 6190, *et seq.*, Burns' Supp. 1897, § 6200, *et seq.*, and 6339*a*, *et seq.*, and Acts 1899, pp. 60, 365, 381, 539, 540.

Elections—Irregularities—Statutes construed.—Statutes regulating the mere mode of conducting elections are directory, and any departure from the prescribed mode will not vitiate an election, if the irregularity does not deprive any legal voter of his vote, or admit a disqualified person to vote, or cast uncertainty on the result, and has not been occasioned by the agency of a party seeking to derive a benefit from it. Gass v. State, 34 Ind. 425; Mustard v. Hoppess, 69 Ind. 324, 334; Enos v. State, 131 Ind. 560.

The first general election for city officers was to be held, under the amendatory act of 1859, on the first Tuesday of May of that year. Williams v. Connelly, 13 Ind. 502.

Municipal election—Sale of intoxicating liquor.—An election held under the act of March 25, 1879 (R. S. 1894, § 4250), authorizing cities to construct water-works, is a municipal election within the act of March 5, 1877, prohibiting the sale of intoxicating liquors on the day of a municipal election. State v. Kidd, 74 Ind. 554.

Special election—Councilmen.—It is unlawful for a licensed vendor to sell intoxicating liquors on the day of a special election for councilmen in a ward different from that in which his place of business is situate. Qualter v. State, 120 Ind. 92.

Primary election.—It is a crime for a person having a license under the law to sell intoxicating liquors in a less quantity than a quart at a time on the day of a primary election held by a political party to select candidates to be voted for at a general election. State v. Hirsch, 125 Ind. 207.

62. Canvass of votes.—11. When the poll of any such election is closed, the inspector and judges thereof, in each of said wards, shall immediately proceed to canvass the votes therein given, and shall make out, under their hands, a statement specifying the number of votes each person voted for has received, and the office designated thereby to fill; and said statement, together with the poll-list and one of the tally-papers, shall be deposited with the inspector, or, if he

should be unable to further serve, with one of the judges elected by such board of election. R. S. 1894, § 3479.

63. Inspector's certificate.—12. The inspectors named in such appointment, if at the first election, or the inspector appointed as hereinafter provided, if at a subsequent election, of the several wards shall, on the day next following the same, meet at the common council room, and, upon the inspection of the statements aforesaid, determine the persons having the highest number of votes for each of the several offices voted for, and thereupon shall make and sign a certificate, setting forth the names of the persons voted for and for what offices, the whole number of votes given for each of the several offices, and the person having the highest number therefor, and shall declare the person elected to the same. Such certificate shall be filed with the clerk of the corporation. Should two or more persons have an equal and the highest number of votes for the same office, such board of inspectors shall certify the fact to the trustees or common council, as the case may be, who shall immediately give notice, as in other elections, for a new election, specifying the office to be filled thereby and the ward, if a councilman, in which the poll is to be opened. R. S. 1894, § 3480.

Inspectors' duties—Certificate—Mandate.—The duties of inspectors of city elections are ministerial, and not judicial, and a mandamus will lie to compel them to give a certificate of election to the person who, upon the face of the proper election document, appears to have received the highest number of votes. Kisler v. Cameron, 39 Ind. 488; Johnston v. State, 128 Ind. 16; Enos v. State, 131 Ind. 560; Moore v. Kessler, 59 Ind. 152.

If they unlawfully fail to perform their duty, or perform it in an unlawful manner, whereby a person is injured, they are liable; and it is immaterial whether they acted maliciously, purposely or by mistake. Moore v. Kessler, 59 Ind. 152.

The board of canvassers of a city election can not hear evidence of the regularity of the election; their powers are ministerial. Moore v. Kessler, 59 Ind. 152.

Returns of election—Uncertainty in.—Where the returns of an election fail to state for what office parties named are voted for, they are void for uncertainty, and the canvassers of election should reject them. Moore v. Kessler, 59 Ind. 152.

Municipal elections—Contests—Right of appeal.—Section 6323, Burns' R. S. 1894, providing that all contests for municipal offices shall be tried in the manner provided by law for the contest of county and township offices, is construed with § 644, Burns' R. S. 1894, providing generally for appeals from the circuit court to the supreme court, and an appeal will lie from the circuit court from contested municipal elections. Weakley v. Wolf, 148 Ind. 208.

64. Notice to persons elected.—13. It shall be the duty of the clerk of such municipal corporation, within twenty-four hours after filing the certificate of the board of inspectors in his office, as provided in the preceding section, to notify, either by personal service or by leaving a copy of the same at the usual place of residence, each and all of the persons elected to fill the said offices. R. S. 1894, § 3481.

65. Penalty for refusal to serve.—14. Any person thus elected who shall not, within five days after being notified by personal service of the same, take and subscribe the oath of office before some proper

officer, and file the same with the clerk of such corporation, shall be deemed as having refused to serve, and shall forfeit, for the use of such city, therefor the sum of ten dollars, provided he is not prevented from so doing by sickness or unavoidable accident, which forfeiture shall be recoverable on complaint filed in the name of the city against the party so failing to serve. R. S. 1894, § 3482.

66. Vacancies.—16. Vacancies in the office of mayor, city judge, clerk or councilman, occurring in any manner, shall be filled by special election ordered by the common council, and conducted in the same manner as the annual elections therefor, and all vacancies in the other offices shall be filled by the common council. R. S. 1894, § 3483.

[Acts 1891, page 33. In force June 3, 1891.]

67. Vacancies—How filled.—1. That all vacancies in the office of mayor, clerk or councilman of any incorporated city occurring in any manner, shall be filled by appointment by the common council of such city. R. S. 1894, § 3484.

68. Term of appointee.—2. Such appointee shall hold office until the election and qualification of his successor, who shall be elected at the next general election after such vacancy. R. S. 1894, § 3485.

Treasurer—Vacancy—Appointment—Term.—One appointed to fill a vacancy caused by the death of the city treasurer is entitled to hold the office until the expiration of the term for which the deceased was elected. Carson v. State, 145 Ind. 348.

A vacancy in the office of city treasurer can not be filled by election, but must be filled by appointment. State v. Winter, 148 Ind. 177.

The council can fill a vacancy in the office of councilman occurring from the creation of additional wards. Swindell v. State, 143 Ind. 153.

Under the act of 1857 a person elected to fill a vacancy in the office of councilman held for the unexpired term. State v. Mayor, etc., 28 Ind. 248.

[Acts 1881, p. 14. In force March 8, 1881.]

69. Cities of fifteen thousand voters.—1. Any city incorporated under the laws of the state, and having a voting population of fifteen thousand votes or more, as shown by the poll-books of any general state election, shall be governed by a common council and board of aldermen. R. S. 1894, § 3486.

70. Councilmen.—2. Such city shall be divided, by the common council, into wards containing as nearly as possible equal numbers of voters. No ward shall contain less than six hundred voters, nor shall any city be divided into more than twenty-five wards; and each ward shall be entitled to one councilman, who shall be elected on the first Tuesday in May, in the year 1881, and shall serve until the first day of January, 1884; and whose successor shall be elected on the second Tuesday in October, 1883, and biennialy thereafter, and whose term of office shall be two years from the first of January next following, and until his successor is elected and qualified. R. S. 1894, § 3487.

71. Aldermen.—3. Any such city shall be divided by the common council into five aldermanic districts, formed of an equal number of contiguous wards; and two aldermen shall be elected in each district, who shall be freeholders in the district which they are elected to rep-

resent, and one of whom shall be elected on the first Tuesday in May, in the year 1881, and who shall serve until the first day of January in the year 1884, and until his successor is elected and qualified. On the second Tuesday in October, 1883, and biennially ever after, there shall be elected two aldermen from each aldermanic district, whose term of office shall begin on the first day of January after such election, and who shall serve for two years, and until their successors are elected and qualified. In case of vacancies in the board of aldermen, the person elected to fill such vacancy shall serve only the unexpired term of his predecessor. Any member of the board of aldermen may, by seven votes, be expelled for malfeasance in office, but not a second time for the same offense: *Provided*, That each alderman elected on the first Tuesday in May, 1880, shall hold his office until his successor is elected and qualified. R. S. 1894, § 3488.

72. Legislation—Elections.—4. Concurrent action of the common council and board of aldermen shall be necessary for the passage of any ordinance, order, resolution, or motion for the appropriation of money or for the government of such city. For the appointment of such officers and boards as are appointed from the members of the common council, and required or authorized by act of the general assembly or ordinances of the city, the common council and board of aldermen shall meet in joint convention, in the council chamber, on the first Friday evening after the first annual meeting of the common council, at eight o'clock, and shall proceed to the election of such officers and boards by ballot, and such joint convention may adjourn from time to time until its work is completed; and all such officers and boards so elected shall serve during their term of office as councilmen, and until their successors are elected and qualified. And for the appointment of all other officers, commissioners, trustees, and boards required or authorized by act of the general assembly or ordinances of the city, the common council and board of aldermen shall meet in joint convention, in the council chamber, on the second Monday evening in November after the first annual meeting of the common council, and shall proceed to the election of such officers, commissioners, trustees, and boards by ballot; and such joint convention may adjourn from time to time until its work is completed. All such officers, commissioners, trustees, and boards, so elected, shall serve for two years from the first day of January after their election, and until their successors are elected and qualified, unless sooner removed according to law: *Provided*, That no member of the board of aldermen shall be elected to serve on any board elected by such joint convention. R. S. 1894, § 3489.

73. Separate action.—5. The powers and duties of the common council, as defined in act of March 14, 1867, and subsequent acts, shall remain in force under this act, except that the concurrent action of the board of aldermen shall be required in all cases, except in regard to qualification of its members and its order of business, to give effect to its action; but all ordinances, orders, resolutions, or motions

for the appropriation of money or for the government or regulation of such city shall originate in the common council; and upon all questions, except as herein provided, the action of the common council and board of aldermen shall be separate and distinct. And no ordinance, resolution, or motion providing for joint committees of the two bodies shall be passed; and no ordinance, order, or resolution shall become the law or be operative until it has been passed by both bodies, and been signed by the mayor and president of the board of aldermen, and promulgated according to law. R. S. 1894, § 3490.

74. Officers—Election.—6. All officers of any such city elected on the first Tuesday in May, 1881, shall serve until the first day of January, 1884; their successors shall be elected on the second Tuesday in October, 1883, and biennially ever after, to serve two years, and until their successors are elected and qualified. R. S. 1894, § 3491.

75. President of board.—7. A president of the board of aldermen shall be elected by the board at their first annual meeting after each general election [and also a president *pro tempore*]; who shall, in case of absence or disability of the president, perform all his duties. R. S. 1894, § 3492.

76. Records—Journal.—8. The city clerk shall have charge of the books and records of the board of aldermen; and all meetings of the board of aldermen shall be public; and the minutes and records thereof shall be kept by a deputy clerk, appointed by the city clerk and approved by the common council and board of aldermen, and who shall keep a journal of all proceedings, and enter the ayes and noes on any ordinance, order, resolution, or motion, at the request of any two members. R. S. 1894, § 3493.

77. Pay of members.—9. The common council and board of aldermen shall determine, by ordinance, the compensation to be paid the members of each body: *Provided*, That such compensation shall not exceed the sum of two hundred dollars per year to each person. R. S. 1894, § 3494.

78. President of board, when acting mayor.—10. In case of removal, death, resignation, or non-election of mayor, the duties of the office of mayor shall devolve on the president of the board of aldermen until a mayor is chosen and qualified according to the provisions of this act. R. S. 1894, § 3495.

[Acts 1881 S., p. 408. In force April 15, 1881.]

79. Sewer tax and districts.—1. In all cities organized and incorporated under the general laws of this state, having a common council and board of aldermen, such common council and board of aldermen shall have power to levy, and cause to be assessed and collected, in each year, a tax, to be designated as a sewer tax, on all property subject to state and county taxation in such city; and the cost of the construction, maintenance, or repair of any or all sewers or drains of an internal diameter of more than three feet may be paid out of such sewer tax. And such common council and board of alder-

men shall also have power to create and divide such city into sewer districts; and the cost of the construction, maintenance, and repair of any or all sewers or drains in each district shall be paid out of the sewer tax of such district: *Provided, however,* That where a sewer or drain extends into or through more than one district, the cost of the construction, maintenance, or repair thereof may be paid out of the sewer tax of such districts, in such proportions as the common council and board of aldermen may direct. And such common council and board of aldermen shall have power to enact such by-laws and ordinances as may be necessary to carry into effect the powers herein conferred. R. S. 1894, § 3496.

Sewers.—See *post*, § 124, clauses 26 and 43, §§ 127, 183, 1090, *et seq.*, and 1107, *et seq.*

[Acts 1867, p. 33. In force March 14, 1867.]

80. Mayor's duties and powers.—17. It shall be the duty of the mayor to see that the laws of the state and the by-laws and ordinances of the common council be faithfully executed within such city. He shall be a conservator of the peace, and, as such, shall have, within the city limits, the power conferred upon justices of the peace for that purpose. He shall exercise supervision over subordinate officers, and recommend to the common council such measures as he deems for the public good. He shall sign all commissions, licenses, and permits granted by the common council; and he shall perform such other duties as the nature of his office and the interests of the city require. He shall have the custody of the corporate seal; and may take and certify, under the same, the proof and acknowledgment of deeds and other instruments in writing, which shall be good in any court in this state without further authentication; he may also take and certify depositions and affidavits, and the same shall have a like force and effect as if taken by a justice of the peace. He shall hold a city court every day, Sunday excepted, at a place to be furnished by the common council; while sitting as such court, he shall have exclusive jurisdiction of all prosecutions for violation of the by-laws and ordinances of the city and township in which such city is situated. He shall have, within the limits of said city, the jurisdiction and powers of a justice of the peace in all matters, civil and criminal, arising under the laws of this state; and for crimes and misdemeanors, his jurisdiction shall be co-extensive with the county in which such city is situated: *Provided,* That, in trials before him, he shall have power to adjudge imprisonment as a part of his sentence, not exceeding thirty days, in the city or county prison. In all actions in the city judge's or mayor's court, either party may have a trial by jury, a change of venue to a justice of the peace in such city, and an appeal to a court of competent jurisdiction, under the same restrictions and in the same manner as in a justice's court, except that in cases where the mayor has exclusive jurisdiction no change of venue shall be allowed. The same rules of pleadings and practice shall be observed in the city judge's or mayor's court that are in a justice's court. The mayor shall give bond, payable to the state of Indiana, in any penal sum not

less than three thousand dollars, to be approved by the clerk of the circuit court, with freehold security, conditioned for the faithful performance of his duties as mayor and all other duties herein required, and file the same with the clerk of the circuit court within the time directed by law for justices of the peace. All fines and penalties collected by him shall be paid into the city treasury within one month after the same shall have been received by him, in the kind of funds so received, except when otherwise directed by acts prescribing the duties and powers of justices of the peace; in which case he shall pay all fines and forfeitures collected by him for violation of the penal laws of the state into the county treasury, in the same manner and under the same restrictions that justices of the peace are required to do. R. S. 1894, § 3497.

Bond of Mayor. See *post*, § 113.

Title to office—Intrusion—Quo warranto and injunction.—When the title to the office of mayor is involved, *quo warranto* is the proper remedy; but injunction is the proper remedy to prevent the intrusion of one claimant into the office against one occupying the office upon a claim of right. Parsons v. Durand, 150 Ind. 203; City of Huntington v. Cast, 149 Ind. 255.

Powers—Duties, etc.—The mayor is the chief executive and administrative officer of the corporation. It is his duty to execute the laws of the state and the ordinances and by-laws of the city. His powers depend upon the statute. In addition to executive and administrative duties he has the judicial duties imposed by the statute. 1 Beach Pub. Corp., § 178, *et seq.*; 1 Dillon Corp., 4th ed., §§ 291, 292; Waldo v. Wallace, 12 Ind. 569.

Contracts.—The common council of a city alone has power to obligate the city; the mayor, in executing contracts, acts simply as the instrument or agent of the council. He can only bind the city according to the authority given him. State v. City of Michigan City, 138 Ind. 455.

A judicial officer.—The mayor of a city, when authorized to try actions, is a judicial officer within the meaning of the constitution, and is ineligible to any office other than a judicial one during the term for which he was elected. In the discharge of judicial duties he acts as a state officer. Waldo v. Wallace, 12 Ind. 569; Gulick v. New, 14 Ind. 93; Howard v. Shoemaker, 35 Ind. 111.

Jurisdiction.—Within the city limits a mayor has the jurisdiction and powers of a justice of the peace; in prosecutions for crimes and misdemeanors the jurisdiction is co-extensive with the county in which the city is situated; and, as a general rule, an action may be brought before the mayor upon a contract made, or for a tort committed, without the city, if the defendant lives in the city. Gulick v. New, 14 Ind. 93; Toledo, etc., R. Co. v. Stevens, 63 Ind. 337; Wabash, etc., R. Co. v. Lash, 103 Ind. 80; State v. Wolever, 127 Ind. 306; Stevens v. Anderson, etc., 145 Ind. 304; State v. Gardner, 8 App. 440.

Additional jurisdiction.—In addition to the jurisdiction of justices of the peace, the mayor has power to adjudge imprisonment as a part of his sentence, not exceeding thirty days, in the city or county prison. This provision of the statute giving to mayors the power to imprison as a part of the sentence for a violation of law, is constitutional. Stevens v. Anderson, etc., 145 Ind. 304; State v. Wolever, 127 Ind. 306; Waldo v. Wallace, 12 Ind. 569.

Prior to the act of 1875 (*post*, § 264) the mayor had exclusive jurisdiction over actions for the violation of city ordinances. McNulty v. Connew, 50 Ind. 569.

Authentication of proceedings.—When the mayor acts under the state laws as a justice of the peace, his proceedings need not be authenticated by the seal of the city. State v. Walters, 64 Ind. 226; Cluggish v. Rogers, 13 Ind. 538.

Judicial action—Liability.—Mayors can not be held liable for damages on account of any judicial action taken by them. State v. Wolever, 127 Ind. 306.

A mayor who maliciously or corruptly refuses to grant a change of venue, upon a proper application, in a case pending before him, is not liable civilly to the person applying for it. State v. Wolever, 127 Ind. 306.

Act constitutional—Judicial powers.—The statute conferring judicial powers upon the mayor of a city is not unconstitutional. Waldo v. Wallace, 12 Ind. 569.

Executive—Administrative—Judicial duties—Constitution.—The executive and administrative duties of the mayor of a city, under the act of 1857, are not within the executive and administrative departments of the state government, as established by the constitution. In respect to such duties, the mayor is merely an officer of a municipal corporation; and he may discharge such duties and his judicial functions at the same time without violating § 1 of art. 3 of the constitution. Waldo v. Wallace, 12 Ind. 569.

A lucrative office.—The offices of mayor of a city incorporated under the act of 1867, and of a director of the state prison are both lucrative offices under the constitution. The election of one who is such director to the office of mayor and his acceptance thereof will vacate his office of director. Howard v. Shoemaker, 35 Ind. 111; State v. Kirk, 44 Ind. 401, 406.

Pleading and practice.—Pleading and practice before the mayor is the same as before justices of the peace; and upon appeal from the mayor to the circuit court the cause may proceed according to the rules of pleading and practice before justices of the peace. Berkey v. City of Elkhart, 141 Ind. 408; Wabash, etc., R. Co. v. Lash, 103 Ind. 80; Carter v. Edwards, 16 Ind. 238; Hill v. Sleeper, 58 Ind. 221; Zorger v. City of Greensburg, 60 Ind. 1; City of Goshen v. Croxton, 34 Ind. 239; City of Greensburg v. Corwin, 58 Ind. 518; Hasty v. City of Huntington, 105 Ind. 541; Berkey v. City of Elkhart, 13 App. 314. See *post*, § 84 and note.

Depositions.—Depositions may be taken outside of the state in actions pending before mayors. Reeves v. Allen, 42 Ind. 359.

Mandamus.—The duty of the mayor to recognize members of the common council and permit them to exercise their duties as such may, in case of his refusal, be enforced by mandamus. Swindell v. State, 143 Ind. 153.

81. Docket fees—Vacancies.—18. The mayor or city judge shall keep a docket, as justices of the peace do. And, in case of the absence of such mayor or city judge from the city for the space of five days or more, or of inability, in consequence of sickness or other cause, for a like period, he shall, prior to such departure in the first case, and at the expiration of five days in the last case (if his inability continue), deposit, or cause to be deposited, his docket with any justice of the peace within said city; and such justice shall, during such absence or inability, be vested with and exercise all the judicial powers and authority of said mayor or city judge, and be entitled to his fees and emoluments therefor. The mayor or city judge shall be entitled to the same fees as justices of the peace. In case of vacancy in the office of mayor or city judge by death, resignation, or otherwise, the council shall cause his docket to be placed in the hands of some justice of the peace in said city, who shall act as and have all the judicial powers

and authority of such mayor or city judge until the vacancy can be supplied by special election; and the official bond of such justice shall embrace all his official acts in such capacity: *Provided*, That all fees herein provided for the mayor or city judge shall be paid to such mayor or city judge for the use and benefit of such city; which fees the mayor or city judge shall pay into the city treasury, once in every three months, for the benefit of the general funds of said city. The mayor or city judge shall draw no salary from the city treasury until he shall have filed with the city clerk or auditor a relinquishment and transfer to such city of all taxable fees allowed him by law in cases cognizable before him for alleged violations of the ordinances or by-laws of such city. In any city containing a population of less than ten thousand, the mayor may, at any time, with the consent of the common council, deposit his docket with any justice of the peace of such city, who shall thereupon act as, and have all the judicial powers and authority of such mayor, during such time as the mayor may continue such docket in the hands of such justice. R. S. 1894, §3498.

82. Suits by city, what averments unnecessary.—89. Whenever any suit shall be instituted by such city, it shall not be necessary to aver its corporate organization or the publication of its by-laws or ordinances, unless the same is contradicted by affidavit. R. S. 1894, § 3499.

See *post*, § 84.

Proof of publication—Affidavit.—When a city sues for the penalty for violation of an ordinance it is not necessary that proof of publication be made, unless it be denied by affidavit. Lake Erie, etc., R. Co. v. City of Noblesville, 15 App. 697; Green v. City of Indianapolis, 25 Ind. 490; Lake Erie, etc., R. Co. v. City of Noblesville, 16 App. 20.

Action on bond.—Where a bond is given in a legal proceeding against a city running to the mayor of the city of ——, and marshal of the city of ——, the city is the real party in interest in an action upon such bond. Hyatt v. City of Washington, 20 App. 148.

83. Suits against railroads—Process—Judgment.—91. In all prosecutions against any railroad or other incorporated company for the violation of any ordinance of the common council of any city, a summons may issue against the company and may be served on the president, superintendent, secretary, treasurer, station agent, or general agent; and, upon the trial of the cause, judgment may be rendered against the railroad company for such penalty as may be adjudged; or the conductors or other agents of the company guilty of the violations may be arrested by warrant, and may be proceeded against personally as in other cases. R. S. 1894, § 3500.

84. Actions for penalties.—19. All actions brought to recover any penalty or forfeiture incurred under this act, or ordinances made in pursuance thereof, shall be brought in the corporate name of such city. The process in every such action shall be a warrant; and the person named in such warrant shall be arrested, and retained in custody, or under reasonable recognizance, until the next sitting of

the city court; and it shall not be necessary to file with the affidavit or complaint a copy of the ordinance or section thereof charged to have been violated, but it shall be sufficient to recite in the affidavit or complaint the number of the section charged to have been violated, with the date of its adoption; nor shall it be necessary to copy any part of the affidavit, complaint, or other pleadings in the record of the cause: *Provided*, That the mayor shall note upon his docket the parties to the action, the title to the cause, the filing of the complaint or affidavit, the issuing and return of process, and the judgment and proceedings had in the cause, and the satisfaction of judgment when paid. R. S. 1894, § 3501.

See *ante*, § 82.

Civil actions.—Actions before the mayor to recover a penalty for the violation of a city ordinance, though a warrant for the arrest of the defendant may be issued and served, is a civil action, and the rules of practice in civil actions apply and are to be observed on the trial. Common Council v. Fairchild, 1 Ind. 315; Board, etc., v. Chissom, 7 Ind. 688; Ridge v. City of Crawfordsville, 4 App. 513; City of Greensburg v. Corwin, 58 Ind. 518; City of Hammond v. New York, etc., 5 App. 526; City of Hammond v. New York, etc., R. Co., 126 Ind. 597; City of Goshen v. Croxton, 34 Ind. 239; Shea v. City of Muncie, 148 Ind. 14; 1 Beach Pub. Corp., § 523.

Complaint—Pleading—Copy of ordinance.—A copy of the ordinance need not be set forth in an action thereon, but it is sufficient to recite in the affidavit or complaint the number of the section charged to have been violated with the date of its adoption. Where two or more sections are relied upon as defining the offense and prescribing the penalty, both sections should be referred to by their numbers and date of adoption. Lake Erie, etc., R. Co. v. City of Noblesville, 15 App. 697; Whitson v. City of Franklin, 34 Ind. 392; City of Huntington v. Cheesbro, 57 Ind. 74; City of Goshen v. Kern, 63 Ind. 468; City of Frankfort v. Aughe, 114 Ind. 77; City of Elkhart v. Calvert, 126 Ind. 6; City of Huntington v. Pease, 56 Ind. 305; Shea v. City of Muncie, 148 Ind. 14; Green v. City of Indianapolis, 25 Ind. 490; Lake Erie, etc., R. Co. v. City of Noblesville, 16 App. 20.

The complaint should allege the acts done or omitted to be done by the defendant. It is not sufficient to allege "defendant, etc., did then and there violate" a certain section of a certain ordinance of the city. City of Huntington v. Pease, 56 Ind. 305.

A complaint for violation of an ordinance must state the facts constituting such violation. City of Huntington v. Pease, 56 Ind. 305; Lippman v. City of South Bend, 84 Ind. 276.

A complaint for violation of a city ordinance forbidding the maintenance of public nuisances, alleging that the defendant "kept a large quantity of hides, tallow and other substances which emitted a disagreeable odor," does not show sufficient facts, and is bad on motion in arrest of judgment. Lippman v. City of South Bend, 84 Ind. 276.

Towns.—The above statute does not apply to towns, and in an action to recover a penalty for the violation of a town ordinance the complaint must exhibit or copy so much of the ordinance as relates to the subject. Clevenger v. Town of Rushville, 90 Ind. 258; Wagner v. Town of Garrett, 118 Ind. 114.

Pleading and practice—Appeal.—Pleading and practice before the mayor is the same as before justices of the peace, and upon appeal from the mayor to the circuit court the cause may proceed according to the rules of pleading and practice before the justice of the peace. See *ante*, § 80, note. Berkey v. City of Elkhart, 141 Ind. 408, Wabash, etc., R. Co. v. Lash, 103 Ind. 80.

When not necessary to plead—Evidence.—In an action against a railroad company, for an injury caused by negligence in running its cars, a copy of a city ordinance limit-

ing the speed of trains need not be filed with the complaint, to authorize its introduction in evidence; an averment of its existence is sufficient. Lake Erie, etc., R. Co. v. Hancock, 15 App. 104; Madison, etc., R. Co. v. Taffe, 37 Ind. 361; St. Louis, etc., R. Co. v. Mathias, 50 Ind. 65.

Where a city ordinance is admitted in evidence without objection, and it has been admitted that it has been passed, the jury is justified in concluding that the ordinance was in force, though there was no proof of publication as required by law. Lake Erie, etc., R. Co. v. Brafford, 15 App. 655.

Costs.—If on appeal the city is defeated it is liable for the costs. City of Kokomo v. Wills, 34 Ind. 48.

Invalidity of ordinance—Defense.—The effect of the above statute is to require the defendant, if he claims that the particular sections, which he admits he violated, are invalid, to bring the matter of the invalidity forward by way of defense. City of Elkhart v. Calvert, 126 Ind. 6; City of Frankfort v. Aughe, 114 Ind. 77.

Enforcement of void ordinance—Injunction.—A court of equity may enjoin the enforcement of a void city ordinance in order to prevent a multiplicity of actions, or at the instance of any person whose interests are to be injuriously affected thereby; but if it is not void, a court of equity can not determine whether or not the plaintiff is guilty of its violation. Davis v. Fasig, 128 Ind. 271, 276; City of Rushville v. Rushville, etc., Co., 132 Ind. 575, 587.

Entire ordinance must be void.—Unless the party asking an injunction points out some particular provision in the ordinance that infringes upon his rights or privileges, in order to justify a court in declaring the ordinance void, the ordinance must be void *in toto*. Davis v. Fasig, 128 Ind. 271, 276.

Defenses.—In an action to recover a penalty for a violation of a penal ordinance, all defenses, except the statute of limitations, set off and matter in abatement, may be given in evidence without plea. Zorger v. City of Greensburg, 60 Ind. 1.

Appeals—Jurisdiction.—In appeals from judgments in actions to recover penalties for the violation of ordinances the appellate court has jurisdiction of the appeal; but if the validity of an ordinance is properly called in question in the lower court the jurisdiction of an appeal is in the supreme court. City of Indianapolis v. Consumers' Gas Trust Co., 140 Ind. 107; Berkey v. City of Elkhart, 141 Ind. 408; City of Hammond v. New York, etc., R. Co., 126 Ind. 597; Lake Erie, etc., R. Co. v. City of Noblesville, 15 App. 697.

Prior to the creation of the appellate court, the supreme court had no jurisdiction of an appeal in an action to recover a penalty for a violation of a city ordinance, when the amount in controversy in such appeal, exclusive of interest and costs, did not exceed ten dollars. Dailey v. City of Indianapolis, 53 Ind. 483; Quigley v. City of Aurora, 50 Ind. 28; Bogart v. City of New Albany, 1 Ind. 38; Cheny v. City of Shelbyville, 19 Ind. 84; Donovan v. Town of Huntington, 24 Ind. 321.

An appeal can not be prosecuted from a cause originating before a justice of the peace, or mayor of a city, on a penalty prescribed by city ordinance, when the amount in controversy, exclusive of interest and costs, is less than fifty dollars, where the validity of the ordinance is not in question. Griffee v. Town of Summitville, 10 App. 332; Ridge v. City of Crawfordsville, 4 App. 513; Galbreath v. Trump, 83 Ind. 381; Lake Erie, etc., R. Co. v. Yard, 8 App. 199.

An action to recover the penalty prescribed by the ordinance does not necessarily call in question the validity of the ordinance. Griffee v. Town of Summitville, 10 App. 332.

Jurisdiction upon appeal can not be conferred by consent of the parties. Ridge v. City of Crawfordsville, 4 App. 513.

Construction of penal ordinances.—Penal ordinances, like penal statutes, are not always construed literally, and courts will make the necessary exceptions. City of

Indianapolis v. Consumers', etc., Co., 140 Ind. 107, 119; Donnell v. State, 2 Ind. 658; Nixon v. State, 76 Ind. 524.

Ordinances should be construed reasonably; courts will endeavor to sustain them rather than to overthrow them, and especially is this so when their validity depends on their being reasonable or otherwise. However, when they are highly penal in their character, they will be strictly construed. 1 Dillon Munic. Corp., § 420 n.

The construction of municipal ordinances is governed by the same rules that are applied to statutes in similar cases. City of Indianapolis v. Consumers', etc., Co., 140 Ind. 107; Zorger v. City of Greensburg, 60 Ind. 1; 1 Beach Pub. Corp., §§ 106 n., 517; Terre Haute, etc., R. Co. v. City of South Bend, 146 Ind. 239.

Ordinances or by-laws with penalties are not penal statutes. The penalty is in the nature of liquidated damages. The strict rules by which the validity of penal statutes is tested do not apply to by-laws and ordinances except when they are highly penal. 1 Dillon Munic. Corp., § 420 and n.

As a general rule, and in absence of any special legislative restraint, strangers, as well as citizens, are bound by ordinances and by-laws of a municipal corporation. Horney v. Sloan, 1 Ind. 266.

Willful violation of ordinance.—An ordinance which makes it a penal offense for a gas company to "willfully" refuse to lay gas pipes in a street when ordered by the common council is not violated by such company's refusal to lay such pipe, when such refusal is made in good faith, upon the ground that it is not physically and financially able to do so. City of Indianapolis v. Consumers', etc., Co., 140 Ind. 246.

Penalty.—A provision in an ordinance fixing the penalty at a maximum amount is valid. Bills v. City of Goshen, 117 Ind. 221.

Where the provisions of an ordinance regulating the speed at which railroad trains shall be run through the corporate limits of a city are violated by an engineer of a railroad company the penalty may be recovered in an action against the company. City of Hammond v. N. Y., etc., R. Co., 5 App. 526.

A city has no power to pass an ordinance creating a penalty in favor of the city for an injury to private property of a citizen. City of Goshen v. Crary, 58 Ind. 268; Lippman v. City of South Bend, 84 Ind. 276.

A penal ordinance of a city, providing a punishment for wantonly injuring, or causing to be injured, "any private or public property, or shade or ornamental trees," etc., does not authorize the city to maintain an action against the owner of a domestic animal which has voluntarily injured any such tree. City of Goshen v. Crary, 58 Ind. 268.

Repeal—Effect on pending prosecution.—"If, during the progress of a prosecution' the ordinance on which it is based is repealed, the prosecution must fail, unless the repealing ordinance contains some express provisions whereby all pending prosecutions are saved from its operations." Horr and Bemis Munic. Ords., § 63; Terre Haute, etc., R. Co. v. City of South Bend, 146 Ind. 239; 1 Beach Pub. Corp., § 519.

Repeal of ordinance by implication.—Ordinances as statutes may be repealed by implication. Where a statute or ordinance covers the whole subject-matter of an older one, adds new provisions, prescribes different penalties, and is evidently intended to supersede and take the place of the prior statute or ordinance, the latter is repealed by implication. Terre Haute, etc., R. Co. v. City of South Bend, 146 Ind. 239.

Statutory crimes and misdemeanors.—Unless the statute prohibits it a city may enact ordinances providing for penalties for acts that are made crimes or misdemeanors by state law. Ambrose v. State, 6 Ind. 351; Williams v. City of Warsaw, 60 Ind. 457; City of Hammond v. N. Y., etc., Co., 5 App. 535; Sloan v. State, 8 Blackf. 361.

It is now provided by statute that whenever any act is made a public offense against the state and the punishment prescribed therefor, such act shall not be made punishable by any ordinance of any incorporated city or town. Any ordinance prescribing a pen-

alty in such case is null and void, and all prosecutions for any such public offense must be made under the state law only. City of Indianapolis v. Huegele, 115 Ind. 581; City of Hammond v. N. Y., etc., Co., 5 App. 535; City of Indianapolis v. Higgins, 141 Ind. 1.

85. Imprisonment—Stay.—20. If the penalty or forfeiture in which judgment is obtained be not paid or replevied, the defendant may be committed, for any period not exceeding thirty days, to the work-house of such city, or, if such city have no work-house, then to the county prison of the county in which such city is situated; and in the latter case, it shall be the duty of the person having charge of such prison to receive such defendant and obey the judgment of the city judge's or mayor's court in reference to him or her. And in default of payment or replevy of such judgment and costs, the defendant, unless a female, may be adjudged and required to pay the same by manual labor in said work-house, or on the street or other public works of said city, under the control of the street commissioner or marshal of such city; for which labor such defendant shall be allowed, on such judgment and costs, seventy-five cents per day. It shall be the duty of such street commissioner or marshal, or such other officer as the common council may direct, to work such defendant not less than six nor more than ten hours per day, according to the season, and each evening to return him to the custody of the keeper of such prison or work-house. Upon the full payment, as aforesaid, of the judgment and costs, such defendant shall be fully discharged. And such street commissioner or marshal is hereby authorized and required to perform all the duties herein prescribed, and to use all proper means thereto; and the common council are hereby vested with full authority to pass by-laws and ordinances for the purpose of compelling the enforcement of such manual labor by such defendant, by the use of sufficient force and means as they may deem right and proper. The keeper of such prison or work-house shall receive for the keeping, custody and boarding of said defendant fifty cents per day, to be paid by such city upon the presentation of an itemized account therefor; and he shall receive only one commitment and one discharging fee. And such defendant may, at any time, replevy and pay such judgment and costs; and in case he has performed labor under such judgment, he shall be entitled to a credit for the same to the amount of labor performed, and the balance may be paid or replevied as aforesaid. R. S. 1894, § 3502.

Statute construed.—The imprisonment provided for by above section is imposed for a failure to pay judgment for a penalty or forfeiture, and as a means of coercing such payment, and not as a part of the penalty for the violation of a city ordinance. Quigley v. City of Aurora, 50 Ind. 28; Town of North Manchester v. Oustal, 132 Ind. 8.

Said section contemplates two different modes of enforcing the payment of a judgment for a violation of a city ordinance, viz.:

First. By imprisonment of the defendant, whether male or female, in the workhouse or city prison, for a period not exceeding thirty days, where the judgment remains unpaid or unreplevied; and

Second. By adjudging that the defendant, if a male, shall be required to pay the

judgment and costs by manual labor, he remaining in custody till the judgment has been paid or replevied.

The thirty days' imprisonment is inflicted to enforce payment or replevy of the judgment, but does not operate as a payment of the judgment, and must be computed continuously from the date of the judgment. Flora v. Sachs, 64 Ind. 155; Torbert v. Lynch, 67 Ind. 474.

A rearrest of the defendant after the thirty days from the date of the judgment, he having escaped, is unlawful. Flora v. Sachs, 64 Ind. 155.

A defendant against whom, for a violation of a city ordinance, a fine has been assessed, and a simple judgment of imprisonment until the fine and costs are paid has been rendered, can not be compelled to pay the same by manual labor on the streets, and, if compelled to do so, he can maintain an action for damages for false imprisonment. Torbert v. Lynch, 67 Ind. 474.

If a defendant works out a judgment including costs, it having been adjudged that he do so, in default of paying or replevying the judgment and costs, the city does not become liable to the officers in whose favor costs were taxed for the payment of such costs. The docket fees to which the city attorney is entitled are to be charged up as costs against the defendant and the city is not liable for such costs where the judgment and such costs are so paid by manual labor. Tuley v. City of Logansport, 53 Ind. 508; Flora v. Sachs, 64 Ind. 155.

A penalty for the violation of a town ordinance is not a debt, in the sense of the constitution, which forbids imprisonment for debt. Hardenbrook v. Town of Ligonier, 95 Ind. 70.

A city is liable for the expense of receiving, boarding and discharging a prisoner convicted of a breach of a provision of its charter or by-laws and confined in the county jail. Board, etc., v. Chissom, 7 Ind. 688.

If such prisoner is committed to the custody of the keeper of the county prison a short time before midnight, and is discharged a short time after that hour, the city can not properly be charged with two days' boarding therefor. City of Indianapolis v. Parker, 31 Ind. 230; Pressley v. Board, etc., 80 Ind. 45.

In 1856, under laws in force in 1853, a town which had adopted the provisions of the statute for the incorporation of cities, had the right to use the county jail as the town had before being incorporated as a city. Board, etc., v. City of Lafayette, 7 Ind. 614.

86. Clerk's duties—Evidence—Fees.—21. The clerk shall have the custody of all books and papers belonging to such municipal corporation. He shall make record of all proceedings of the common council, whose meetings it shall be his duty to attend. He shall countersign and register all licenses and permits, and all other official papers of the common council directing acts to be done or duties to be performed; and he shall do all other things required by the common council and pertaining to his office. Copies and transcripts from the records, certified by him under the corporate seal, shall be evidence of the matters therein contained in all courts of this state; and he shall be entitled to receive therefor, except when otherwise ordered by the common council, the same fees that are allowed to the clerk of the circuit court for similar services. R. S. 1894, § 3503.

City clerk—Office.—The office of city clerk is not an office "under the state," within the meaning of § 16, art. 7, of the constitution of Indiana, and one who has been elected to the office of justice of the peace, and has qualified and entered on the duties of said office, is not ineligible to the office of city clerk during the term for which he was

elected justice of the peace. Mohan v. Jackson, 52 Ind. 599; Chambers v. State, 127 Ind. 365; State v. Denny, 118 Ind. 382.

Duties.—It is the duty of the clerk to attend all meetings and make record of all proceedings of the common council. State v. Curry, 134 Ind. 133.

Nunc pro tunc entry.—Where the city clerk has failed to keep the record of the yeas and nays upon the adoption of a resolution by the common council, the proper remedy is for the common council to cause a *nunc pro tunc* entry of the yeas and nays to be made. City of Logansport v. Crockett, 64 Ind. 319; Chamberlain v. City of Evansville, 77 Ind. 542; City of New Albany v. Endres, 143 Ind. 192.

Act of municipal body—Evidence.—The only competent evidence of any act or proceeding of a municipal body upon which the members of the corporate body are required to vote, is the record of the proceedings. Byer v. Town of Newcastle, 124 Ind. 86; City of Logansport v. Crockett, 64 Ind. 319; State v. Curry, 134 Ind. 133.

Parol evidence.—The minutes of the common council are only evidence of their proceedings and actions; if no minutes or records have been kept the proceedings and actions of the council may be proved by parol evidence, like any other facts. State v. Hauser, 63 Ind. 155; Ross v. City of Madison, 1 Ind. 281; School Town of Princeton v. Gebhart, 61 Ind. 187; City of Logansport v. Dykeman, 116 Ind. 15.

If the records kept by the clerk have been destroyed the proceedings may be proved by parol evidence. City of Delphi v. Evans, 36 Ind. 99.

Parol evidence of the proceedings of a city council, and of the declarations of individual members thereof, in ordering the grade of a street, or in proceedings for condemnation of real estate, is not admissible until some valid excuse is shown for not producing the record of such proceedings. City of Aurora v. Fox, 78 Ind. 1; Byer v. Town of Newcastle, 124 Ind. 86.

The record of proceedings kept by the city clerk is competent evidence to prove that a street is under the control of the city. City of Huntington v. Mendenhall, 73 Ind. 460.

The record of the proceedings of the common council, showing the report of a committee appointed by it, and the action taken thereon, is admissible in evidence against the city. City of Delphi v. Lowery, 74 Ind. 520.

City council proceedings—Sewer assessment—Evidence—Appearance—Waiver.—In an action to enforce a sewer assessment lien it was not error to admit in evidence, over defendant's objection, because of certain descriptions therein and misnomer of defendant, the transcript of proceedings of the city council upon which the alleged lien was predicated, where it appears that during the proceedings before the council, which resulted in the assessment of benefits, for which the lien is sought to be enforced, and before the same were finally settled and confirmed upon the report of the civil engineer, the defendant, by its attorneys, made a full appearance to the proceedings and filed a remonstrance, no objection then being offered to the description and alleged misnomer. Such facts constituted a waiver to the objection, even if it ever had any merits. Lake Erie, etc., R. Co. v. Bowker, 9 App. 428.

87. Orders—Clerk's duties.—22. The clerk shall draw all orders upon the treasury of such city, which shall be signed by the mayor and countersigned by him; but no order shall be drawn upon the treasury except upon an allowance made by the common council, or when the same is fixed by law or the ordinances of such city. He shall keep a register of orders and a register of receipts issued or received by him, so that no two receipts or orders shall bear the same number; the said books, to be styled a "Register of Orders" and a "Register of Receipts," shall be furnished by the common council at

the expense of the city. He shall properly file and keep documents belonging to said city and appertaining to his office; and deliver the same, with all other things belonging to his office, to his successor, as soon as such successor is qualified. The clerk shall, in proper books to be furnished him, open separate accounts for special and general funds, expenditures, salaries of officers, contracts for work, or other service done for the city, exhibiting therein all receipts, disbursements, and appropriations upon each account, and the whole amount of receipts and expenditures in one general account. R. S. 1894, § 3504.

City clerk—Bond—Sureties—Warrant—Liability.—If a city clerk, under color of his office, fill up and sign city orders which have been signed in blank by the mayor, and make them payable to himself, present them to the treasurer, and procure the money thereon, when nothing is due him from the city, this constitutes a breach of his official bond, for which his sureties are liable. Armington v. State, 45 Ind. 10.

City warrant—Contract—Consideration.—A city order on its treasurer for the payment of money is a contract; and, in an action thereon by the holder, a plea of want of consideration is good. City of Connersville v. Connersville Hydraulic Co., 86 Ind. 235; City of Connersville v. Connersville Hydraulic Co., 86 Ind. 184.

A city, incorporated under the general laws of the state, may be sued upon a warrant drawn upon its treasurer by the proper officers, by the holder thereof, and he need not proceed by mandate, nor is it necessary, to entitle the holder thereof to recover, that he should show that the city treasurer had funds with which to pay it, or that he indorsed it "not paid for want of funds." City of Connersville v. Connersville Hydraulic Co., 86 Ind. 184.

City warrant—Taxes.—Where, in an action upon a city order by the holder, the city answers, by way of set-off, that he is indebted to the city for taxes in a certain sum, but fails to allege any facts showing his or his property's liability to taxation, or the city's authority to levy and collect taxes, such answer is insufficient on demurrer. City of Connersville v. Connersville Hydraulic Co., 86 Ind. 235.

Notice.—Where notice is required to be given by a city to terminate a contract, one given by a councilman, without authority from the common council, is not sufficient. But a notice given by the city clerk, thereunto ordered by the common council, is sufficient. City of Indianapolis v. Bly, 39 Ind. 373.

The city clerk is the proper city officer, under R. S. 1894, § 8672, to give notice to persons whose property has been omitted to be assessed for municipal purposes. City of Delphi v. Bowen, 138 Ind. 235.

88. Duplicate tax list.—23. The clerk shall, annually, between the first Monday of June and the fifteenth of November, make out a duplicate list of taxes assessed in such incorporated city in the same manner that duplicate lists of taxes are made out by county auditors, and shall cause a copy of such duplicate list to be delivered to the city treasurer on or before the fifteenth day of November of each year; and in all matters pertaining to the making up of such duplicate tax lists, and the assessment of taxes thereon, and in the manner of entering property returned delinquent for taxes, he shall be governed by the laws defining the duties of county auditors, so far as the same may be applicable, and not otherwise herein provided; and he shall deliver the same, with a warrant, under the corporate seal of said city, attached thereto, to the treasurer of said city, directing him that of the goods and chattels of all and every person named in said duplicate, and of

all persons whose names may be added thereto by him, he shall cause to be made, by distress and sale if necessary, the amount of tax charged against each of said persons named in said duplicate, and make report of his doings in the premises by the third Monday in March next following, and make full return, report, and final settlement thereof by the first Monday of August next following. R. S. 1894, § 3505.

See Art. 3, Taxation, *post*, § 212, *et seq.*

Tax duplicate and warrant—Treasurer's authority.—The tax duplicate and the warrant attached thereto, constitute the city treasurer's authority for enforcing the payment of taxes by seizure and sale of property, and, taken together, confer on him the same power to seize and sell personal property as is conferred by an execution by a sheriff; but the duplicate, unaccompanied by the warrant, is not sufficient. Wise v. Eastham, 30 Ind. 133.

Injunction—Illegal tax.—In an action against the treasurer, to enjoin the collection of a tax alleged to have been illegally assessed by the assessor, the complaint must show that the assessment was placed upon the tax duplicate, that the duplicate is in the hands of the treasurer, and that he is threatening to collect the tax. Pugh v. Irish, 43 Ind. 415; Anthony v. Sturgis, 86 Ind. 479.

Illegal annexation of territory—Cases distinguished.—Where the complaint states facts sufficient to show a right to have a municipal corporation restrained from exercising corporate powers over territory not legally annexed to the city, the pleading is not bad because it omits to aver that the treasurer had the tax duplicate in his hands. The cases of Wise v. Eastham, Anthony v. Sturgis, and Pugh v. Irish, *supra*, distinguished. Welch v. State, 104 Ind. 347.

Duplicate legal on its face—Effect.—Where the duplicate in the hands of the treasurer is legal on its face, it is not necessary for him to show a legal assessment of the taxes. Adams v. Davis, 109 Ind. 10; Ewing v. Robeson, 15 Ind. 26; Noland v. Busby, 28 Ind. 154; Hazzard v. Heacock, 39 Ind. 172.

Presumption.—It will be presumed, in the absence of any showing to the contrary, that specified taxes were placed upon the duplicate in the treasurer's hands by the proper officer. Adams v. Davis, 109 Ind. 10.

89. Assessor's duties.—24. Each city assessor shall, on or before the first Monday in June of each year, unless otherwise directed by the common council, make and deliver to the city clerk of his city, in tabular form and alphabetical order, a list or lists of the names of all persons, companies or corporations in whose names any personal property, moneys, credits or other taxables shall have been by him listed in his city, on which list or lists he shall enter separately, in appropriate columns, opposite each name, the several species of personal property and taxables required by law to be taxed for state and county purposes, as attested by the person required to list the same, or as determined by the assessor; and he shall also make a separate list of such other property or thing as the common council in their ordinances direct to be specially taxed; the columns shall be accurately added up. And in every case where any person whose duty it is made by law to list any personal property or other taxables for taxation for the state and county purposes shall refuse to make out and return the lists of personal property and taxables, the assessor shall enter, in an appropriate column, the words "refused to list;" and in every case

where the person required to list personal property for taxation shall refuse to take and subscribe the oath or affirmation required of him by this act in regard to the truth of his statement, the assessor shall enter, in an appropriate column, the words "refused to swear;" and in every case where any person required to list property for taxation shall have been absent, or unable from sickness to list the same, the assessor shall enter opposite his name the word "absent" or "sick." Said assessment shall be completed at the time above indicated, and return made thereof to the clerk of the city, unless, by an order of the common council, further time be given him. He may, with the concurrence of the common council, appoint one or more assistants, who shall be sworn, in like manner as other officers, to well and faithfully perform the duties thereof. Such assessor and assistants shall have the same powers, and be subject to the same provisions of the same laws as the assessor of personal property for state and county purposes. But if, at any time, any town or city adopting this act shall have no assessor except the one elected on the first Tuesday in May as aforesaid, then it shall be lawful for the common council to appoint an assessor, who shall qualify as if elected, and shall assess for the year commencing on the first Monday in January next preceding such appointment; and the assessor elected at a regular election as aforesaid shall assess, as herein required, for the year commencing on the first day of January following such election. Such assessor shall, at the time he is required by this act to make return of taxable property to the city clerk, also deliver to him all the statements of property which he shall have received from persons required to list the same, arranged in alphabetical order, corresponding with his list or lists, and the clerk shall carefully preserve the same in his office. R. S. 1894, § 3506.

Assessment of bank stock.—If bank stock is assessed in the name of the bank instead of that of the stockholders, the lien of the taxes assessed is not thereby affected. Small v. City of Lawrenceburgh, 128 Ind. 231.

90. Assessor's duties.—25. Each city assessor shall annually (except when the real estate is appraised), at the time of taking lists of personal property, also take a list of all real estate situate in his city that shall have become subject to taxation since the last previous listing of property therein, with the value thereof, estimated agreeably to the laws regulating the duties of appraisers of real estate; and all new improvements, buildings, or other structures of any kind, the value of which shall not have been previously added to or included in the valuation of the lands on which such improvements have been made or structures erected; and shall make return thereof to the city clerk at the same time that he is required by this act to make return of personal property; in which return he shall set forth the parcel of real property on which each of such improvements shall have been made or structures erected, and the true value added to such parcel of real estate by the making of such improvement or the erection of such structure. And the additional sum which it is believed the land on

which the improvement shall have been made or structure erected will sell for at private sale, in consequence thereof, shall be considered the value of such improvement or structure. And in case of destruction by fire, flood, or otherwise, of any improvement, building, or structure of any kind which shall have been made or erected previous to the last valuation of the land on which the same shall have been added to any former valuation of such land, the assessor shall determine, as nearly as practicable, how much less such land would sell for at private sale in consequence of such destruction, and make return thereof to the city clerk, as in this section before provided in relation to improvements made or structures erected. R. S. 1894, § 3507.

By § 254, act of 1891, R. S. 1894, § 8672, the office of city assessor and city boards of equalization are abolished. See *post*, § 216; also §§ 354 and 1056.

91. Civil engineer's duties.—27. The civil engineer shall prepare plans, specifications and estimates when thereunto directed by the common council, of proposed public improvements, and shall superintend the opening of streets and the preservation of the true lines thereof, and perform all other duties appertaining to his office when directed by the common council. And such engineer shall have exclusive jurisdiction to survey, determine, establish and perpetuate the lines and corners of all lots, blocks, parcels of lands and subdivisions thereof, within the limits of such city. He shall make a record of all such surveys, as the county surveyor is now required to do; and such record, or certified copies thereof, shall have the same force and effect as the record of surveys made by the county surveyor has; and from all such surveys an appeal may be taken, as provided for appeals from surveys made by the county surveyor: *Provided*, That when the city authorities have once established the grade of any street or alley in the city, such grade shall not be changed until the damages occasioned by such change shall have been assessed and tendered to the parties injured or affected by such change, and such damages shall be collected by the city from the party or parties asking such change of grade in the manner provided for the collection of street improvments. R. S. 1894, § 3508.

Change of grade.—See *post*, § 218, note, Improvement of streets—Fixing and changing grade.

Removal of city engineer.—See *ante*, § 59a.

Repealed as to cities of 100,000.—This section as to cities of more than one hundred thousand population was repealed by act of March 6, 1891, commonly designated as the charter of the city of Indianapolis. Hirth v. City of Indianapolis, 18 App. 673.

Change of grade of street.—A city may not change a street grade legally established by it, without first assessing and paying, or tendering, the damages occasioned by such change, to the abutting property owner. City of Logansport v. Pollard, 50 Ind. 151; City of Kokomo v. Mahan, 100 Ind. 242; City of Lafayette v. Wortman, 107 Ind. 404; City of Lafayette v. Nagle, 113 Ind. 425; City of Anderson v. Bain, 120 Ind. 254; City of Valparaiso v. Adams, 123 Ind. 250; City of Jeffersonville v. Myers, 2 App. 532; City of Huntington v. Griffith, 142 Ind. 280, 282; Keehn v. McGillicuddy, 15 App. 580; Stein v. City of Lafayette, 6 App. 414.

May change town grade.—A city is not liable for damages arising from the establishment of a street grade in conflict with a grade established by a former town corporation, embracing the same territory. City of Wabash v. Alber, 88 Ind. 428; City of Huntington v. Griffith, 142 Ind. 280, 282.

Abutting lot owner—Damages.—An abutting lot owner is not entitled to recover damages resulting from the original grading of a street, but to entitle him to damages on account of the grading of a street he must show that there was a prior established grade, and that the damages for which he sues were caused by a change therein. City of Lafayette v. Nagle, 113 Ind. 425; City of Anderson v. Bain, 120 Ind. 254; Keehn v. McGillicuddy, 15 App. 580.

Grade—How established.—Until proceedings are had by the common council directing that the grade of a certain street or streets, or specified portions thereof, shall be established, or that a grade already established is approved and adopted in some authoritative way by the common council, it can not be deemed that the city authorities have once established the grade of the street. Mattingly v. City of Plymouth, 100 Ind. 545; City of Valparaiso v. Adams, 123 Ind. 250.

Adoption of town grade.—The acceptance of a city charter does not impliedly work an adoption, by the city, of street grades established by a former town, in the sense that, under the statute creating a liability, the city may not establish a grade, and the adoption by the city of a prior town street grade, essential to the right of a property owner to recover damages for an alleged change of grade, should be shown by proof of authoritative acts and proceedings of the common council, in adopting such former town grade. City of Huntington v. Griffith, 142 Ind. 280.

Constitutional and statutory liability.—Cities and towns, however, are not liable for consequential damages necessarily caused in changing the grade of a street, previously established, except they are made liable by some statute, the constitution or by the charter of incorporation. City of Valparaiso v. Adams, 123 Ind. 250; Snyder v. Town of Rockport, 6 Ind. 237; Baker v. Town of Shoals, 6 App. 319; Macy v. City of Indianapolis, 17 Ind. 267; City of Seymour v. Cummins, 119 Ind. 148; City of Lafayette v. Nagle, 113 Ind. 425; 1 Beach Pub. Corp., §§ 662, 747; Elliott Roads and Streets, pp. 336, 344; 2 Dillon Munic. Corp., §§ 686, 989, *et seq.*

Liability for negligence.—But municipal corporations are liable, without reference to such statutory or constitutional provisions, for injuries to the property of citizens by reason of the negligent manner in which the work is done in grading and improvement of streets. Baker v. Town of Shoals, 6 App. 319; City of Jeffersonville v. Myers, 2 App. 532; Town of Princeton v. Geiske, 93 Ind. 102; City of North Vernon v. Voegler, 103 Ind. 314; City of Lafayette v. Wortman, 107 Ind. 404; 1 Beach Pub. Corp., § 662; Elliott Roads and Streets, p. 336.

Property damaged beyond city limits.—The provisions of the above section, that when the grade of a street has been once established it shall not be changed without first assessing and tendering the damages occasioned by the change, refers to damages as well to property outside of the city limits as to that inside. City of Columbus v. Hydraulic, etc., Co., 33 Ind. 435; City of Evansville v. Decker, 84 Ind. 325.

Sidewalks—Change of grade.—The word "street" embraces sidewalks, and the statute requiring compensation for damages resulting from a change of grade applies to changes in the grade of a sidewalk. City of Kokomo v. Mahan, 100 Ind. 242; Dooley v. Town of Sullivan, 112 Ind. 451; Wiles v. Hoss, 114 Ind. 371; Town of Rosedale v. Ferguson, 3 App. 596; Taber v. Grafmiller, 109 Ind. 206.

Complaint—Averments.—A complaint in an action for damages for change of grade is bad where it contains no allegation that a grade has been legally established, and that a change was made in the grade without first assessing the damages occasioned thereby. City of Valparaiso v. Adams, 123 Ind. 250; Mattingly v. City of Plymouth, 100 Ind. 545.

Where the ordinance set out in a complaint for damages for a change in the grade of a street is a general one and fixes the grade at the crossings of the street surrounding plaintiff's property, taken in connection with the averment that the street was graded in accordance with such established grade, the complaint sufficiently shows a previously established grade. Keehn v. McGillicuddy, 15 App. 581.

Injunction.—The abutting property owner may maintain an injunction to restrain the municipal authorities from proceeding to change the grade previously established until the damages are assessed and tendered as provided by the statute. City of Kokomo v. Mahan, 100 Ind. 242; City of Logansport v. Pollard, 50 Ind. 151; City of Columbus v. Hydraulic, etc., Co., 33 Ind. 435.

But when the work has been nearly completed, injunction will not be granted. City of Columbus v. Storey, 33 Ind. 195.

Special damages.—To entitle the property owner to recover damages for a change of grade, the injury sustained must be special, and not merely such as the public may suffer. City of Lafayette v. Nagle, 113 Ind. 425; Elliott Roads and Streets, pp. 344, 345.

Damages recoverable—Improvements.—All damages, both past and prospective, that will result by a change of grade, must be recovered in an action, and improvements made in accordance with the old grade may be considered in fixing the damages. City of Lafayette v. Nagle, 113 Ind. 425; City of North Vernon v. Voegler, 103 Ind. 314; Elliott Roads and Streets, pp. 344, 345.

The owner of the property at the time of the change of grade is the proper person to assert a claim for damages for such change of grade. His subsequent grantee can not recover. Stein v. City of Lafayette, 6 App. 414.

Original grading—Negligence.—A city is not liable for consequential damages caused by an original grading and improvement of its streets, unless the work be negligently performed, in which case it is liable for the injury caused by its negligence. City of Jeffersonville v. Myers, 2 App. 532; Davis v. City of Crawfordsville, 119 Ind. 1; City of Valparaiso v. Adams, 123 Ind. 250; City of Wabash v. Alber, 88 Ind. 428.

Discretion.—The municipal authorities have discretionary power to determine when a change of grade is necessary, but the power to cause a change is subject to the provisions of the above section respecting the assessment and tender of damages. City of Jeffersonville v. Myers, 2 App. 532; City of Kokomo v. Mahan, 100 Ind. 242.

Assessment of damages.—If the established grade of a street or alley be changed by the city, without first having the prospective damages assessed and tendered, this, under the above section, is an unlawful act and an affirmative wrong, for which damages may be recovered by any person whose property may thereby be injured. City of Lafayette v. Wortman, 107 Ind. 404; City of Lafayette v. Nagle, 113 Ind. 425.

Grade—How established—Ordinance—Record.—The grade of a street which can not be changed without the assessment and tender of damages occasioned thereby is a grade established in pursuance of some ordinance or order of the common council involving some general plan of improvement or grading of a street, or specified portion thereof. And such grade, when established, must be approved and adopted in some way by the common council, and should be made a matter of record. The record of the survey establishing the grade should appear in the record which the civil engineer is required to keep; and the proceedings of the council should, in some way, either by ordinance or resolution, show that the survey establishing the grade was authorized or approved so as to make it authoritative. The records and files pertaining to these proceedings should be produced in evidence under proper averments in the complaint, and unless these are shown to have been lost or destroyed no other proof is admissible. Mattingly v. City of Plymouth, 100 Ind. 545 (citing Nebraska City v. Lampkin, 6 Neb. 27); City of Valparaiso v. Adams, 123 Ind. 250; City of Aurora v. Fox, 78 Ind. 1.

Estoppel of corporation as to establishment of grade.—The fact that an ordinance

requires all sidewalks to be built in conformity with the grade of the corresponding street, and makes it the duty of the street commissioners to oversee the construction and maintenance of all sidewalks, and requires all persons, before laying a sidewalk, to apply to the city engineer for the proper grade, and to construct the proposed sidewalk in accordance with the grade as given by him, and the fact that one who does so apply makes such improvement according to the direction of the engineer, where the street has not been established by the steps specified in previous note, do not estop the city from establishing a different grade for the street without the assessment and tender of damages. Nor does the fact that the committee on streets, with the city engineer, directed the owner where to place the sidewalk, estop the city. Mattingly v. City of Plymouth, 100 Ind. 545.

Town not liable—Change of grade.—The proviso to the above section has no application to an incorporated town. The town is not liable to an abutting property owner for consequential damages resulting to the property by a change of an established grade. Baker v. Town of Shoals, 6 App. 319.

Change of grade—Not a taking of property.—Consequential injuries resulting from a change in the grade of a street do not constitute a taking of private property for a public use within the meaning of the constitution, and a property owner can only claim damages for such injuries in cases where the right to damages is given by statute. City of Kokomo v. Mahan, 100 Ind. 242; Weis v. City of Madison, 75 Ind. 241; City of Lafayette v. Bush, 19 Ind. 326; City of Delphi v. Evans, 36 Ind. 90.

Common council—Change of grade.—Common councils of cities may, of their own motion, by a two-thirds vote, change the grade of streets, pay the damages occasioned out of the city funds, and re-improve the street at the expense of the property owners on the line of the improvement. City of Lafayette v. Fowler, 34 Ind. 140.

Witnesses—Opinion—Damages.—In an action by a lot owner for damages resulting from a change of grade, it is competent to take the opinion of witnesses as to the value of the property before and after the change was made. It is not necessary that the witness should be an expert, but if it appears that he has an acquaintance with the value of property in the vicinity, his opinion is competent. City of Lafayette v. Nagle, 113 Ind. 425.

Improvements with reference to grade.—The fact that improvements have been made to correspond with the old grade may be considered in an action to recover damages for a change of grade. City of Lafayette v. Nagle, 113 Ind. 425.

Liability for acts of contractor—Encroachment upon abutting land.—A city which is not negligent in making a plan for raising the grade of a street is not liable for the act of an independent contractor in making the slope for the grade on the land of an abutting owner. City of Bloomington v. Wilson, 14 App. 476; Kinser v. DeWitt, 7 App. 597.

Estimate—Mandate.—As to the manner and the basis upon which an estimate is to be made under this section, the engineer is subject to the orders of the common council. Until after such direction by the common council, and a disobedience by the engineer, there is no occasion for the engineer to be made a party to a mandamus proceeding to compel the making of an estimate. The mandate lies against the city as a corporation. Wren v. City of Indianapolis, 96 Ind. 206.

Engineer's duties.—It is the statutory duty of the city civil engineer to prepare plans and specifications of proposed street improvements, and it will be presumed that he prepares them in proper time and in conformity to the ordinances. Such plans and specifications are competent evidence in a suit to collect a street assessment. Taber v. Grafmiller, 109 Ind. 206; Taber v. Ferguson, 109 Ind. 227.

Street improvement estimates.—The city civil engineer is the proper officer to make the estimate and apportion the costs to each lot or tract of land in street improvement proceedings. Reeves v. Grottendick, 131 Ind. 107; Ray v. City of Jeffersonville, 90 Ind. 567; Van Sickle v. Belknap, 129 Ind. 561.

Estimate prima facie correct.—The estimate by the city engineer is deemed prima facie correct, and the party who assails it assumes the burden of impeaching it. Van Sickle v. Belknap, 129 Ind. 561; Elliott Roads and Streets, p. 430.

92. Street commissioner's duties.—28. It shall be the duty of the street commissioner, under the direction of the common council, to superintend the streets, alleys, market places, landings; the construction, repairing, cleaning, and lighting the same; the building of sewers and drains; the purchase of the necessary implements of labor, and the employment of laborers; and shall perform all the other duties incident to his office: *Provided*, He shall have no power to contract for any debt or liability against the city, unless specially authorized so to do by an order, resolution, or ordinance of the common council, made in accordance with the powers vested in such council by this act. R. S. 1894, § 3509.

Removal.—The common council may, by a majority vote, remove and dispense with the street commissioner and require the marshal to perform his duties. City of Madison v. Kelso, 32 Ind. 79; City of Madison v. Korbly, 32 Ind. 74; State v. Sohn, 97 Ind. 101.

An order of the common council dispensing with the services of the street commissioner is a removal from office. When this is done and the officer is then reappointed, his term of office commences from the time of his reappointment. State v. Sohn, 97 Ind. 101.

The common council of a city, while the street commissioner remains in office, can not direct that his duties be performed by any other officer. Mitchell v. Wiles, 59 Ind. 364.

Notice to street commissioner—Notice to city.—Notice to the street commissioner of a defective street is notice to the city. City of Lafayette v. Larson, 73 Ind. 367; Turner v. City of Indianapolis, 96 Ind. 55.

Liability.—The street commissioner is liable to an employe of a city, who is under the direction and control of the street commissioner, when the employe is injured in the performance of an act directed by the commissioner, when such injury is the result of the commissioner's negligence, and the employe is himself without fault. City of Lebanon v. McCoy, 12 App. 500.

93. Marshal's duties and powers.—29. The marshal shall be the chief ministerial officer of the corporation. He shall be a conservator of the peace within his city, and shall arrest, without process, all persons who within his view, shall commit any crime or misdemeanor or violate any ordinance of such city, take them before the mayor or other officer having jurisdiction of the offense with which such person is charged, and detain them in custody until the cause of such arrest has been investigated; suppress all breaches of the peace within his knowledge, hereby giving to him authority to call to his aid the power of the city; pursue and commit to jail all felons and persons guilty of misdemeanors or violations of the ordinances of such city. He shall execute and return all process directed to him by the mayor or city judge, or by order of the common council, either in person or by deputy; attend upon and preserve order in the mayor's court and in justice's court within his city, in all cases wherein he has served the writ or process to bring such party into court; and, in addition to the powers herein vested in such marshal, he may, without any writ

or order of attachment, confine any person or persons guilty of any offense against the penal laws of the state of Indiana or ordinances of such city in the city watch-house or prison, or county jail (if such arrest be made when the court having jurisdiction of the offense with which such person is charged shall not be open or in session), until there shall be an opportunity to bring such defendant before the mayor, if for violation of the ordinances of such city, or before a justice of the peace or mayor, if for violation of the penal laws of the state, which it is his duty to do at the earliest practicable time. But no person shall be detained in custody more than eighteen hours, unless by order of the mayor or a justice of the peace, upon affidavit and writ charging such person with some offense. R. S. 1894, § 3510.

See *post*, § 276.

[Acts 1881 S., p. 109. In force April 9, 1881.]

94. Has constables' powers.—1. City marshals shall have, in addition to the powers they now possess, the jurisdiction and powers of constables in their respective counties. R. S. 1894, § 3511.

95. Same fees as constables.—2. City marshals shall be entitled to the same fees as constables, as well while acting in the capacity of marshal as constable. R. S. 1894, § 3512.

Constables' powers—Acts throughout county—Citizens to aid.—Constables, in the discharge of their duties, shall have power to act throughout their respective counties, unless restrained by law; and, whenever necessary, may call upon any number of citizens to assist them in the discharge of their duties, who shall not refuse such assistance, under such penalty as may be prescribed by the criminal law. R. S. 1894, § 8054.

Mittimus—Receipt.—Whenever any constable shall commit to jail any prisoner in his custody, he shall leave with the jailer the writ by authority of which he commits such prisoner; and such jailer shall give him a receipt therefor, containing at length a copy of such writ. R. S. 1894, § 8055.

When may arrest fugitive.—In executing a warrant for the apprehension of any fugitive from justice who has fled into another county from any county in this state, a constable may arrest such offender in any county where he may be found; but if such offender shall request it, he shall not remove him from such county without taking him before some officer authorized to issue and try writs of habeas corpus, and giving such offender time to make application for such writ. R. S. 1894, § 8056. See R. S. 1894, § 1694.

For further powers and duties of constables see R. S. 1894, §§ 1506, 1510, 1542, 1576, 1579, 1580, 1582, 1596, 1616, 1637, 8050.

Constables' fees.—Constables shall receive fees as follows:

For serving a summons or warrant on each person named therein, twenty-five cents.

For copy of the process left at residence of defendant, twenty-five cents.

For serving subpena for each person named therein, twenty-five cents.

For returning each writ, ten cents.

For bail bond, twenty-five cents.

For serving execution, twenty-five cents.

For commitment to prison, twenty-five cents.

For sale of goods, when value of goods does not exceed six dollars, twenty-five cents.

On all sums above five dollars, five per centum.

On all moneys collected on execution without sale, one-fourth of the above commission.

For returning execution, ten cents.

For summoning a jury on any case, fifty cents.

For posting up advertisements of sale, thirty cents.

In criminal cases for serving warrants on each person named therein, twenty-five cents.

For serving subpena, twenty-five cents.

For attending examination on trial of a person charged with a crime or misdemeanor, twenty-five cents.

If more than one, additional for each, twenty-five cents.

For commitment of each person to prison, twenty-five cents.

For service not herein enumerated, the same as in civil cases. R. S. 1894, § 8060.

Mileage.—Constables' mileage, for each mile necessarily traveled in going and returning to serve process and subpena, ten cents. R. S. 1894, § 8061.

Arrest without process.—City marshals and constables can not arrest persons without process for the commission of misdemeanors when not committed within their view. They are liable in trespass for illegal arrests. Pow v. Beckner, 3 Ind. 475; Plummer v. State, 135 Ind. 308; Doering v. State, 49 Ind. 56; Boaz v. Tate, 43 Ind. 60; Wiltse v. Holt, 95 Ind. 469.

City marshals may arrest without process any person who, within their view, shall commit any crime or misdemeanor, or violate any ordinance of the city, and detain such person until the cause of the arrest can be investigated. If the court having the jurisdiction is not in session, he may confine the person arrested in the city prison or county jail until he can be brought before the court, and this should be done at the earliest period. Boaz v. Tate, 43 Ind. 60; Scircle v. Neeves, 47 Ind. 289; Wiltse v. Holt, 95 Ind. 469; Veneman v. Jones, 118 Ind. 41.

He may arrest for a felony, without a warrant, on view, or upon information when he has reasonable or probable cause to believe that a felony has been committed, and in the latter case he does not make the arrest at the peril of proving the commission of the felony. Doering v. State, 49 Ind. 56; Simmons v. Vandyke, 138 Ind. 380.

He has no authority to arrest a fugitive from another state, charged with a felony, upon a telegram from a peace officer of such other state directing the arrest and stating that he holds a warrant for such fugitive. Simmons v. Vandyke, 138 Ind. 380.

Fugitives from justice from one county in the state to another county in the state may be apprehended by proceedings as provided in R. S. 1894, § 1667, and fugitives from another state into this state may be arrested, detained and returned upon demand of the executive authority of the state from which the criminal is a fugitive, upon warrant and upon identification as required by R. S. 1894, § 1668, *et seq.* Simmons v. Vandyke, 138 Ind. 380.

Police officer—Arrest without warrant.—A police officer may make an arrest upon view without a warrant where he has seen the agent of a brewing company at his place of business make a gift of a bottle of beer to a third person on the day of a general state election. Weser v. Welty, 18 App. 664.

A police officer, after making an arrest at a time of day so early that the mayor of the city is not at his office and no other magistrate can be found, may incarcerate the prisoner in a jail for a brief period until he can be brought before a magistrate to answer to the charge. Weser v. Welty, 18 App. 664.

To an action for false imprisonment against a marshal or constable, an answer, that the defendant found the plaintiff on the street intoxicated, and having just assaulted a citizen, and arrested and detained him three hours until he became sober, when a criminal charge was regularly made before a justice, and the plaintiff fined, etc., is good on demurrer. Wiltsie v. Holt, 95 Ind. 469.

Under the general act of 1857 for the incorporation of cities, there was no authority for imprisoning a man for an uncertain time, because he may be subject to a penalty,

to be recovered in an action in the nature of an action of debt. Low v. Evans, 16 Ind. 486.

Arrest with process.—When the arrest is upon valid process issued by a court having jurisdiction, the officer is protected, and an action for false imprisonment will not lie. Boas v. Tate, 43 Ind. 60; Jeffries v. McNamara, 49 Ind. 142.

A warrant issued by a court having jurisdiction of the offense charged, regular upon its face, will justify the officer in making the arrest. Jeffries v. McNamara, 49 Ind. 142; Vess v. State, 93 Ind. 211.

A valid warrant, though informal and erroneous, is sufficient. Goodwine v. Stephens, 63 Ind. 112.

An officer holding a valid warrant may call upon persons to assist him in making the arrest, or to assist the officer to prevent the escape of the person arrested. State v. Deniston, 6 Blackf. 277; Goodwine v. Stephens, 63 Ind. 112, 118.

A warrant issued by a justice of the peace for the arrest of a person duly charged before him with the commission of a crime or misdemeanor, and who has left the county in which the offense was committed, and where the warrant was issued, may be served by a constable of said county in any other county where the defendant may be found, upon attaching a certificate of the clerk of said county where such warrant was issued, setting forth that the justice signing the warrant is duly commissioned and qualified as such, and that his signature is genuine. Sturm v. Potter, 41 Ind. 181.

A warrant commanding the arrest of a named person "and five other persons, whose names are unknown," is bad as to all persons arrested thereunder, except the one whose name is given, if timely objection be taken. Ard v. State, 114 Ind. 542.

The right of a city marshal to arrest and imprison in the county jail carries with it the right, on the part of the jailer, to receive and detain the prisoner. Boaz v. Tate, 43 Ind. 60.

If a city marshal or police officer make an arrest and take the prisoner to a jail with the declaration that he has been arrested for an offense committed on view, that declaration stands in the place of a *mittimus* in other places, and the jailer should receive the prisoner without regard to the question of his guilt or innocence. Boaz v. Tate, 47 Ind. 61.

A city marshal has no authority to accept bail for appearance. Boaz v. Tate, 43 Ind. 60.

A city marshal is liable for the acts of his deputy within the scope of his authority. Boaz v. Tate, 43 Ind. 60.

Force.—A marshal, in making an arrest, is not authorized to use more force than is reasonably necessary to subject the person to his authority; and if the officer use excessive force and violence upon such person, he may repel force by force, and if, in the reasonable exercise of self-defense, he kills such officer he is justifiable. Plummer v. State, 135 Ind. 308.

Escape.—The arrest of an offender and the retaking of him on fresh pursuit after an escape constitute but one effective arrest. Cooper v. Adams, 2 Blackf. 294; Freeman v. Smith, 7 Ind. 582.

Marshals of cities are not required by law to leave their cities or counties to detect criminals, and may recover a reward offered for the detection and arrest of criminals outside of their jurisdiction. Bronnenberg v. Coburn, 100 Ind. 169. See Hayden v. Souger, 56 Ind. 42.

Compensation—Fees—Salary.—Prior to the enactment of this section city marshals were not entitled to fees. City of Brazil v. McBride, 69 Ind. 244.

The common council fixes the salary of the marshal by ordinance; the common council has full power over the salary of the marshal and other city officers, with no restrictions or limitations on the exercise of such power, except such as are specifically mentioned in the statute. The council, in the exercise of their discretion, have the power to reduce the salary of the city marshal at any time during his period of services. City of Brazil v. McBride, 69 Ind. 244.

The city marshal and other officers of the city are prohibited from entering into contracts with the city; the marshal can not recover for services contracted to be rendered by him to the city outside of the duties of his office, and the duties of his office he must perform for the compensation fixed by the statute and the salary prescribed by the council by ordinance. City of Brazil v. McBride, 69 Ind. 244.

Liability of city.—The city is not liable for a wrongful arrest by the marshal, and can not be held liable on an agreement to indemnify the officer for performing his duty by making an arrest for the violation of a penal ordinance. Vaughtman v. Town of Waterloo, 14 App. 649.

Police officers of a city are not its agents or servants, and it is not liable for their negligence. City of Lafayette v. Timberlake, 88 Ind. 331; Faulkner v. City of Aurora, 85 Ind. 130, 135; Town of Laurel v. Blue, 1 App. 128; Hopewell v. State, App. Ct., June 9, 1899.

A municipal corporation is not liable for an illegal arrest by its marshal made without warrant, and under an invalid ordinance. Town of Laurel v. Blue, 1 App. 128.

[Acts 1867, p. 33. In force March 14, 1867.]

96. City attorney's duties and fees.—30. The city attorney shall be the legal adviser of all the officers of the city in relation to their official acts, and shall advise the council upon all matters of law which may be submitted to him in reference to the action of such council. He shall draw all contracts, ordinances, and legal documents which may be required of him by the common council, and do and perform all other acts pertaining to the duties of his office. He shall prosecute all actions in favor of the city, and defend all actions brought against such city for any cause; but in no case shall the city be liable for costs. The city attorney shall be allowed a docket fee in all cases tried before the mayor or city judge, for violations of the city ordinances or upon appeals from judgments to the circuit court, when he appears in person or by deputy, as follows:

Docket fee before the mayor or city judge, on a plea of "guilty," two dollars.

Docket fee before the mayor or city judge, upon a plea of "not guilty," four dollars.

Docket fee in cases in the circuit court, upon appeal on a plea of "guilty," two dollars and fifty cents.

Docket fee in cases in the circuit court, upon appeal on a plea of "not guilty," five dollars. R. S. 1894, § 3513.

Appointment—Removal.—The city attorney is appointed by the common council in the same manner as the street commissioner and the civil engineer, and he becomes an officer of the city on his being appointed and qualifying by taking the oath and giving bond as prescribed by the statute. He holds office subject to removal by the common council at their pleasure; and the council may at any time abolish the office. State v. Curry, 134 Ind. 133; City of Madison v. Korbly, 32 Ind. 74; City of Logansport v. Crockett, 64 Ind. 319; State v. Wilson, 142 Ind. 102; Goodwin v. State, 142 Ind. 117. By Acts 1899, p. 562, he may be removed only for cause. See *ante*, § 59*a*.

On the adoption of a resolution by the common council, removing the city attorney, the yeas and nays thereon must be taken and entered of record. City of Logansport v. Crockett, 64 Ind. 319; State v. Curry, 134 Ind. 133.

Parol evidence is inadmissible to prove the yeas and nays on the adoption of such resolution; the record, or a duly authenticated copy thereof, being the only competent evidence of such fact. City of Logansport v. Crockett, 64 Ind. 319.

A writ of mandate will lie to reinstate a city attorney appointed by the common council and afterward wrongfully removed by it from office. City of Madison v. Korbly, 32 Ind. 74.

The common council has no power to appoint a person city attorney as long as the office is filled by one previously duly appointed. State v. Curry, 134 Ind. 133.

Salary—Fees.—The yeas and nays must be taken and entered of record on the adoption of a resolution by the common council fixing the salary of the city attorney. City of Logansport v. Crockett, 64 Ind. 319.

Authority of city attorney.—A city attorney who is charged by statute with the duty to prosecute and defend all suits for and against the city in several controversies involving the same issues may bind the city by an agreement that all the controversies shall abide the result of one test case. Bank of Commerce v. City of Louisville, 88 Fed. Rep. 398.

Costs.—Regardless of the effect of above section, if a party in an action against him for the violation of a city ordinance, upon appeal is found not guilty and recovers a judgment for costs against the city, he is entitled only to judgment for the fees and costs for which he would himself be liable. It is only the fees for which a party is liable that he may recover as costs against the other party. Mott v. State, 145 Ind. 353; Kiefer v. Summers, 137 Ind. 106.

Cities are not liable to city attorneys for docket fees, when persons convicted of violating ordinances are adjudged, in default of paying or replevying the judgment and costs, to pay the same by manual labor, and do, accordingly, work out the judgments and costs. Tuley v. City of Logansport, 53 Ind. 508.

Special counsel.—The common council of a city has the power to employ counsel in addition to the city attorney to protect the interests of the city, but such employment must be made directly or through an authorized agency. Justice v. City of Logansport, 8 App. 135; City of Logansport v. Dykeman, 116 Ind. 15; Cullen v. Town of Carthage, 103 Ind. 196.

Cities and towns have the power to employ special counsel to defend their officers against liability which they may incur in the bona fide discharge of their duties. Cullen v. Town of Carthage, 103 Ind. 196.

When the common council of a city, properly convened, enters into a contract with an attorney, or where an attorney is employed through the agency of a committee or other authorized person, and has performed services of which the municipality has accepted the benefit, it may not afterwards object that the contract was not in writing, or that the vote of the council, on the question of employment, does not appear upon its records. Contracts of this character need not to be in writing, nor is it necessary that they should be evidenced by formal ordinance, by-law or resolution. City of Logansport v. Dykeman, 116 Ind. 15.

Although the debt of a city may be actually or nominally up to the constitutional limit, the provisions of article 13 of the constitution will not operate to invalidate a contract made by its common council, agreeing to pay an attorney for services to be rendered in compromising or contesting any part of such indebtedness. City of Logansport v. Dykeman, 116 Ind. 15.

97. Treasurer's duties.—31. The treasurer shall receive all moneys, notes, bonds, and orders belonging to the city, and keep an accurate account of the amounts received and paid out by him; and no money shall be paid out of the treasury by him, except upon an order signed by the mayor or presiding officer of the common council, and countersigned by the clerk. R. S. 1894, § 3514.

See *post*, § 1060.

Mandamus—License fee.—A vendor of intoxicating liquors can not maintain an action for a mandate to compel a city treasurer to accept a license fee under an ordinance of the city, in order that he may, prior to the expiration of a license previously issued to him, demand of the city clerk a new license. State v. Bonell, 119 Ind. 494.

98. Duties of treasurer and clerk.—32. All moneys due to or collected for such city on any account whatever shall be paid to the city treasurer, who shall, for all sums received by him, issue a receipt to the person paying the same; which receipt, except for taxes charged on the duplicate, such person shall file with the city clerk, who shall thereupon issue a quietus to such person, and charge the treasurer with the amount therein specified and upon what account paid. He shall receive city orders that are due, in payment of any debt, tax, or assessment due such city; and when an order is received by him for any debt, tax, or assessment due such city, or otherwise paid or redeemed, he shall cancel the same by writing or stamping upon the face of such order the word "redeemed" and the date of redemption; and such order shall never again be put in circulation. He shall also, in like manner, cancel all bonds or other evidences of indebtedness redeemed or liquidated by him. He shall register all orders by him so redeemed in a book to be furnished him for that purpose, in the same manner as the clerk is required to register such orders; he shall also register all receipts given by him as required in this act, except receipts for taxes charged on the tax duplicate. R. S. 1894, § 3515.

[Acts 1875, p. 28. In force August 24, 1875.]

99. Treasurer's duties—Interest.—1. The city treasurer shall pay all orders issued by the city of which he is such treasurer, when presented, whether indorsed or not as hereinafter stated in this act, if there be money in the treasury, appropriated for that purpose, sufficient to pay the same; if there be not money enough thus to pay such orders, he shall write or stamp on the back thereof, over his name, the date of such presentation, and note same "indorsed," in a register of orders to be provided him for that purpose; and such orders shall be entitled, thenceforth, to draw legal interest until there shall be money on hand sufficient to pay the same. R. S. 1894, § 3516.

[Acts 1899, p. 85. In force April 27, 1899.]

99a. Treasurer's duties — Interest.—1. That the city treasurer shall pay all orders issued by the city, of which he is such treasurer, when presented, properly indorsed, as hereinafter stated in this act, if there be money in the treasury appropriated for that purpose, sufficient to pay the same; if there be not money enough thus to pay such orders he shall write or stamp on the back thereof, over his name, the date of such presentation, and note the same in a register of orders, indorsed, to be provided him for that purpose, and such orders shall be entitled thenceforth to draw such interest as may be provided by the common council, not exceeding six per cent. until there shall be money on hands sufficient to pay the same: *Provided*, That the pro-

visions of this act shall not apply to cities having more than twenty thousand inhabitants as shown by the last United States census.

100. Interest—Orders receivable.—2. Whenever there shall be money on hand to pay all outstanding orders which have been indorsed prior to any given date, the treasurer shall publish notice of such fact, by three insertions in some newspaper of general circulation in such city, and that such outstanding orders will be redeemed on presentation; and interest shall cease on such orders from and after the date of such publication: *Provided*, That city orders shall be received in payment of taxes for general purposes, and for all claims and demands due or belonging to the general fund of the city, without regard to priority of presentation or date of issue; but the treasurer shall not pay any balance thereon, over and above the amount of such tax, claim, or demand, when there are outstanding orders unpaid for want of funds. (As re-enacted, Acts 1899, p. 85.) R. S. 1894, § 3517.

[Acts 1867, p. 33. In force March 14, 1867.]

101. Treasurer's statements and liability.—33. The treasurer shall, on the last day of each month, furnish to the clerk a statement of all the receipts and disbursements made by him during the month, and the balance then in the treasury belonging to each fund, general and special, and also deliver to him all the orders redeemed and canceled by him during the same period, taking the clerk's receipt therefor; which statement with the orders redeemed, the clerk shall lay before the common council at its next meeting, to be disposed of as the common council may direct. The treasurer shall, at least fifteen days before any annual election, and at all other times when so required by the common council, render a full account of the receipts and expenditures for the current year, and the general condition of the treasury. He shall also, at his own peril, keep the moneys of the city safely. R. S. 1894, § 3518.

Statements—Not conclusive.—The entries and statements made by city treasurers as to the funds received by them are not conclusive against their sureties in actions upon their bonds. State v. Grammer, 29 Ind. 530, and State v. Prather, 44 Ind. 287, overruled. Ohning v. City of Evansville, 66 Ind. 59; State v. Haynes, 79 Ind. 294; Strong v. State, 75 Ind. 440; Heagy v. State, 85 Ind. 260; State v. Hauser, 63 Ind. 155.

But such reports are prima facie evidence, and unless satisfactorily contradicted, will warrant a finding against the officer and his sureties. Osborne v. State, 128 Ind. 129; Strong v. State, 75 Ind. 440; Ohning v. City of Evansville, 66 Ind. 59.

Statements—Other duties.—County treasurers who act as city treasurers for cities containing over seventy thousand inhabitants, as provided by the act of February 21, 1885, R. S. 1894, § 3744, *et seq*, must furnish the statements required by the above section, and § 2 of said act of 1885 enjoins upon and requires of him the performance of the same duties theretofore performed by the city treasurer, in the same manner and with like effect as such city treasurer had been previously required to perform such duties. Miller v. State, 106 Ind. 415.

Action—Demand.—Without previous demand action may be maintained against city treasurer for money not paid to successor. Foster v. City of Huntington, App. Ct., June 7, 1899.

102. Treasurer's assessments.—34. The treasurer shall require of each and every person whom the assessor failed to list, a statement

of his taxable property and the value thereof, which shall be given under the same regulations as if furnished by the assessor; and for that purpose the treasurer is authorized to administer the necessary oath or affirmation. If such person fail to furnish such statement, the treasurer shall value the same as the assessor is required to do in like cases. R. S. 1894, § 3519.

Treasurer's assessment—Alteration of assessment.—The city treasurer has power to assess whom the assessor has failed to list, but has no authority to alter upon the tax duplicate an assessment made by the assessor, or to add to such assessment by the assessor property omitted belonging to the person assessed. Wise v. Eastham, 30 Ind. 133.

103. Collecting delinquent taxes.—35. The treasurer is not required, in any instance, to make a demand of taxes from the persons charged therewith, but may, in his discretion, do so; and if any person charged with a poll-tax, or any tax upon personal property, or any tax upon real estate, shall fail, when called on, to pay the same, together with all interest, penalties, and costs, it shall be lawful for said treasurer to seize the chattels of such defaulter forthwith, and make sale thereof, as provided in this act, to satisfy the same; and should there be a surplus, after such sale and payment, he shall pay the same to the said person making such default. R. S. 1894, § 3520.

The city treasurer alone is empowered to enforce the collection of city taxes delinquent, current and unpaid, and any contract made by the city or its common council, with any person other than such city treasurer, for the collection of any city taxes, is *ultra vires* and absolutely void. City of Ft. Wayne v. Lehr, 88 Ind. 62; Miller v. Embree, 88 Ind. 133; Vandercook v. Williams, 106 Ind. 345.

104. Lien of taxes.—36. The lien of such incorporated city for all taxes, general or specific, shall attach on all real estate on the first day of April annually; and such lien shall be perpetual for all taxes due from the owner thereof, which have heretofore accrued or shall hereafter accrue, with the interest and penalties in each case, until payment; which lien shall in nowise be affected or destroyed by any sale or transfer of any such real estate. All the property, both real and personal, situate in any incorporated city, shall be liable to the payment of all taxes, penalties, interest, and costs charged to the owner thereof in such incorporated city; and no partial payment of any such taxes, penalties, interest, or costs shall discharge or release any part or portion of such property, until the whole be paid; which lien shall in nowise be affected or destroyed by any sale or transfer of any such personal property. All taxes upon real estate shall be a lien thereon to the same extent as a judgment of a court of record of general jurisdiction, and shall have preference to any private charges upon the same; and all taxes upon personal property shall have preference over private claims. R. S. 1894, § 3521.

105. Collecting taxes.—37. Immediately on receiving the tax duplicate, the city treasurer shall proceed to collect the same, and shall give notice, by publication in some newspaper having a general

circulation in such city, for three successive weeks, stating in such notice the amount of tax charged for general or specific purposes on each one hundred dollars' valuation, also, the amount of poll-tax, and, also, the day on which the penalty will attach for non-payment of such taxes. In case any person shall refuse or neglect to pay the tax imposed on him, the city treasurer shall, after the third Monday of April, levy the same, together with ten per cent. damages, and the costs and charges that may accrue, by distress and sale of the goods and chattels of such person who ought to pay the same, wheresoever the same may be found in the city. The power to levy and collect shall continue in such treasurer after his return and settlement with the city clerk, until the taxes shall be paid, should goods or chattels of the delinquent be found within the city. The said treasurer shall, annually, on the first Monday of August, file with the city auditor schedules of all such delinquent taxes collected by him, verified by oath or affirmation, and shall be charged by the clerk with the amount collected. R. S. 1894, § 3522.

106. Sale of land for taxes.—38. If no goods or chattels can be found, out of which to make the tax, penalties, interest and costs charged against any person named in such duplicate, the treasurer shall sell any lot or land, or so much thereof as may be necessary, listed to such person, to pay the tax, with interest, penalties and costs thereon; and the treasurer's certificate to the purchaser shall state for what tax or taxes, interest, penalties and costs said lot or parcel of land was sold, which certificate shall be prima facie evidence of all the facts therein set forth. R. S. 1894, § 3523.

107. Notice of sale of chattels.—39. The treasurer shall give public notice of the time and place of sale of all goods and chattels to be sold, at least ten days previous to the day of sale, by written or printed advertisements, to be posted up in at least three public places in the city where such sale shall be made. R. S. 1894, § 3524.

108. Chattels at auction.—40. Such sales shall be made at public auction. No more property shall be sold than is sufficient to pay the tax, penalties, interest, costs and charges; and, if convenient, it shall be sold in parcels, and if sold for more than the amount necessary, the surplus shall be returned to the owner thereof. R. S. 1894, § 3525.

109. Land, how sold.—41. In selling lots and parcels of land the treasurer shall offer the least quantity thereof that any bidder will take, and pay the amount of tax, penalties, interest, damages and costs assessed; and he shall make, seal and acknowledge, before some competent authority, a certificate of the land thus sold to such person. Before making such sale the treasurer shall give notice, not less than twenty days, in a newspaper printed and published in said city, that on a certain day therein named he will offer for sale the lands and lots on which taxes shall remain unpaid, or so much thereof as shall be necessary to pay said taxes, penalties, interest, and all costs and charges made by reason of the failure to pay said taxes. If such city is a

county seat, it shall be made at the court-house door; if not, it shall be made at the door of the city hall or other place of meeting of the common council. R. S. 1894, § 3526.

110. Return of land sold—Redemption.—42. It shall be the duty of the treasurer, immediately after the sale of any lot or parcel of land, to make return of the same to the city clerk, distinctly stating the lot or parcel of land sold, the name of the purchaser, the day of sale and the amount of tax, penalties, interest and costs for which it was sold; and any owner or claimant thereof, his agent or attorney, may redeem the same, upon the terms and like manner as the lands sold for state and county taxes are redeemed, by payment to the city treasurer. R. S. 1894, § 3527.

111. Annual settlement.—43. The city clerk and treasurer shall attend at the office of said clerk on the third Monday of April annually; and the treasurer shall then and there make settlement with the clerk for the amount of taxes for which said treasurer is to stand charged, as follows:

First. The clerk shall take from the duplicate in the hands of the treasurer for collection, a list of all such taxes as said treasurer shall have been unable to collect, therein describing the property on which such delinquent taxes are charged as the property described on such duplicate, and shall note therein, in a marginal column, the reasons assigned by such treasurer why such taxes could not be collected.

Second. Such list shall be signed by the treasurer; and he shall also testify to the correctness thereof, under oath or affirmation, to be administered by the clerk.

Third. The clerk shall forthwith record such list of delinquencies in a book to be kept in his office, and deliver copies of the same to the treasurer for collection; and the treasurer shall make return of such collections in the manner provided for in the thirty-seventh section of this act. R. S. 1894, § 3528.

112. Fees on forfeited lands.—44. The treasurer shall be entitled to such fees for collections made by distress and sale, and charges for keeping and removing property distrained, as are paid to county treasurers for like services. In case of no sale of any lot or parcel of land for want of bidders, the treasurer shall so return to the common council; and the said lot or parcel of land shall thereafter be considered as forfeited to such city, to be disposed of as the common council shall thereafter, by ordinance, direct; but no disposition shall be made by such common council until after the expiration of four years from the date of such forfeiture; and until so disposed of or redeemed, such lot or parcel of land shall be continued on the duplicate, charged with all arrearages for which it was forfeited, and interest and ten per cent. damages per annum, and shall be annually assessed and charged with all accruing taxes, penalties, and interest, as other lands. Such land shall annually be offered for sale, with and on the same terms as other delinquent lands; and, until sold for the amount of all arrearages, may be redeemed, as provided in section 42 [§ 3527], on pay-

ment of the same into the city treasury by the owner or owners thereof. All sales by the treasurer for delinquent taxes, and the giving of certificates and conveyances therefor, shall be conducted in like manner as by the county treasurer under the general law of the state; but such conveyance shall be made to such purchaser in the corporate name of the city; which certificates and deeds of conveyance shall be prima facie evidence of all the facts stated therein. R. S. 1894, § 3529.

Fees for the collection of taxes.—The fees of city treasurers for collecting taxes by the sale of goods are only such as are allowed constables on execution sales, and such fees are to be collected from the tax-payer, except when the proceeds of sale are not sufficient to pay all taxes due and such fees. Board, etc., v. Wasson, 74 Ind. 133.

Same—Presumption—Complaint—Demurrer.—Upon a demurrer to a complaint in an action by the board of school commissioners of a city, against the city treasurer, to recover school tax levied by them and claimed by such treasurer as fees and charges for collections made by distress and sale, it will be presumed that such officer levied on property sufficient to pay all that was due, including his own fees and charges. Board, etc., v. Wasson, 74 Ind. 133.

113. Oath—Bonds.—45. The mayor, each member of the common council, city clerk, assessor, civil engineer, street commissioner, marshal, city attorney, and treasurer shall each, before entering upon the duties of his office, take and subscribe an oath, to be indorsed upon the back of his certificate of election, before some officer authorized to administer the same, to support the constitution of the United States and the constitution of the state of Indiana, and to faithfully and honestly discharge the duties of his office; which oath, with his certificate of election, shall be filed with the city clerk. And each of said officers, except members of the council, shall, in like manner, execute a bond, with approved security, payable to the state of Indiana in such penal sum as the common council shall, by resolution or ordinance, order and direct, conditioned for the faithful performance of the duties of his office and the payment of all moneys received by him according to law and the ordinances of such city: *Provided, however*, That in no case shall the mayor's bond be fixed at a less sum than $3,000, nor shall the treasurer's bond be fixed at a less sum than double the amount of the estimated tax duplicate of the current year; which bonds shall be filed with the city clerk, except the bond of the clerk, which shall be filed with the city treasurer. R. S. 1894, § 3530.

Bond of mayor. See *ante*, § 80.

Officers, liability on bond.—If a wrongful act be done by virtue of the office, the officer and his sureties will be liable on his official bond. State v. Walford, 11 App. 392; State v. Beckner, 132 Ind. 371.

A public officer and his sureties are liable also for wrongful acts done by color of his office, as well as by virtue of his office. State v. Druly, 3 Ind. 431; Snell v. State, 43 Ind. 359; State v. White, 88 Ind. 587; State v. Walford, 11 App. 392.

Under R. S. 1894, § 7543, a permanent, continuing liability is created against an officer and sureties for the failure to discharge any duty imposed by existing law, and for the failure to discharge any duty required under laws subsequently enacted. State v.

Davis, 96 Ind. 539; State v. Stevens, 103 Ind. 55; Davis v. State, 44 Ind. 38; Rogers v. State, 99 Ind. 218.

Clerk's bond, liability.—In an action upon the official bond of a city clerk to recover moneys collected by him pursuant to ordinances of the city, which it is alleged he failed to pay over and converted to his own use, in violation of the conditions of his bond, the obligors are estopped to assert that the ordinances under which the clerk received the moneys, and which were in force when the bond was executed, are void. Middleton v. State, 120 Ind. 166.

If a city clerk, under color of his office, fills up city orders, which have been signed by the mayor in blank, and makes them payable to himself, and presents them to the treasurer and procures the money thereon when nothing was due him from the city, this will constitute a breach of his official bond for which his sureties will be liable. Armington v. State, 45 Ind. 10.

This section authorizes the bond of a city clerk to be conditioned for the payment of all moneys received by him according to law and the ordinances of the city. Middleton v. State, 120 Ind. 166.

City treasurer—Liability on bond.—If a city treasurer loan funds of the city under direction of the city council, and take notes therefor approved by the council, payable to him as treasurer, the sureties on his bond are liable for the interest collected for which he fails to account. Hunt v. State, 124 Ind. 306. See Hadley v. State, 66 Ind. 271.

The city treasurer is liable on his bond for moneys received by him from the sale of bonds, no matter by whom such sale is made. State v. Hauser, 63 Ind. 183.

He is not liable on his bond for the mere sale, assignment and delivery by him of bonds when acting as the agent of the common council pursuant to an ordinance, resolution or other order. State v. Hauser, 63 Ind. 183.

An answer in an action on the city treasurer's bond for money alleged to have been received by him as such from the sale of such bonds, that by the terms of such negotiation, which was approved by the common council, the proceeds of such bonds were to and did remain in the hands of the purchaser, to be used only as needed in constructing the water-works, and that the purchaser had become insolvent while the funds in question yet remained in his hands, is sufficient. State v. Hauser, 63 Ind. 155.

Estoppel—Report of city treasurer.—The fact that the city treasurer, in reporting to the common council the condition of the fund realized from such sale, had therein charged himself with funds which, under the contract made between the common council and the purchaser of the bonds, yet remained in the hands of the purchaser, does not estop him to deny his liability for such funds. State v. Hauser, 63 Ind. 155.

In this state, a public officer, as a county treasurer, who has received public money, with the custody of which he is charged by virtue of his office, in the absence of a statute providing that the ownership of the specific money shall remain in the public, is not, like a trustee or an agent, the mere bailee or custodian of such money, but it becomes his own money, and he can only be required to account for it and pay it over as provided by law and by the terms of his official bond, and can not be required to account for and pay over amounts collected or received by him as interest on such money. Shelton v. State, 53 Ind. 331; Halbert v. State, 22 Ind. 125; Rock v. Stinger, 36 Ind. 346; Bocard v. State, 79 Ind. 270; Linville v. Leininger, 72 Ind. 491; Brown v. State, 78 Ind. 239; Hiatt v. State, 110 Ind. 472; Rowley v. Fair, 104 Ind. 189; Rogers v. State, 99 Ind. 218.

The use of the money by the officer does not constitute a breach of the bond. The breach occurs only when the officer fails to account for the money as required by law. Harvey v. State, 94 Ind. 159; Brown v. State, 78 Ind. 239; Hiatt v. State, 110 Ind. 472.

If the council declares the office of treasurer vacant, and appoints one to fill the vacancy, the treasurer acquiescing, the appointee becomes treasurer *de facto*, and the fact that no vacancy existed can not be pleaded by his sureties to a suit for breach of his bond for failing to perform his duties while in office, or failing to pay over money belonging to the city. Mowbray v. State, 88 Ind. 324.

Loaning funds—Can not recover.—Where an officer loans public funds in violation of the statute, R. S. 1894, § 2019 (*post*, § 1158), he can not maintain an action to recover the same. Winchester Electric Light Co. v. Veal, 145 Ind. 506.

In an action on the bond of a city treasurer the bond itself is the foundation of the action, and may properly be made part of the complaint by copy. State v. Hauser, 63 Ind. 155.

That an official bond of a city treasurer was not approved, or that the officer did not take office until after the death of a surety thereon, or an irregularity as to the time of approval, does not affect the validity of the bond. Mowbray v. State, 88 Ind. 324.

Under the charter of the town of Peru, which provided that the marshal should give bond within ten days after his election, his failure to do so would not vacate his office. State v. Porter, 7 Ind. 204. See State v. Hadley, 27 Ind. 496, and State v. Johnson, 100 Ind. 489.

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[Acts 1867, p. 33. In force March 14, 1867.]

114. Meetings—Casting-vote—President pro tempore.—46. The mayor and common councilmen of said city shall constitute the common council, and shall meet within ten days after the annual election, and at such other times as they shall, by resolution, direct. The mayor shall be the presiding officer of the common council, and shall have a casting-vote in all cases when a tie, but not otherwise. The presiding officer, in the absence of the mayor, shall sign all contracts, licenses, permits and other instruments as the mayor might do, and they shall have like effect. R. S. 1894, § 3531.

Mayor—Duties—Mandamus.—The mayor under this section is the presiding officer of the common council, and, in case of a tie, has the casting vote. The duty of the mayor to recognize members of the common council and permit them to exercise their duties as such, may, in case of his refusal, be enforced by mandamus. Swindell v. State, 143 Ind. 153; State v. Swindell, 146 Ind. 527.

Councilmen—Liability.—The members of a common council of a city are not liable, either civilly or criminally, for acts done by them as such in the exercise of a discretion confided to them by law, unless they act corruptly. Walker v. Hallock, 32 Ind. 239; Baker v. State, 27 Ind. 485; Newman v. Sylvester, 42 Ind. 106; 1 Beach Pub. Corp., §§ 203, 516.

Liability of city.—A municipal corporation is an instrumentality of government and is not liable for a failure to exercise legislative or judicial powers, nor for an improper

or negligent exercise of such powers. City of Anderson v. East, 117 Ind. 126; Wheeler v. City of Plymouth, 116 Ind. 158; Dooley v. Town of Sullivan, 112 Ind. 451; City of Terre Haute v. Hudnut, 112 Ind. 542; City of Evansville v. Decker, 84 Ind. 325; Brinkmeyer v. City of Evansville, 29 Ind. 187; Stackhouse v. City of Lafayette, 26 Ind. 17; 1 Beach Pub. Corp., §§ 258, 259.

A municipal corporation is not liable for a failure to enact or enforce ordinances. Wheeler v. City of Plymouth, 116 Ind. 158; City of Lafayette v. Timberlake, 88 Ind. 330; Dooley v. Town of Sullivan, 112 Ind. 451.

A municipal corporation is not liable for the acts of its licensees unless it is shown that they were authorized to perform an act dangerous in itself. Wheeler v. City of Plymouth, 116 Ind. 158; City of Warsaw v. Dunlap, 112 Ind. 576; Ryan v. Curran, 64 Ind. 345; City of Michigan v. Boeckling, 122 Ind. 39.

Ministerial duties.—For the negligent performance of a ministerial duty imposed by law the city is liable. City of Anderson v. East, 117 Ind. 126; Stackhouse v. City of Lafayette, 26 Ind. 17; City of Greencastle v. Martin, 74 Ind. 449; Weis v. City of Madison, 75 Ind. 241; City of Logansport v. Wright, 25 Ind. 512; Roll v. City of Indianapolis, 52 Ind. 547; 1 Beach Pub. Corp., § 260.

Delegation of power.—The common council can not delegate its powers. State v. Hauser, 63 Ind. 155; Martindale v. Palmer, 52 Ind. 411.

Office of councilman lucrative, but not in constitutional sense.—The office of councilman is lucrative in the ordinary sense of the word, but is not a lucrative office within the meaning of the ninth section of the second article of the constitution, which provides that no person shall hold more than one lucrative office. It is an office purely and wholly municipal in its character, and such officer has no duties to perform under the general laws of the state. State v. Kirk, 44 Ind. 401; Chambers v. State, 127 Ind. 365.

Councilmen, when disqualified to act.—When councilmen have a personal interest in the action of the council different from the interests of the inhabitants of the city generally, they are not competent to act. City of Madison v. Smith, 83 Ind. 502; Mayor, etc., v. State, 57 Ind. 152.

Notice to councilmen—Notice to city.—Notice to a member of the common council of a city or the board of trustees of a town of the defective condition of a street or sidewalk, is notice to the city or town. City of Logansport v. Justice, 74 Ind. 378; City of Columbus v. Strassner, 124 Ind. 482; Jewell v. Town of Sullivan, 5 App. 188; City of Lafayette v. Larson, 73 Ind. 367; Board, etc., v. Leggett, 115 Ind. 544.

Mandate—Ministerial duties.—Mandate may lie against a city council to compel the performance of ministerial duties. Mayor v. State, 57 Ind. 152; Wren v. City of Indianapolis, 96 Ind. 206.

Where the council has a discretionary power, mandate will not lie; but where the duty is an imperative one mandate will lie. City of Madison v. Smith, 83 Ind. 502; Board, etc., v. State, 129 Ind. 42.

115. Stated and special meetings.—47. The common council shall hold stated meetings at least twice in each month; and the mayor or any five councilmen may call special meetings. A majority of all members to which the wards are entitled shall be a quorum; and the minutes of every such meeting shall be kept by the city clerk, which shall be open to public inspection. R. S. 1894, § 3532.

Quorum.—When a quorum of a city council is present, a majority of such quorum may transact business. Rushville Gas Co. v. City of Rushville, 121 Ind. 206.

Less than a quorum of the council can do no valid act. City of Logansport v. Legg, 20 Ind. 315.

Special meeting.—The duty growing out of the power to call special meetings, in

proper cases, being an individual duty imposed on each member of the council, it is incumbent upon each, when informed of an emergency which requires the action of the common council, to notify the mayor or other councilmen who may join in the necessary call, and, if he negligently fails to perform this duty the city is liable to anyone who may suffer injury thereby. City of Logansport v. Justice, 74 Ind. 378.

116. Officers.—48. At every such first annual meeting the common council shall appoint, by ballot, a chief engineer of the fire department, three commissioners to form a board of health, and, in their discretion, a sealer of weights and measures, and as many supervisors of streets, to act under the direction of the street commissioner, as they may deem necessary, and all other officers which the by-laws may create or require, unless, for a good cause, deemed inexpedient at that time. And the common council may, by ordinance, prescribe such rules and regulations, in addition to those herein contained, for the qualification and official conduct of all city officers, as they may deem for the public good, and which shall not be inconsistent with the provisions of this act. And the common council may authorize any city officer, except the mayor or city judge, to appoint, with the concurrence of the common council, one or more deputies. R. S. 1894, § 3533.

Local boards of health, see *post*, § 1153, *et seq.*

Rules—Ordinances.—When the common council by ordinance prescribes rules and regulations for the enactment of ordinances, such rules and regulations must be complied with so long as such ordinance is in force, and such ordinance can not be repealed by verbal motion. Swindell v. State, 143 Ind. 153; State v. Swindell, etc., 146 Ind. 527.

Members of board of health—City officers—Contracts.—A member of a board of health of a city is a city officer, and can not be interested in any contract by which any indebtedness is created against the city. City of Ft. Wayne v. Rosenthal, 75 Ind. 156.

Small-pox—Vaccination—City ordinances construed.—City ordinances requiring the board of health to have persons vaccinated as a protection against small-pox do not thereby impose upon the board, or its members, the duty to do, but only to provide for the doing of, such services as may be required of physicians. City of Ft. Wayne v. Rosenthal, 75 Ind. 156.

Same—Voluntary services.—In such case, the services rendered by a physician, who is a member of the board of health, are voluntary, and confer upon the city no value or benefit which could have been rejected, and by keeping which the city ratifies the contract and becomes liable upon a *quantum meruit*, or a *quantum valebat*. City of Ft. Wayne v. Rosenthal, 75 Ind. 156.

Supervisors.—The supervisors of streets authorized by this section can act only under the direction of the street commissioner. Mitchell v. Wiles, 59 Ind. 364.

117. Ordinances.—78. All by-laws and ordinances shall, within a reasonable time after their passage, be recorded in a book kept for that purpose, and shall be signed by the presiding officer of the city, and attested by the clerk. On the passage or adoption of any by-law, ordinance or resolution, the yeas and nays shall be taken, and entered on the record. R. S. 1894, § 3534.

See *post*, § 124 and notes.

[Acts 1899, p.125. In force February 24, 1899.]

117a. Ordinances—Approval and objections by mayor.—1. That in all incorporated cities which had a population of less than 30,000 inhabitants, according to the census of 1890, every ordinance of the common council shall, immediately upon its enrollment, attestation and signature of the clerk, be presented by him to the mayor, and a record of the time of such presentation made by the clerk. If the mayor approves it, he shall sign it and it shall become a law; if he does not approve it, he shall return it to the clerk with his objections in writing within ten days after receiving it and the clerk shall present the same to the common council at its next meeting. It shall be the official duty of the mayor to express in writing his disapproval as hereinbefore provided. If for any reason within the ten days the mayor fails to disapprove the same in writing, it shall be deemed equivalent to approval, and in all cases of disapproval by the mayor, the same shall not become a law unless the body in which the measure originated within thirty days after the time named by the mayor's action, again pass the same by a majority vote of the members of the common council elect.

Passage of ordinance—Yeas and nays.—On the adoption of an ordinance or resolution by the common council of a city the yeas and nays thereon must be taken and entered of record. This provision is mandatory, and a non-compliance therewith will render the adoption of an ordinance nugatory. New Albany, etc., Co. v. Crumbo, 10 App. 360; Swindell v. State, 143 Ind. 153; City of Logansport v. Crockett, 64 Ind. 319; 1 Dillon Munic. Corp., § 291; Coffin v. City of Portland, 43 Fed. Rep. 411.

Parol evidence of yeas and nays incompetent.—Parol evidence is inadmissible to prove the yeas and nays on the adoption of an ordinance or resolution; the record or a duly authenticated copy thereof being the only competent evidence of such fact. City of Logansport v. Crockett, 64 Ind. 319; Byer v. Town of New Castle, 124 Ind. 86; City of Aurora v. Fox, 78 Ind. 1.

Nunc pro tunc entry.—Where the city clerk has failed to keep the record of the yeas and nays, the proper remedy is for the common council to cause a *nunc pro tunc* entry of the yeas and nays to be made. Everett v. Deal, 148 Ind. 90; City of Logansport v. Crockett, 64 Ind. 319; Chamberlain v. City of Evansville, 77 Ind. 542; City of New Albany v. Endres, 143 Ind. 192.

Record evidence.—The only competent evidence of any act or proceeding of a municipal body, upon which the members of the corporate body are required to vote, is the record of the proceedings. City of Logansport v. Crockett, 64 Ind. 319; Byer v. Town of New Castle, 124 Ind. 86.

Estoppel—Parol evidence.—Where one has been induced to perform work or expend money on the faith of the proceedings of the council, the municipality is estopped, after receiving the benefit of the work, to say that the evidence of the proceedings was not properly preserved. In such cases parol evidence of the proceedings of the council is competent. Byer v. Town of New Castle, 124 Ind. 86; City of Logansport v. Dykeman, 116 Ind. 15; Ross v. City of Madison, 1 Ind. 281; State v. Hauser, 63 Ind. 155.

Record and parol evidence.—In proceedings to appropriate real estate, parol evidence of the taking of the essential steps required by the statute can not be received; such steps can be proven only by the proper record. Byer v. Town of New Castle, 124 Ind. 86; City of Aurora v. Fox, 78 Ind. 1.

The statutory mode for proving the acts of a corporation should be followed, or some

excuse shown for not doing so. City of Aurora v. Fox, 78 Ind. 1; Indianapolis, etc., R. Co. v. Jewett, 16 Ind. 273.

The statute which provides that the acts and proceedings of a corporation may be proven by a sworn copy of the record was not intended to make such copy the only legal evidence of such acts. The original record is the best evidence, and is always admissible in evidence. Green v. City of Indianapolis, 25 Ind. 490.

The record of the proceedings of the council is admissible in evidence against the city. City of Delphi v. Lowery, 74 Ind. 520.

Yeas and nays sufficiently shown.—R. S. 1894, § 3534, provides, that "on the passage of any by-law, ordinance or resolution, the yeas and nays shall be taken and entered of record." A resolution and an order for the advertisement for bids, the record of which shows that the "yeas and nays being taken under the general rule, were unanimously adopted by a full vote of the council," shows a compliance with this statute, and can not be collaterally attacked by an owner whose property is benefited by the improvement ordained. New Albany, etc., Co. v. Crumbo, 10 App. 360.

Signing, attesting and recording.—Under this section all by-laws and ordinances enacted by the common councils of cities are required, within a reasonable time after their passage, to be recorded in a book kept for that purpose, and to be signed by the presiding officer and attested by the clerk. City of Hammond v. New York, etc., R. Co., 5 App. 526, 530.

When sufficiently signed, etc.—Where an ordinance was duly and legally passed and adopted by the common council of a city and was spread of record at length and recorded in the minutes of the conncil proceedings in a book kept for that purpose, and the minutes of all the proceedings of said session at which said ordinance was passed and adopted were duly signed and attested by the clerk of said city, but said ordinance was not signed apart from said council proceedings, there was a substantial compliance with R. S. 1894, § 3534, in the matter of the signing, attesting and recording of said ordinance. Bills v. City of Goshen, 117 Ind. 221, distinguished; City of Hammond v. New York, etc., R. Co., 5 App. 526, 531.

Signature of mayor—Validity.—It is not essential to the validity of an ordinance that the same be signed by the mayor. The provision of the statute as to signing by the mayor is directory. Martindale v. Palmer, 52 Ind. 411; Shea v. City of Muncie, 148 Ind. 14.

The last preceding section has been enacted since these decisions.

Lost record—Effect.—The losing of the record of an ordinance does not render the ordinance invalid. Keehn v. McGillicuddy, 15 App. 580.

Publication, when necessary.—It is only ordinances that are penal in their character that are required to be published. City of Elkhart v. Wickwire, 121 Ind. 331, 340.

118. Penal ordinances—Publication.—57. Every by-law imposing a penalty or forfeiture for the violation thereof shall, before the same shall take effect, be published two weeks consecutively in some newspaper printed in the city: *Provided*, That in case of insurrection, riot, pestilence, conflagration or other impending danger requiring the immediate operation of such ordinance, it shall take effect as soon as proclamation is made thereof by such common council and posted at five public places in each of the wards of such city: *Provided, further*, The common council shall have discretionary power to direct the publication of any ordinance in a daily newspaper and the publication thereof for one day each in any two consecutive weeks in any daily paper shall be deemed sufficient to allow the same to take effect: *Provided*, That when no paper is published in such city, printed or

written copies of such ordinance shall be posted up by the city marshal in at least five public places in each ward of such city for two weeks before the taking effect thereof: *Provided, further*, That whenever any city shall publish any of its ordinances in book or pamphlet form, such publication shall be of itself a sufficient publication, and such ordinance or ordinances shall take effect two weeks from the date of publication appearing upon the said book or pamphlet. Any such publication in book or pamphlet form, if the same shall purport to be printed under the authority of the common council of such city, shall be presumptive evidence in all courts and places of the ordinances therein contained and of the date of adoption, and that the same are properly signed, attested and recorded. [As amended, Acts 1889, p. 342. In force May 10, 1889.] R. S. 1894, § 3535.

See *post*, §§ 211,1383 and notes, and R. S. 1894, §§ 1299, 1303.

Publication of ordinances.—An ordinance prescribing a penalty must be published pursuant to the statute before it can take effect. If an ordinance is defective, and it is sought to remedy such defect, in a penal ordinance, by a supplemental ordinance, the latter must be published before it can be effective. City of Elkhart v. Wickwire, 121 Ind. 331; Bills v. City of Goshen, 117 Ind. 221.

Under R. S. 1894, § 3499 (*ante*, § 82) in an action on a city ordinance to recover a penalty, proof of publication of the ordinance need not be made unless publication is denied under oath. Green v. City of Indianapolis, 25 Ind. 490; Lake Erie, etc., R. Co. v. City of Noblesville, 15 App. 697; Lake Erie, etc., R. Co. v. City of Noblesville, 16 App. 20.

Evidence.—When a city ordinance is admitted in evidence without objection, and it has been admitted that it has been passed, the jury is justified in concluding that the ordinance was in force, though there was no proof of publication as required by law. Lake Erie, etc., R. Co. v. City of Noblesville, 15 App. 697.

Validity of ordinance—When not in question.—An action to recover the penalty prescribed for the violation of a city ordinance does not necessarily call in question the validity of the ordinance. Griffee v. Town of Summitville, 10 App. 332.

Criminal offense—Invalidity of ordinance.—Where an act is made a misdemeanor punishable under the criminal law of the state, a city or town can not enact an ordinance prescribing a penalty for the same offense. City of Indianapolis v. Higgins, 141 Ind. 1; City of Indianapolis v. Huegele, 115 Ind. 581; Jett v. City of Richmond, 78 Ind. 316.

Prior to the enactment of the statute prohibiting towns and cities from making acts punishable by ordinance which are made public offenses punishable by the state, cities and towns could be authorized to provide by ordinance for the punishment of an act already punishable by the criminal law of the state. Williams v. City of Warsaw, 60 Ind. 457; Ambrose v. State, 6 Ind. 351; Sloan v. State, 8 Blackf. 361; Waldo v. Wallace, 12 Ind. 569.

119. Expulsion of officers.—88. Any member of the common council may be expelled or removed from office by a two-thirds vote of the whole number elected; but not a second time for the same offense. Any officer of such municipal corporation, whether elected or appointed, may be removed by a like vote. The common council shall make provision in their by-laws or ordinances as to the mode in which charges shall be preferred and the hearing of the same had. R. S. 1894, § 3536.

Removal of city attorney and city engineer, see § *ante*, § 59*a*.

Charges against officers.—This section only has reference to officers removed on

charges preferred, and not to such officers as the council may remove at its pleasure. City of Madison v. Korbly, 32 Ind. 74; City of Madison v. Kelso, 32 Ind. 79.

Power to remove officers.—The common council of a city has power to remove a corporate officer for neglect or violation of duty, whether such officer be elected by that body or by the people. Muhler v. Hedekin, 119 Ind. 481; City of Logansport v. Crockett, 64 Ind. 319. See 1 Dillon Munic. Corp., § 251, *et seq.*; 1 Beach Pub. Corp., §§ 190, 191, 192 n.

Common council not a judicial body—Injunction.—A common council is not a judicial body, and in the examination of charges preferred against a municipal officer, with a view to determine whether he shall be removed, and in removing him, it does not act judicially in such a sense as to subject its proceedings to the jurisdiction of a court of chancery, either by way of prohibition or injunction. Muhler v. Hedekin, 119 Ind. 481; Mitchell v. Wiles, 59 Ind. 364, 367.

120. City seal.—49. Each common council shall cause to be provided a corporate seal, around the margin of which shall be the name of such city and the word "Indiana," and in the center thereof, such device as the common council may direct; and such seal shall be affixed to all instruments or writings needing authentication. R. S. 1894, § 3537.

121. Streams and ferries.—50. The common council shall have exclusive power to keep open streams, and preserve, and, if necessary and expedient, change the course of rivers passing through or bordering upon the corporate limits of such city; to prevent encroachments or injury to the banks thereof, or the casting into the same of offal, dead animals, logs, or rubbish; and, within the corporate limits of such city, to establish and regulate ferries across such streams and rivers; to license any person or persons or corporation to keep such ferry or ferries, and exact a reasonable fee for such license; to designate the kind of boats to be used at such ferries, and the times and places of landing; and to prescribe the rates of ferriage to be charged at such ferry or ferries. And whenever the bank of such stream or river shall be a public highway or public wharf or commons within the limits of such city, the common council of such city shall have full and exclusive power to authorize the use of any part or parts of such bank as a landing-place for such ferry or ferries: *Provided, however,* That no new ferry or ferries shall be thus established within one mile below or above an established ferry, unless the common council of said city shall determine, by the votes of two-thirds of the members of such common council, that public convenience requires the establishment of such new ferry or ferries: *And provided, further,* That if any person be aggrieved by the establishment of such new ferry or ferries, or by the action of the common council in fixing the rates of ferriage, he shall have the right to appeal to the circuit court of the proper county, upon filing bond in the city clerk's office, within thirty days thereafter, payable to such city, with security to be approved by such clerk, and conditioned for the due prosecution of such appeal, and the payment of all costs if judgment be rendered against such appellant; and the city clerk shall cause such bond, with a certified copy of the proceedings of said common council, and all of the original papers of the cause, to be filed in the office of the clerk of

such circuit court within twenty days thereafter, and such cause shall be docketed for the ensuing term of such court, and further proceedings had and judgment rendered therein as in other cases of appeal. R. S. 1894, § 3538.

Streams—Rivers—Watercourses.—For definition of "streams," "rivers," and "watercourses" see the following: Board, etc., v. Castetter, 7 App. 309; Board, etc., v. Wagner, 138 Ind. 609, 616; Schlichter v. Phillipy, 67 Ind. 201; Weis v. City of Madison, 75 Ind. 241; Hebron, etc., Co. v. Harvey, 90 Ind. 192; Rice v. City of Evansville, 108 Ind. 7; Board, etc., v. Bailey, 122 Ind. 46.

Under the power conferred by the above section upon the city the duty devolves upon it to keep open the streams of water within the corporate limits, and if by public improvements it obstructs such streams, thereby causing them to overflow adjoining property to the injury of the owner thereof, the city will be liable in damages. City of South Bend v. Paxon, 67 Ind. 228; Weis v. City of Madison, 75 Ind. 241.

Ferries—License—Interstate waters.—A state may, either directly or through a grant of power delegated to a municipal corporation, exact reasonable license fees from the keepers of ferries living within the state, although their boats ply between landings lying in two different states. City of Madison v. Abbott, 118 Ind. 337, 339.

Interstate ferries—Municipal regulation.—The common council of a city may prescribe reasonable regulations for the government of interstate ferries, and may designate the time and place of landing, consistently with the general law and with such regulations as the board of county commissioners is authorized to make. City of Madison v. Abbott, 118 Ind. 337, 340.

Under a prior general act for the incorporation of cities it was held that a power conferred upon the common council "to regulate ferries" (1 G. & H. 223) does not include the authority to prohibit, without a license first obtained from the city. Duckwall v. City of New Albany, 25 Ind. 283; Shallcross v. City of Jeffersonville, 26 Ind. 193.

122. Contracts.—52. No member of the common council or other officer of such city shall, either directly or indirectly, be a party to or in any manner interested in any contract or agreement with such city for any matter, cause, or thing by which any liability or indebtedness is in any way or manner created against such city; and if any contract should be made in contravention of the foregoing provisions, the same shall be null and void. No officer of such city shall purchase any bond, order, claim, or demand whatever against such city, during his continuance in office, for any sum less than the amount specified therein; and any bond, order, claim, or demand purchased by any officer of such city, in contravention of the foregoing provision, shall be forfeited to such city, and no action shall ever be maintained thereon. R. S. 1894, § 3539.

See *post*, § 1420.

Contracts with officers void.—Cities can not make contracts with any officer thereof that will create any liability against the city. All such contracts are void. The above provision is strictly construed. City of Madison v. Smith, 83 Ind. 502; City of Brazil v. McBride, 69 Ind. 244; City of Fort Wayne v. Rosenthal, 75 Ind. 156; Case v. Johnson, 91 Ind. 477; Benton v. Hamilton, 110 Ind. 294; McGregor v. City of Logansport, 79 Ind. 166; Waymire v. Powell, 105 Ind. 328; 1 Beach Pub. Corp., § 177; 1 Dillon Munic. Corp., § 444; 2 Beach Conts., § 1210.

Interest of councilmen.—Where the action of a common council in voting aid to a

railroad company depends upon discretion, councilmen who are stockholders in the railroad company are not competent to act, and a grant of aid carried by their votes will not be valid. City of Madison v. Smith, 83 Ind. 502. See Mayor, etc., v. State, 57 Ind. 152.

Marshal.—A city marshal's contract for compensation for special services is void. City of Brazil v. McBride, 69 Ind. 244.

Member of board of health.—A member of a board of health of a city is a city officer; and his contract with the city to vaccinate pupils in the public schools is a void contract, and creates no liability against the city. City of Fort Wayne v. Rosenthal, 75 Ind. 156.

An officer of a city can not as agent contract with himself personally, buying what he is employed to sell, or hiring himself to do a service which he is employed to procure to be done. City of Fort Wayne v. Rosenthal, 75 Ind. 156.

City judge.—The common council of a city can not make a valid contract with the city judge for the use of his office as a city court room. McGregor v. City of Logansport, 79 Ind. 166.

This section does not prevent a city from compromising its debts through trustees appointed for that purpose, and the facts that any of such trustees are, at the time, members of her common council, and contribute voluntarily to a fund for the payment of the bond-holder, do not forfeit the debt to the city; nor does it render void a tax levied to pay such debt. City of Aurora v. Lamar, 59 Ind. 400.

123. Salaries.—51. The common council shall, within one month after the annual election in each year, fix the salaries of all the officers of such city provided for in this act, and by ordinance provide for the payment of the same; which salaries shall be paid on the first days of January, April, July, and October in each year, and, when so fixed, shall not be increased during that year: *Provided*, That no member of the common council shall be allowed a greater sum than one hundred and fifty dollars in any one year for all services rendered by him as such member. R. S. 1894, § 3540.

Salaries should be fixed by ordinance, and not by resolution. 1 Beach Pub. Corp., § 166; City of Brazil v. McBride, 69 Ind. 244.

Ordinance—Salaries, etc.—On the adoption of an ordinance or resolution fixing the salaries of officers the yeas and nays must be entered of record. City of Logansport v. Crockett, 64 Ind. 319.

In an action by an officer to recover a balance due him on salary, a copy of the ordinance fixing such salary must be filed with or set out in the complaint. City of Brazil v. McBride, 69 Ind. 244.

Under this act, the common council of a city has full power over the salaries of city officers, with no restrictions or limitations on such power, except such as are specifically mentioned in the statute. The council has power to reduce the salary of a city officer in their discretion. City of Brazil v. McBride, 69 Ind. 244; 1 Beach Pub. Corp., § 166; 1 Dillon Munic. Corp., 4th ed., § 231.

City of Evansville—Charter—Salaries of officers.—For a construction of the provisions of the former charter of Evansville upon the subject of the power of the council to fix and change salaries, see Walker v. City of Evansville, 33 Ind. 393.

The act of March 11, 1875, Acts 1875, Reg. Sess., p. 148, was not designed to, nor did it in any way, change the law concerning the salary, compensation, fees, or emoluments of city treasurers. By the above section, city treasurers are to be paid for general services, a salary to be accurately determined and fixed on some certain basis by

the city council. It may be a percentage on taxes levied, but it can not be on taxes collected during the year, nor are city treasurers entitled, in addition to such salary, to a percentage of the taxes collected by them, assessed by the city board of school commissioners. Board, etc., of Indianapolis v. Wasson, 74 Ind. 133.

The city or its officers can not charge any part of the salaries of its officers named in this section, against the taxes collected for the school corporation. Board, etc., of Indianapolis v. Wasson, 74 Ind. 133.

[Acts 1873, p. 50. In force March 10, 1873.]

124. Common council—Control of finances—General powers.—53. They shall have the management and control of the finances of the city, and of all property, real and personal, belonging thereto; and shall have the additional powers herein permitted, and may make and publish by-laws and ordinances necessary to enforce the same. The common council shall have power to enforce ordinances.

See *ante*, §§ 117, 117*a*, and notes.

The act of 1895 (Burns' Supp. 1897, § 3541), amending § 53 of the general act for the incorporation of cities, is not void in that the title fails to mention the subject of prohibiting sales of intoxicating liquors in residence portions of cities. Shea v. City of Muncie, 148 Ind. 14.

Power to make contracts.—The common council of a city alone has power to obligate the city by contract. State v. City of Michigan City, 138 Ind. 455.

The powers possessed by municipal corporations are: First, those granted in express words; second, those necessarily or fairly implied in, or incident to, the powers expressly granted; third, those essential to the declared objects and purposes of the corporation. 1 Beach Pub. Corp., § 538; 2 Beach Pub. Corp., § 1003; 1 Dillon Munic. Corp., 4th ed., §§ 89, 450; City of Crawfordsville v. Braden, 130 Ind. 149; Lewisville, etc., Co. v. State, 135 Ind. 49, 51; Champer v. City of Greencastle, 138 Ind. 339; Pittsburgh, etc., R. Co. v. Town of Crown Point, 146 Ind. 421; City of Shelbyville v. Cleveland, etc., R. Co., 146 Ind. 66; Clark v. City of South Bend, 85 Ind. 276; 2 Beach Conts., § 1138.

No contract can be made which is expressly prohibited by the statute, whatever may be the consequences; nor can a contract prohibited by statute be ratified. 1 Dillon Munic. Corp., 4th ed., § 447; City of Indianapolis v. Indianapolis, etc., Co., 66 Ind. 405; City of Valparaiso v. Gardner, 97 Ind. 6; City of Indianapolis v. Wann, 144 Ind. 175.

Subsequent legislative ratification of unauthorized municipal acts.—The legislature, by subsequent ratification, may make legal municipal action which was originally without legal sanction, but which it might, in the first instance, have authorized. Bolles v. Brimfield, 120 U. S. 759; Anderson v. Santa Anna, 116 U. S. 356.

Municipal powers—Liabilities—Local law binding on federal courts.—When the settled decisions of the highest court of a state have determined the extent and character of the powers which its political and municipal organizations may possess, the decisions are authoritative upon the courts of the United States; the decisions of the state court upon the liabilities of municipal corporations are equally binding. Claiborne County v. Brooks, 111 U. S. 400; Detroit v. Osborne, 135 U. S. 492. See B. & O. Railroad v. Baugh, 149 U. S. 368, 374, 397; Rich v. Mentz, 134 U. S. 632; Taylor v. Ypsilanti, 105 U. S. 60.

Qualification or exception to the rule.—If a contract when made is valid by the laws of the state, as then expounded by all the departments of its government, and administered in its courts of justice, its validity and obligation can not be impaired by any subsequent act of the legislature of the state or decisions of its courts, altering the construction of the law. Taylor v. Ypsilanti, 105 U. S. 60; Ohio Life Ins. Co. v. Debolt, 16 How. 416; City v. Lamson, 9 Wall. 477.

Enumerating powers—General statute.—The enumeration in the general statute for

the incorporation of cities of certain powers which would belong to the corporation without such specific enumeration is merely a declaration of a pre-existing power, or of a power which is inherent in the nature of a municipal corporation, and which is essential to enable it to accomplish the end for which it is created. Such enumeration of powers, although it include a portion of those usually implied, does not necessarily operate as a limitation of corporate powers by excluding those not enumerated. City of Crawfordsville v. Braden, 130 Ind. 149, 154; Clark v. City of South Bend, 85 Ind. 276; First Nat. Bank v. Sarlls, 129 Ind. 201.

Municipal powers—How exercised.—A municipal corporation can only exercise such powers as are conferred upon it, either expressly or by necessary implication, by the law under which it is incorporated; but where the power to do an act is conferred upon the corporation, and the law is silent as to the manner of doing such act, the corporate authorities are necessarily clothed with a reasonable discretion to determine the manner in which such act shall be done. City of Anderson v. O'Conner, 98 Ind. 168; Rushville Gas Co. v. City of Rushville, 121 Ind. 206, 214; City of Lafayette v. Cox, 5 Ind. 38; Eichels v. Evansville, etc., Co., 78 Ind. 262; City of Crawfordsville v. Braden, 130 Ind. 149; Miller v. Board, etc., 66 Ind. 167; City of Richmond v. McGirr, 78 Ind. 197; Newcomb v. City of Indianapolis, 141 Ind. 451; 1 Beach Pub. Corp., §§ 541, 542.

Method of exercise of power prescribed.—When the method for the exercise of the power is prescribed such method must be followed; the acts authorized in such case must be done in the manner prescribed by the charter; and, especially when such acts affect private property, the powers granted must be strictly pursued. Kyle v. Malin, 8 Ind. 34; City of Aurora v. West, 22 Ind. 88; City of Anderson v. O'Conner, 98 Ind. 168; Cross v. Morristown, 18 N. J. Eq. 305; 1 Dillon Munic. Corp., § 307, n., p. 385; Churchman v. City of Indianapolis, 110 Ind. 259; Smith v. Board, etc., 6 App. 153, 163; 1 Beach Pub. Corp., §§ 541, 542; 2 Beach Conts., § 1136.

Discretion—Control by courts.—The discretion of municipal corporations, within the sphere of their powers, is not subject to judicial control, except in case of fraud or where the discretion has been grossly abused to the oppression of the inhabitants. City of Terre Haute v. Terre Haute, etc., Co., 94 Ind. 305, 307; City of Crawfordsville v. Braden, 130 Ind. 149, 158; City of Anderson v. O'Conner, 98 Ind. 168; Newcomb v. City of Indianapolis, 141 Ind. 451.

A city has the power to operate a plant of its own for the purpose of lighting its streets, and consequently it has the power to purchase all the materials and employ all the labor necessary for carrying it on. The right to employ labor, etc., is among the general discretionary powers which are not subject to judicial control except in cases of fraud, or where it is shown that such discretion has been grossly abused to the detriment of public interests; and such contracts, when they do not come within these exceptions, will be upheld. Rushville, etc., Co. v. City of Rushville, 121 Ind. 206, 213; City of Crawfordsville v. Braden, 130 Ind. 149, 158; Rockebrandt v. City of Madison, 9 App. 227, 229.

Charter—Strict construction.—Municipal charters are to be construed strictly, yet they are to be so construed as to carry into effect every power clearly intended to be conferred on the municipality, and every power necessary to be implied for the complete exercise of the powers granted. Smith v. City of Madison, 7 Ind. 86; Kyle v. Malin, 8 Ind. 34; Board, etc., v. Silvers, 22 Ind. 491; Robb v. City of Indianapolis, 38 Ind. 49, 51; Pittsburgh, etc., R. Co. v. Town of Crown Point, 146 Ind. 421.

Same—Implied powers.—No incidental powers can be implied, except such as are essential to the accomplishment of the declared objects or purposes of the corporation and for its continued existence; doubtful claims to power, or any doubt or ambiguity in the terms used by the legislature, are resolved against the corporation. Pittsburgh, etc., R. Co. v. Town of Crown Point, 146 Ind. 421; City of Shelbyville v. Cleveland, etc., R. Co., 146 Ind. 66.

All persons contracting with a municipal corporation must at their peril inquire into the power of the corporation and its officers to make the contract. Union School Township v. First National Bank, 102 Ind. 464, 476; Pine Civil Township v. Huber Mfg. Co., 83 Ind. 121; 1 Dillon Munic. Corp., §§ 457, 477, and note, § 488; City of Indianapolis v. Wann, 144 Ind. 175; Hamilton v. City of Shelbyville, 6 App. 538; City of La Porte v. Gamewell, etc., Co., 146 Ind. 466.

Implied and incidental powers.—The authority to construct sewers for the drainage of streets is an incidental power of a municipal corporation invested with a general power over highways within the corporate limits, and the corporate officers have authority to contract for a right to construct a sewer through private property. Leeds v. City of Richmond, 102 Ind. 372.

Municipal corporations have implied power to light the streets and public places, etc. No statute is necessary to give them this power. City of Crawfordsville v. Braden, 130 Ind. 149.

Cities have also the incidental power to compromise and adjust disputed claims, and to employ agents or attorneys to accomplish that end.

In respect to contracts which are within the ordinary corporate power of the city, and in relation to which no statutory requirements are laid down, or mode of procedure prescribed, such city will be bound by its contract, and will be affected by the principles of ratification, in the same manner as an individual, and will be bound by implied contracts or agreements to pay for services performed for it at its request, and such implied agreements may be deduced by inference by authorized corporate acts, without either a vote or writing. City of Logansport v. Dykeman, 116 Ind. 15.

Among the implied powers possessed by municipal corporations is the power to enact and enforce reasonable by-laws and ordinances for the protection of health, life and property. City of Crawfordsville v. Braden, 130 Ind. 149, 155; Corporation of Bluffton v. Studabaker, 106 Ind. 129; Clark v. City of South Bend, 85 Ind. 276; Baumgartner v. Hasty, 100 Ind. 575.

For general statement of implied powers, see 1 Beach Pub. Corp., § 637, *et seq.*

Cities may execute contracts for the purpose of carrying out the intentions and objects of their organizations, and when such contracts do not restrict the legitimate exercise of the public functions of such cities, or are not in restraint of the legislative power thereof, they are valid and binding on the corporations. City of Valparaiso v. Gardner, 97 Ind. 1, 4; City of Indianapolis v. Indianapolis, etc., Co., 66 Ind. 396.

Municipal corporations have power to make contracts in aid of their local government, and the test of the validity of such a contract is whether or not the object to be accomplished will aid in such government. Hamilton v. City of Shelbyville, 6 App. 538.

Distinction between powers.—There is a distinction between powers of a legislative character and powers of a business nature. City of Valparaiso v. Gardner, 97 Ind. 1, 4; City of Vincennes v. Citizens', etc., Co., 132 Ind. 114, 126.

Evidence—Report of committee—Admission.—In an action against a city to recover on a contract for professional services, the report of the committee of the common council, on the subject of the performance of such contract, which is in the nature of an admission that the council had notice of the contract, and that the plaintiff was proceeding under it, is admissible in evidence. City of Logansport v. Dykeman, 116 Ind. 15.

How contracts may be made.—In the transaction of mere matters of business, such as the purchase of goods, the employment of persons or agencies to perform service for the municipality, a formal ordinance, by-law or resolution is not necessary, nor need such contracts be in writing. City of Logansport v. Dykeman, 116 Ind. 15, 18; Over v. City of Greenfield, 107 Ind. 231.

Contracts by the common council of a city can only be made by an order, resolution or ordinance, passed in the manner required by the statute. City of Terre Haute v. Lake, 43 Ind. 480; Pettis v. Johnson, 56 Ind. 139, 151.

The contracts of corporations rest upon the same footing as those of natural persons, and are valid without seal, whether expressly made by the corporation, or arising by implication from the general relation of the agent toward the corporation, or from the ratification of acts done by persons assuming to act as agents, although without sufficient authority. Ross v. City of Madison, 1 Ind. 281; Trustees, etc., v. Johnson, 53 Ind. 273, 275.

Ultra vires—Injunction.—The execution of a contract is a ministerial act, and may be enjoined if the contract is in excess of corporate authority, and the suit may be maintained by a tax-payer. City of Valparaiso v. Gardner, 97 Ind. 1, 4; Sackett v. City of New Albany, 88 Ind. 473; City of Madison v. Smith, 83 Ind. 502; Noble v. City of Vincennes, 42 Ind. 125; City of Richmond v. Davis, 103 Ind. 449; 2 Beach Conts., §§ 1156, 1167.

Limit of power to contract.—While the power of a city to contract for a supply of water for public use is, in a general sense, a discretionary one, it can not be so exercised as to create a corporate debt beyond that limited by law, nor to surrender or suspend legislative power. City of Valparaiso v. Gardner, 97 Ind. 1, 3.

A city can not by contract surrender any of its legislative or discretionary powers confided to it for the public good, and which may or may not be exercised at its pleasure in the interest of the public. City of Peru v. Gleason, 91 Ind. 566, 577; Schipper v. City of Aurora, 121 Ind. 154.

Oral contract, when valid.—An oral contract made by a city for the purchase of personal property of the value of over $50 is void under the statute of frauds, unless it is brought within some of the exceptions of the statute. Over v. City of Greenfield, 107 Ind. 231, 236.

Contract with attorney—Service accepted.—Where the common council of a city, properly convened, enters into a contract with an attorney, or where an attorney is employed through the agency of a committee or other authorized person, and has performed services of which the municipality has accepted the benefit, it may not afterward object that the contract was not in writing, or that the vote of the council, on the question of employment, does not appear upon its records. City of Logansport v. Dykeman, 116 Ind. 15, 19.

General averment of contract—Presumption.—In an action against a city for services rendered in securing the settlement of its indebtedness, where there is an averment in the complaint that such city entered into a contract with the plaintiff, whereby the latter undertook and agreed, in consideration, etc., it will be presumed that whatever was necessary to be done by the common council, in respect to its records in relation to entering into such contract, was properly done; and no additional averment as to the manner of executing the contract is necessary. City of Logansport v. Dykeman, 116 Ind. 15, 18.

A complaint on a cause of action based upon the making or annulling of a contract by a city must contain a copy of the orders of the common council in making and annulling the contract. City of Terre Haute v. Lake, 43 Ind. 480.

Contracts may be ratified.—Contracts which are within the ordinary corporate powers of a city, and in reference to which there are no statutory requirements, may be ratified by cities as private contracts between individuals may be ratified. City of Logansport v. Dykeman, 116 Ind. 15; Ross v. City of Madison, 1 Ind. 281.

Notice of termination of contract.—Where notice must be given by a city of the termination of a contract, one given by a councilman, without authority from the common council, is not sufficient; but a notice given by the city clerk, thereunto ordered by the common council, is sufficient. City or Indianapolis v. Bly, 39 Ind. 373.

Can not purchase real estate for school purposes.—A city, organized under the general law for the incorporation of cities, has no power to buy and give its promissory notes for a county seminary, though for school purposes in the city. That power belongs to the school corporation of the city. State v. City of Terre Haute, 87 Ind. 212.

Sale of city property—Gift.—A municipal corporation may sell property of the city not held for a public purpose. The power to do so is an incidental power inherent in all corporations, public and private, unless withheld by the law under which they are organized. The officers of the city have no power to make gifts of city property. City of Terre Haute v. Terre Haute, etc., Co., 94 Ind. 305; O'Boyle v. Shannon, 80 Ind. 159; Shannon v. O'Boyle, 51 Ind. 565; City of Ft. Wayne v. Lake Shore, etc., R. Co., 132 Ind. 558.

Sales of property made by municipal corporations in the exercise of discretionary power can not be annulled for the reason that the bargain was improvident. City of Terre Haute v. Terre Haute, etc., Co., 94 Ind. 305.

Common council—Regularity of proceedings—Presumption.—Where the common council by resolution accepts a proposition for the sale of property, the regularity of the proceedings by which such resolution is adopted will be presumed, and averments showing the particular manner of its adoption are unnecessary. Over v. City of Greenfield, 107 Ind. 231; City of Logansport v. Dykeman, 116 Ind. 15.

Right to alienate corporate property.—A municipal corporation possesses the implied right to alienate its property, real or personal, of a private nature, unless restrained by charter or statute, but it can not dispose of property of a public nature in violation of the trust upon which it is held. There is a distinction between property purchased for a public use, and not yet dedicated, and property purchased for that purpose and actually dedicated to that use. A deed which vests title to property in a municipal corporation may be of such a character as to dedicate the property to a public use, and where a deed vests the title to property in fee-simple in the municipal corporation, without limitation or restriction as to its alienation, the corporation has the right, any time before it is dedicated to a public use, to dispose of the property. City of Fort Wayne v. Lake Shore, etc., R. Co., 132 Ind. 558, 563.

Property of city—Sale on legal process.—The property of a municipal corporation held for public or governmental purposes can not be sold on any legal process. It can not be sold upon execution, nor for the enforcement of street assessment liens or for the payment of mechanics' liens. Lowe v. Board, etc., 94 Ind. 553; President, etc., v. City of Indianapolis, 12 Ind. 620; Board, etc., v. Norrington, 82 Ind. 190; Board, etc., v. O'Connor, 86 Ind. 531; Fatout v. Board, etc., 102 Ind. 223; Secrist v. Board, etc., 100 Ind. 59; Townsend v. Cleveland, etc., Co., 18 App. 568.

Mechanics' lien—Notice to building committee—Liability of city.—Notice to the members of a building committee of the common council, that the persons giving the notice have filed a lien on the building constructed by the city under the supervision of the committee, and that said members will be held liable to a certain amount for materials furnished for said building, will fix no personal liability on the city. City of Crawfordsville v. Irwin, 46 Ind. 438.

Legislative and ministerial power.—A city is not liable for the exercise of a legislative power, but is liable for the negligent performance of ministerial acts. Weis v. City of Madison, 75 Ind. 241, 250; Cummins v. City of Seymour, 79 Ind. 491, 494; City of Evansville v. Decker, 84 Ind. 325, 326; Rozell v. City of Anderson, 91 Ind. 591, 594; City of North Vernon v. Voegler, 103 Ind. 314, 316; Dooley v. Town of Sullivan, 112 Ind. 451, 453; City of Logansport v. Wright, 25 Ind. 512; 1 Beach Pub. Corp., §§ 258, 259, 260.

Police power—Delegation by legislature.—The police power primarily inheres in the state; but the legislature may delegate, at least a part of it, to municipal corporations, either in express terms or by implication arising from the fact of the creation of such corporation. City of Crawfordsville v. Braden, 130 Ind. 149, 154.

Health and safety—Right to guard.—By the act authorizing or incorporating a municipal corporation, the legislature expressly delegates to the municipality the power to preserve the health and safety of its inhabitants. City of Crawfordsville v. Braden, 130 Ind. 149, 155. See 2 Beach Conts., § 1141.

Failure to enact or enforce laws, etc.—A municipal corporation is not liable for failure to exercise governmental powers, as for failure to enforce the state laws or its own ordinances, nor for omitting to enact ordinances. City of Lafayette v. Timberlake, 88 Ind. 330, 331; City of Lafayette v. Rose, 88 Ind. 471; Kistner v. City of Indianapolis, 100 Ind. 210, 220; Summers v. Board, etc., 103 Ind. 262, 264; Wheeler v. City of Plymouth, 116 Ind. 158, 159; City of Anderson v. East, 117 Ind. 126, 127; Town of Monticello v. Fox, 3 App. 481, 487.

Actions—Statute of limitations.—The statute of limitations does not run against the sovereign power, but as against municipal corporations, or corporations deriving their power from the sovereign, and which are, in a limited sense, governmental, as counties and cities, the statute of limitations does run, except as to property devoted to a public use, or held upon a public trust, and contracts and rights of a public character. City of Bedford v. Willard, 133 Ind. 562; Sims v. City of Frankfort, 79 Ind. 446; Churchman v. City of Indianapolis, 110 Ind. 259.

Where land belonging to a county is not held upon a public trust, nor devoted to a public use, and is conveyed to a city, the statute of limitations will run against the county and its grantee, in favor of one who, with his grantors, has had uninterrupted adverse possession of said land for twenty years or more. City of Bedford v. Willard, 133 Ind. 562.

Municipal corporations, as respects public rights, are not within the ordinary limitation statutes. Mere permissive possession of a part of a street for the statutory period of limitation will not confer title. Sims v. City of Frankfort, 79 Ind. 446.

The mere receipt of money, under a claim or color of right, by a public officer, for the recovery of which an ordinary action will lie, does not constitute him a trustee in such a sense as to preclude the defense of the statute of limitations. Churchman v. City of Indianapolis, 110 Ind. 259.

Recovery—When may be had.—A recovery can be had against a municipal corporation only where it negligently performs or fails to perform a ministerial duty imposed by law. City of Anderson v. East, 117 Ind. 126, 128.

Ordinance and by-laws.—The words "ordinance" and "by-law" are used interchangeably in the statute and are synonymous. Bills v. City of Goshen, 117 Ind. 221, 225; 1 Beach Pub. Corp., § 483.

Resolution.—Where a city has power to act in a given instance, and its charter or the general law does not prescribe the manner of its action, it may accomplish its purpose either by a resolution or by an ordinance. City of Crawfordsville v. Braden, 130 Ind. 149, 162; 2 Beach Conts., § 1144.

But when the statute requires an act to be by ordinance, it can not be done by resolution. 1 Beach Pub. Corp., §§ 484, 485.

Title—Constitutional law.—The provision of the constitution relative to titles to acts of the legislature has no application to city ordinances. Baumgartner v. Hasty, 100 Ind. 575, 585; Green v. City of Indianapolis, 25 Ind. 490.

Ordinances are laws.—Ordinances of a city, duly enacted pursuant to powers conferred upon it by its charter, are in the nature of local laws. They have the force of statutes. Swindell v. State, 143 Ind. 168; Penn. Co. v. Stegemeier, 118 Ind. 305, 308; Town of Elwood v. Citizens', etc., Co., 114 Ind. 332; Madison, etc., R. Co. v. Taffe, 37 Ind. 361; Penn. Co. v. Hensil, 70 Ind. 569; Simons v. Gaynor, 89 Ind. 165; 1 Dillon Munic. Corp., §§ 307, 308; Bills v. City of Goshen, 117 Ind. 221; Pittsburgh, etc., R. Co. v. Hays, 17 App. 261; Elliott Roads and Streets, p. 625.

Rules of council—Repeal.—Rules in writing for the regulation of the proceedings of the common council, duly enacted, have the force of ordinances. They can not be repealed upon a mere verbal motion by a majority vote of the council. State v. Swindell, 146 Ind. 527; Swindell v. State, 143 Ind. 153.

Charter and ordinances.—The charter is the fundamental law of a city, and when

an ordinance of the common council conflicts with any of its provisions, the ordinance is necessarily inoperative and void. Mitchell v. Wiles, 59 Ind. 364.

Upon an amendment or change of the charter the existing ordinances that are in harmony with the amendment remain in force; only those which are in conflict with the amended charter are thereby repealed. Chamberlain v. City of Evansville, 77 Ind. 542; 1 Beach Pub. Corp., § 81.

Enactment—Mode of procedure.—The mode of procedure in the enactment of ordinances when committed to the authority or power of a city council, and not regulated by the charter laws of that city, may be fixed by an ordinance, which will govern so long as it is in force, in the enactment of ordinances. Swindell v. State, 143 Ind. 153; State v. Swindell, 146 Ind. 527.

An ordinance providing that all ordinances shall be read three times before being passed, and that no ordinance shall pass or be read the third time on the same day in which it is introduced unless the rule be suspended by a two-thirds vote, can not be annulled or repealed by a mere majority vote. Swindell v. State, 143 Ind. 153; State v. Swindell, 146 Ind. 527.

Majority necessary to passage.—When there is a quorum of a city council present, a majority vote of such quorum present can pass an ordinance. Rushville, etc., Co. v. City of Rushville, 121 Ind. 206, 209.

Taking effect in the future.—The fact that part of the provisions of an ordinance is not to take effect until a date designated in the future will not affect either the validity of the entire ordinance nor of the particular provisions. City of Rushville v. Rushville, etc., Co., 132 Ind. 575, 578.

Prior ordinance incorporated by reference.—A prior ordinance may be incorporated in a subsequent ordinance and carried forward by appropriate language. Baumgartner v. Hasty, 100 Ind. 575, 576.

Construction of ordinances.—The construction of municipal ordinances is governed by the same rules that are applied to statutes. Zorger v. City of Greensburg, 60 Ind. 1; City of Indianapolis v. Consumers', etc., Co., 140 Ind. 107; Martindale v. Palmer, 52 Ind. 411; Pittsburg, etc., R. Co. v. Hays, 17 App. 261.

The title of an ordinance may be considered to ascertain the meaning of the ordinance. Martindale v. Palmer, 52 Ind. 411.

An ordinance will be construed independently of a void clause in it, where the void clause can be stricken out without affecting the remainder. City of Indianapolis v. Bieler, 138 Ind. 30.

Effect of ordinance valid in part.—The fact that an ordinance regulating the licensing of vendors of intoxicating liquors requires a license for the sale of a liquor which is not the subject of municipal regulation, does not invalidate the ordinance so far as it relates to other liquors. Wagner v. Town of Garrett, 118 Ind. 114, 118.

Amendment of ordinances.—An ordinance can not be amended on motion, but must be done by the passage of another ordinance. Bills v. City of Goshen, 117 Ind. 221, 227; Swindell v. State, 143 Ind. 163.

Power to change or repeal by-laws.—The power to pass by-laws, ordinances, or regulations affecting the government of a municipal corporation, carries with it by implication the power to modify or repeal such by-laws, ordinances and regulations, unless the power is restricted in the law conferring the right, or unless such change or repeal would affect a vested right under an order or regulation lawfully adopted. Welch v. Bowen, 103 Ind. 252, 256.

Express repeal.—An express repeal of an ordinance can be effected only by an act of equal grade with that by which the ordinance was originally put in operation. No part or feature of an existing ordinance can be changed by a mere resolution of the council, even though signed by the mayor and recorded. Nor can such ordinance be changed by a motion made and carried. Swindell v. State, 143 Ind. 163; Bills v. City of Goshen, 117 Ind. 221; Horr and Bemis Munic. Ord., § 61.

Repealed by passage of another.—The passage of an ordinance which is within the provisions of another ordinance repeals it *pro tanto*. City of Vincennes v. Citizens', etc., Co., 132 Ind. 114, 128.

Ordinance—Amendment—Repeal—Natural gas.—Where there is an ordinance regulating the price to be charged by companies furnishing natural gas to consumers, a subsequent amendatory ordinance which increases the price to be charged by a particular company for a certain time, does not repeal the prior ordinance, and, on the expiration of the time, the prior ordinance controls. Thistlethwaite v. State, 149 Ind. 319.

Ordinances—Repeal by implication.—The rules which control the repeal of statutes by implication are clearly applicable to questions arising relative to municipal ordinances, and a statute or ordinance which covers the whole subject-matter of an older one, adds new provisions, prescribes different penalties, and is evidently intended to supersede and take the place of the prior act or ordinance, repeals by implication such prior act or ordinance. Terre Haute, etc., R. Co. v. City of South Bend, 146 Ind. 239.

Effect of repeal on pending prosecutions.—"If, during the progress of a prosecution, the ordinance on which it is based is repealed, the prosecution must fail, unless the repealing ordinance contains some express provisions whereby all pending prosecutions are saved from its operation." Horr and Bemis Munic. Ord., § 63; Terre Haute, etc., R. Co. v. City of South Bend, 146 Ind. 239.

When void because unreasonable.—Unless the legislature has, in terms, conferred on a municipal corporation the power to pass ordinances relating to a particular subject, the courts may inquire into the reasonableness of an ordinance on such subject enacted under the general or incidental power of such corporation. Coal Float v. City of Jeffersonville, 112 Ind. 15, and Railway Company v. Harrington, 131 Ind. 426, modified; Champer v. City of Greencastle, 138 Ind. 339.

Where power exists to pass and enforce an ordinance, there can be no inquiry by the courts into the wisdom or reasonableness of the power or its exercise, unless it infringe some provision of the constitution. Rund v. Town of Fowler, 142 Ind. 217; Steffy v. Town of Monroe City, 135 Ind. 466; Coal Float v. City of Jeffersonville, 112 Ind. 15; Cleveland, etc., R. Co. v. Harrington, 131 Ind. 426; Skaggs v. City of Martinsville, 140 Ind. 476; City of Shelbyville v. Cleveland, etc., R. Co., 146 Ind. 66.

An ordinance can not be successfully assailed in a judicial tribunal for unreasonableness when it has been adopted by express authority of the legislature without conflict with any constitutional prohibition or fundamental principles. Beiling v. City of Evansville, 144 Ind. 644.

Motive not open to inquiry.—The rule that courts will not inquire into the motives of the legislative department in the enactment of laws is applicable to the legislative acts of municipal corporations. The motive for passing the ordinance by the common council can not be inquired into. Lilly v. City of Indianapolis, 149 Ind. 648; 1 Dillon Munic. Corp., § 311; 1 Beach Pub. Corp., § 516.

General power—Mode of exercise.—When the power granted by the statute is in general terms, and the mode and manner of its exercise are not prescribed, but are left to the discretion of the city, the courts may inquire whether, in the enactment of the ordinance, there has been a reasonable exercise of the power granted, or whether, in fact, power was given the city to do what it attempted to do by the ordinance. City of Shelbyville v. Cleveland, etc., R. Co., 146 Ind. 66.

Reasonableness of ordinances—When open to inquiry and when not.—When the legislature in terms confers upon a municipal corporation the power to pass ordinances of a specified nature and character, and with precision defines the details of the same and prescribes the penalties that may be imposed, if the power thus granted be not in conflict with the constitution, an ordinance within the power granted, prescribing penalties within the designated limit, can not be set aside by the courts because they may deem it unreasonable, or against public policy. But when the power to legislate upon

a given subject is granted, and the mode of its exercise and the details of such legislation are not prescribed, then the ordinance passed pursuant thereto must be a reasonable exercise of the power; an ordinance which the municipality seeks to uphold by virtue of its incidental powers, or under a general grant of authority, will be declared invalid, unless it be reasonable, fair and impartial, and not arbitrary or oppressive. Pittsburgh, etc., R. Co. v. Town of Crown Point, 146 Ind. 421; City of Shelbyville v. Cleveland, etc., R. Co., 146 Ind. 66; Champer v. City of Greencastle, 138 Ind. 339; Shea v. City of Muncie, 148 Ind. 14.

Same.—Where the power to enact the particular ordinance is specifically conferred on the municipality, the question whether it is reasonable can no more be raised so as to affect its validity than could the same objection be raised against the statute granting the power so as to affect its validity. Shea v. City of Muncie, 148 Ind. 14.

"An ordinance is not void for want of clearness of expression or on account of a difficulty in construing or applying its provisions." "An ordinance is sufficient which follows the words of an expressed power." Horr and B. Munic. Ord., §§ 78–193; Shea v. City of Muncie, 148 Ind. 14; Neilis v. Hayward, 48 Ind. 19.

Validity of certain ordinances—Discrimination.—Municipal ordinances placing restrictions upon lawful conduct, or the lawful use of property, must, in order to be valid, specify the rules and conditions to be observed in such conduct or business; and must admit of the exercise of the privilege by all citizens alike, who will comply with such rules and conditions; and must not admit of the exercise, or of an opportunity for the exercise, of any arbitrary discrimination by the municipal authorities, between citizens who will comply. City of Richmond v. Dudley, 129 Ind. 112; Bills v. City of Goshen, 117 Ind. 221; Yick Wo v. Hopkins, 118 U. S. 356; City of Newton v. Belger, 143 Mass. 598; City of Plymouth v. Schultheis, 135 Ind. 339; Bessonies v. City of Indianapolis, 71 Ind. 189; Graffty v. City of Rushville, 107 Ind. 502.

Same—Residents and non-residents.—An ordinance is invalid which discriminates in favor of residents of the city or state as against non-residents. City of Indianapolis v. Bieler, 138 Ind. 30; Graffty v. City of Rushville, 107 Ind. 502.

An ordinance will also be void if it discriminates in favor of some residents as against other residents. City of Indianapolis v. Bieler, 138 Ind. 30; Bills v. City of Goshen, 117 Ind. 221; City of Plymouth v. Schultheis, 135 Ind. 339.

Valid ordinances are usually binding not only upon the inhabitants of the corporation, but also upon strangers and non-residents who come within the corporate limits, and the latter, as well as the former, must take notice of their provisions. 1 Dillon Munic. Corp., §§ 354, 355, *et seq.*; 2 Beach Pub. Corp., § 1242, n.

Natural gas ordinances, validity of.—Where a city, by ordinance, exercises the power given it by statute to regulate the distribution of natural gas, and to require those to whom the privilege of using the streets is granted to pay a reasonable license (R. S. 1894, § 4306), and such ordinance authorizes the licensee to lay its mains through the streets, etc., and to take them up from time to time for changes or repairs, a clause in such ordinance which provides that the city attorney shall enforce compliance with such ordinance and all other ordinances hereafter passed does not reserve the right to such city to bind the licensee by a subsequent ordinance, which prohibits it from cutting into a certain macadamized street except on certain onerous conditions. City of Indianapolis v. Consumers', etc., Co., 140 Ind. 107.

The fact that the macadam pavement was laid after the passage of the ordinance licensing the use of the streets for gas mains, and the acceptance thereof by the licensee, did not restrict the right of the licensee to lay its mains through the streets in a prudent and lawful manner, and from time to time to take them up and repair them, as provided by such ordinance. City of Indianapolis v. Consumers', etc., Co., 140 Ind. 107.

The city of Indianapolis passed an ordinance, as empowered by statute, authorizing any corporation for the supply of natural gas to lay mains through the streets, etc.,

and to take them up for repairs or alterations, and requiring the licensee to file a fifty-thousand-dollar bond to restore all streets, etc., "to as good condition as they were before," and to maintain them in such condition for one year, etc. The passage of a subsequent ordinance, which prohibited the cutting into any paved street without first securing the consent of the council, and filing a bond, etc., was not a valid exercise of police power as to a licensee which had accepted the former ordinance, and complied with all its conditions. City of Indianapolis v. Consumers', etc., Co., 140 Ind. 107.

Where the part of an ordinance which is void for discrimination can be struck out, leaving the remainder complete in itself, sensible and capable of being executed against all alike, the latter will stand. City of Indianapolis v. Bieler, 138 Ind. 30.

Validity—Jurisdiction on appeal.—If an ordinance is questioned because it is unconstitutional, or in conflict with the statutes, or is unreasonable, these are questions concerning the public, and the jurisdiction upon appeal is in the supreme court; but an objection to an ordinance which goes only to matters of form, or to irregularities in the proceedings of the municipal authorities, is not a question of that grave character and dignity that affect the public, and in such case jurisdiction to determine the validity of the ordinance assailed is entertained by the appellate court. Pittsburg, etc., R. Co. v. Hays, 17 App. 261; City of Hammond v. New York, etc., R. Co., 5 App. 526; Dugger v. Hicks, 11 App. 375; New Albany, etc., Co. v. Crumbo, 10 App. 360.

Interstate commerce.—Ordinances which discriminate against residents of other states, who are engaged in selling goods located in such other states, are void, on the ground that they interfere with interstate commerce. Martin v. Town of Rosedale, 130 Ind. 109; McLaughlin v. City of South Bend, 126 Ind. 471; 1 Beach Pub. Corp., §§ 506, 507.

Ordinances which discriminate against other communities of the same state are void, because in conflict with § 23, art. 1, of the state constitution. Graffty v. City of Rushville, 107 Ind. 502.

Ordinances must be general in their nature and impartial in their operation. Citizens', etc., Co. v. Town of Elwood, 114 Ind. 332, 338; Indianapolis Cable, etc., Co. v. Citizens', etc., Co., 127 Ind. 369; Crowder v. Town of Sullivan, 128 Ind. 489.

When validity not in question—Action.—An action to recover the penalty prescribed for the violation of an ordinance does not necessarily call in question the validity of the ordinance. Griffee v. Town of Summitville, 10 App. 332.

A person having no interest under an ordinance can not successfully attack it on the ground of invalidity. Long v. City of Portland, 151 Ind. 442.

Collateral attack.—Where the right and power of a common council of a city to pass a resolution depends on the existence of antecedent facts, the decision and recitation of the council that such facts do exist is conclusive; and such resolution can not be attacked collaterally in an action to enforce it by showing that the recitations of the council in the resolution relative to the existence of such facts were false. City of Indianapolis v. Consumers', etc., Co., 140 Ind. 246; Evansville, etc., R. Co. v. City of Evansville, 15 Ind. 395; McEneney v. Town of Sullivan, 125 Ind. 407; Town of Cicero v. Williamson, 91 Ind. 541; Ricketts v. Spraker, 77 Ind. 371; Dupuy v. City of Wabash, 133 Ind. 336.

Proceedings of council—Jurisdiction—When void—Injunction.—When the common council proceeds without jurisdiction its proceedings are void, and in such case injunction is the proper remedy. City of Ft. Wayne v. Shoaff, 106 Ind. 66; Goring v. McTaggart, 92 Ind. 200; Wilson v. Poole, 33 Ind. 443; Balfe v. Lammers, 109 Ind. 347, 349.

Injunction—Multiplicity of actions.—A court of equity may enjoin the enforcement of a void city ordinance in order to prevent a multiplicity of actions, or at the instance of any persons whose interests are to be injuriously affected thereby; but if it is not

void, a court of equity can not determine whether or not the plaintiff is guilty of its violation. Davis v. Fasig, 128 Ind. 271; City of Rushville v. Rushville, etc., Co., 132 Ind. 575.

Unless the party asking an injunction points out some particular provision in the ordinance that infringes upon his rights and privileges, in order to justify a court in declaring an ordinance void, the ordinance must be void *in toto*. Davis v. Fasig, 128 Ind. 271.

First. To regulate or prohibit the use of hand organs, or instruments of any annoying character, or music of itinerant performers, in the streets, lanes, alleys, or public places of the city.

Second. To fill up or drain any lot or parcel of ground within such city, or within two miles thereof, whenever water has or may become so stagnant or noxious as to be, in the opinion of such council, a nuisance, and injurious to the health or comfort of such city or any part thereof, at the expense of the owner thereof, under such reasonable regulations as the common council shall prescribe: *Provided, however*, that not to exceed ten per cent. of the value of such lot or land as the same is valued and assessed on the tax duplicate for city purposes, shall be expended in filling up or draining the same in any one year.

Drainage—Legislative power.—The power of a city to drain lands within or without its corporate limits is a legislative power, to be exercised or not at discretion, and such discretion can not be surrendered by contract with the owners of such lands. City of Peru v. Gleason, 91 Ind. 566; Hamilton v. City of Shelbyville, 6 App. 538.

The governmental functions and powers of a municipal corporation must remain free and untrammeled to be exercised for the benefit of the inhabitants as the emergencies may arise, and a municipal corporation can not make a contract to furnish drainage for the lands of a private person. Such a contract, being a limitation on the governmental functions, is absolutely void.

Where a complaint against a municipal corporation, for failure to properly construct a ditch and keep it in repair, declares upon a contract such action must fail. Hamilton v. City of Shelbyville, 6 App. 538.

City not liable on contract.—Within and adjoining a city was a tract of swampy land, injurious to the public, for the purpose of draining which the city contracted with G., a proprietor of a part of the swamp outside of the city limits, and other separate owners of parts of it within and without, whereby the city agreed to make a ditch within its limits, to serve as an outlet, and each proprietor to continue the same through his own tract. This would have rendered the swampy land valuable. G. and the other proprietors performed their agreement, but the city failed. The city was not liable for damages for breach of the contract. City of Peru v. Gleason, 91 Ind. 567.

Drainage—Use of highway.—A municipal corporation has authority to use a public way lying outside of its boundaries for the purpose of drainage, without paying or tendering damages to adjacent property owners, and for consequential injuries resulting from the proper and reasonable exercise of such authority there can be no recovery. For injury resulting from a negligent error in the plan of a drain or sewer the city will be liable. Cummins v. City of Seymour, 79 Ind. 491.

Third. To prevent or regulate the use of firearms, fireworks or other things or practices tending to endanger personal property.

Explosives—Liability of city.—A city is not liable for damages caused to the prop-

erty of a citizen by the negligent manner in which other persons, acting under permission from the mayor, fire explosives within the city. Wheeler v. City of Plymouth, 116 Ind. 158.

Fourth. To direct the location of tallow candleries, soap factories, and other buildings or structures; and to prohibit the erection of such buildings or the continuance of noxious trades or business therein, whenever the health or welfare of the city shall require the same; and for that purpose shall have jurisdiction two miles in every direction from the city limits.

Tallow chandleries—Soap factories—Slaughter-house, etc.—A municipal corporation seeking, by ordinance, to place a restriction on the lawful use of property, must specify in such ordinance the rules and conditions to be observed in such business, and must permit the exercise of the privilege to all citizens who will comply with the conditions, and must not admit of the exercise, or of an opportunity of an exercise, of any arbitrary discrimination by municipal authorities between citizens so complying, otherwise the ordinance will be void. City of Plymouth v. Schultheis, 135 Ind. 339; City of Richmond v. Dudley, 129 Ind. 112; Bessonies v. City of Indianapolis, 71 Ind. 189. See Shea v. City of Muncie, 148 Ind. 14.

Fifth. To establish cemeteries, or burial places within or without such city, and to provide for the sanctity of the dead, and to prohibit interments except in cemeteries heretofore established by law.

Power over cemeteries.—Cities can only subject to the control of the city sexton the cemeteries that belong to the cities. Bogert v. City of Indianapolis, 13 Ind. 134.

The authorities of a city have no power to prohibit the establishment of cemeteries or burying-grounds outside of city limits, nor have they any control over them when so established, under this clause; but see subsequent legislation, *post*, § 1096, *et seq.* Begein v. City of Anderson, 28 Ind. 79.

Cities have absolute authority to determine the necessity of establishing cemeteries. City of Greencastle v. Hazelett, 23 Ind. 186.

Bodies of the dead—Ownership.—The bodies of the dead belong to the surviving relatives, in the order of inheritance, as other property, and they, and not the executor or administrator, have the right to the custody and burial of the same. Renihan v. Wright, 125 Ind. 536.

Upon question of a city's liability for removal of dead body from a lot in which it is interred to a lot used as a common burial ground, see Hamilton v. City of New Albany, 30 Ind. 482.

Sixth. To establish quarantine regulations.

Seventh. To preserve peace and good order, prevent vice and immorality and quell riots and disorderly assemblages.

Eighth. To establish and regulate the police of the city; and may in their discretion authorize the mayor or a board of police to be selected by the common council, to make all appointments of officers and members of such police, and give such mayor or board of police full power to remove from office any officer or member of such police for neglect of duty or other good cause.

Police officers not city officers—State officers—Negligence—Liability.—The police officers of a city are not its agents or servants, and it is not responsible for their negligence. The rule of *respondeat superior* has no application in such case. City of Lafayette

v. Timberlake, 88 Ind. 331; Faulkner v. City of Aurora, 85 Ind. 130, 135; Town of Laurel v. Blue, 1 App. 128; Hopewell v. State, App. Ct., June 9, 1899.

It will be presumed that policemen duly appointed by a city have the ordinary powers of peace officers at common law. Doering v. State, 49 Ind. 56; Hopewell v. State, App. Ct., June 9, 1899.

Interfering with officer.—The interfering with a policeman in the discharge of his duty is, under the statute of 1883, a criminal offense, and cities can not pass ordinances to recover penalties therefor. City of Indianapolis v. Huegele, 115 Ind. 581.

Ninth. To suppress gaming and gaming houses and houses of ill fame; to prohibit and destroy instruments and devices of gaming; and restrain fraudulent practices within said city.

It is probable this clause now has no validity. See *post*, §1383; also statutes on crimes and misdemeanors.

This clause does not, by its terms, provide for the prohibition and destruction of instruments, and devices for gaming, and is not self-executing, but requires an ordinance to make it effective. Ridgeway v. West, 60 Ind. 371; State v. Robbins, 124 Ind. 312.

The words "game" and "gaming" used in this clause and clause 14, are used in the sense in which they are employed in the criminal code of this state, as meaning a game upon the result of which something of value is staked and must be lost and won. Williams v. City of Warsaw, 60 Ind. 457.

Visiting houses of ill fame.—No power is conferred by this clause upon the common council to impose a penalty upon any person for visiting or residing within a house of ill fame outside of the corporate limits of the city. Robb v. City of Indianapolis, 38 Ind. 49.

A complaint which alleged that the defendant, on, etc., did "keep a house of ill fame and prostitution within said city," etc., sufficiently describes the offense, under an ordinance prohibiting the "keeping of a house of ill fame in said city," etc. City of Greensburgh v. Corwin, 58 Ind. 518.

A prosecution can not be maintained for associating with a prostitute in a private place in a city under an ordinance providing a penalty for associating with a prostitute "in any public place, street, alley or common" within said city, etc. Zorger v. City of Greensburgh, 60 Ind. 1.

Tenth. To compel the occupants of any building or outhouse situate upon any real estate in such city, that is filthy or unwholesome, to abate or cleanse the same, and to clean the street and alleys adjoining such property.

Eleventh. To direct the location of market or slaughter houses, or powder magazines, and to regulate the same; and for that purpose shall have jurisdiction for two miles in all directions from the city limits.

Slaughter-house—Ordinance—Validity.—An ordinance prohibiting the maintenance of any slaughter-house within the city, when authorized by statute, can not be defeated by the courts on the ground that it is unreasonable. Beiling v. City of Evansville, 144 Ind. 644; Rund v. Town of Fowler, 142 Ind. 214.

The necessity or expediency of prohibiting slaughter-houses in a city is implied from the ordinance making that prohibition, without any provision for investigation into the character or condition of the slaughter-houses. Beiling v. City of Evansville, 144 Ind. 644.

Slaughter-house—Nuisance.—A slaughter-house, erected or conducted in violation of an ordinance prohibiting its maintenance within the corporate limits of a town, be-

comes a nuisance, although it would not be such in the absence of such ordinance. Rund v. Town of Fowler, 142 Ind. 214.

Slaughter-house—Injunction.—A slaughter-house in use in a populous part of a city is prima facie a nuisance, and its use as such may be enjoined at the suit of neighboring residents, when it is shown by the evidence to be in fact an injury or annoyance. Reichert v. Geers, 98 Ind. 73.

An incorporated town may declare the keeping and maintaining a slaughter-house within the corporate limits of a town to be a nuisance, and may prohibit the same. Rund v. Town of Fowler, 142 Ind. 214.

Nuisances.—The erection or maintaining of anything that is injurious to health, indecent, offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property, constitutes a private nuisance. Injunction will lie for an injury of this kind. Tyner v. People's Gas Co., 131 Ind. 408; Ohio, etc., W. Co. v. Simon, 40 Ind. 278; Owen v. Phillips, 73 Ind. 284; Williamson v. Yingling, 93 Ind. 42; Smith v. Fitzgerald, 24 Ind. 316; Reichert v. Geers, 98 Ind. 73.

Markets.—The city council has no jurisdiction to improve the property of the city, held and used for market purposes, at the expense of owners of adjoining lots. Such proceedings are void, and may be enjoined. City of Ft. Wayne v. Shoaff, 106 Ind. 66.

The statute contemplates the use by the city of its own lands for the location of a public market. The city has no power to establish a market in a public street, or to authorize the occupancy of the same for such purpose. The abutting lot owner may enjoin such use, being injured in a manner different in kind and in degree from the general public. City of Richmond v. Smith, 148 Ind. 294.

Twelfth. To regulate the uses of coaches, hacks, drays and other vehicles for transportation of passengers, freight or other articles, to or from any points within the city, for hire or pay.

Regulation of vehicles.—A city has power to enact ordinances authorizing police officers to prescribe the places where omnibuses, hacks and other vehicles shall stand at a railroad depot, and requiring drivers to obey the directions of such officers in regard to the places which their respective vehicles shall occupy. Veneman v. Jones, 118 Ind. 41.

License.—The power to regulate implies the power to license and to exact a reasonable fee for such license. Tomlinson v. City of Indianapolis, 144 Ind. 142, 145; Smith v. City of Madison, 7 Ind. 86; Scudder v. Hinshaw, 134 Ind. 56.

Railroads—Depots—Regulations.—A railroad company may make reasonable rules and regulations to prevent quarrels between the owners of competing omnibus lines and their employes while upon depot grounds, and may designate the stand each shall occupy. Lucas v. Herbert, 148 Ind. 64. Rules must not discriminate; they must be uniform in operation; exclusive right to stand hacks can not be granted. Indianapolis, etc., R. Co. v. Dohn, Ind. Sup. Ct., May 23, 1899.

Thirteenth. To license, regulate, and restrain all shops, inns, taverns, or other places where intoxicating liquors are kept for sale, to be used in and upon the premises, and in regulating, restraining and licensing such inns, taverns, shops or places aforesaid, they shall have the power to designate the room, building or structure where such liquors may be sold, and may exclude such sales from the suburban or residence portion of such city, and confine the places where such sales may be made, to the business portion of such city, and may direct the arrangement and construction of the doors, windows and openings of the particular room in such building where such sales may be had, or such intoxicating liquors be drunk, and may direct

the location, arrangement and construction of the bar kept therein, and the interior arrangement and construction of such room, and may direct what games may be carried on therein, and may forbid the keeping or use of wine rooms.

See *post*, §§ 210 and 994.

For full text of laws regulating sale of intoxicating liquors, see R. S. 1894, §§ 7276–7288; Burns' Supp. 1897, § 7276.

Note.—This clause was amended and much enlarged by the Acts of 1895 (Burns' Supp. 1897, § 3541). The cases cited were most of them decided prior to such amendment.

Statutory offense—City ordinance.—R. S. 1894, § 1709 (*post*, § 1383), prohibiting towns and cities from making acts punishable by ordinance which are made public offenses and punishable by the state, does not apply to an ordinance providing a punishment for selling intoxicating liquor without first procuring a license from the town or city, that not being an offense under the statute of the state. Clevenger v. Town of Rushville, 90 Ind. 258, 260; Zeller v. City of Crawfordsville, 90 Ind. 262, 263; City of Frankfort v. Aughe, 114 Ind. 77, 79.

Intoxicating liquor—City license.—Municipal corporations have power to exact a license from one who has a state or county license, as well as from all other persons who keep shops for the sale of intoxicating liquors to be used on the premises. Lutz v. City of Crawfordsville, 109 Ind. 466, 469; City of Frankfort v. Aughe, 114 Ind. 77, 78; Emerich v. City of Indianapolis, 118 Ind. 279; Moore v. City of Indianapolis, 120 Ind. 483, 487; Decker v. Sargeant, 125 Ind. 404, 407; Shea v. City of Muncie, 148 Ind. 14; City of Elkhart v. Calvert, 126 Ind. 6.

Intoxicating liquors—Sales under license by United States.—A person who sells intoxicating liquors under and by virtue of a license by the United States is amenable to § 4 of the act of March 11, 1895 (Burns' Supp. 1897, § 7283d), providing that, during the days and hours when the sales of intoxicating liquors are prohibited by law, the room in which such liquors are sold as a beverage shall be so arranged that the whole of the interior may be viewed from the street or highway on which the same is situated. State v. Mathis, 18 App. 608.

License.—Cities have power to require persons selling intoxicating liquors for use on the premises within the corporate limits, and for two miles beyond, to procure a license from the city. Lutz v. City of Crawfordsville, 109 Ind. 466; City of Frankfort v. Aughe, 114 Ind. 77; Emerich v. City of Indianapolis, 118 Ind. 279; City of Lawrenceburg v. Wuest, 16 Ind. 337; Wiley v. Owens, 39 Ind. 429; Sweet v. City of Wabash, 41 Ind. 7; Zeller v. City of Crawfordsville, 90 Ind. 262.

The power to regulate and license the sale of intoxicating liquors does not authorize cities to pass an ordinance prohibiting the sale of intoxicating liquors. Loeb v. City of Attica, 82 Ind. 175; Sweet v. City of Wabash, 41 Ind. 7; Duckwall v. City of New Albany, 25 Ind. 283; Steffy v. Town of Monroe City, 135 Ind. 466; 1 Beach Pub. Corp., § 600.

An ordinance which prohibits the sale, barter or giving away of intoxicating liquors without a license, is valid. Vinson v. Town of Monticello, 118 Ind. 103.

Unless a statute expressly grants the power to do so, a municipal corporation can not require a license for the sale of intoxicating liquors. Walter v. Town of Columbia City, 61 Ind. 24; Cowley v. Rushville, 60 Ind. 327; Deutschman v. Town of Charlestown, 40 Ind. 449.

Amount of tax—Prohibitory.—What will amount to a prohibitory tax is a question of fact. On trial for a violation of an ordinance imposing a license tax, evidence is proper to show that the amount of the tax is in effect prohibitory of the sale. Sweet v. City of Wabash, 41 Ind. 7.

The exaction, by a city, of license money, in the sum of five hundred dollars from each

retail dealer of intoxicating liquors, can not be considered, as matter of law, unreasonable or objectionably prohibitory. Wiley v. Owens, 39 Ind. 429.

Where a city is granted power, by the legislature, "to tax, license and regulate distilleries and breweries," etc., an ordinance imposing a license fee is an exercise of police power in restraint of a harmful occupation, and the fee to be required is subject to the discretion of the city authorities. City of Indianapolis v. Bieler, 138 Ind. 30.

Nature of license—Police power—Revocation.—A license to sell intoxicating liquors is not a contract, but a restrictive special tax imposed in the exercise of the police power of the state, and it may be changed or even annulled by the legislature whenever the public welfare demands it. It has none of the elements of a contract, and it may be revoked even though based upon a valuable consideration. It may be revoked without refunding the consideration paid therefor. McKinney v. Town of Salem, 77 Ind. 213, 214; Hedderich v. State, 101 Ind. 564, 569; State v. Bonnell, 119 Ind. 494, 495; Moore v. City of Indianapolis, 120 Ind. 483, 491; Haggart v. Stehlin, 137 Ind. 43, 54; Shea v. City of Muncie, 148 Ind. 14; Nelson v. State, 17 App. 403; State v. Gerhardt, 145 Ind. 439.

Not repealed—Constitutional.—The act of 1895 (Burns' Supp. 1897, § 3541), amending this section, was not repealed by implication by the act of March 11, 1895 (Burns' Supp. 1897, § 7283a, *et seq.*), known as the "Nicholson law"; nor is said amendment void as being in conflict with §§ 22, 23, art. 4 of the constitution, prohibiting local laws; nor is the act void because authorizing a prohibition of the sale of intoxicating liquors in certain localities; nor is it void because violating § 19 of art. 4 of the state constitution, requiring the subject of the act to be expressed in the title; nor is it void because in conflict with § 23, art. 1 of the state constitution upon the subject of privileges and immunities to citizens. Shea v. City of Muncie, 148 Ind. 14.

Maintaining a saloon in residence portion of city—Nuisance—Damages.—A saloon established in the portion of a city devoted to residences, churches, Sunday schools, orphan asylums, female colleges and public schools, which depreciates the value of property in the vicinity, both for sale and rent, may constitute a nuisance, and in such case a license to sell intoxicating liquors does not constitute a justification. The landlord who rents his premises for the purpose of establishing a nuisance thereon is also liable for damages. Haggart v. Stehlin, 137 Ind. 43.

Sale of liquors—Restriction—Validity of ordinance.—An ordinance under the above section making it unlawful to sell intoxicating liquors in the "residence portions of the city" and providing that all such sales "shall be confined to the business portion thereof," is not void because too uncertain and indefinite as to the boundaries of the localities designated "business portion" and "residence portion" of said city. The ordinance is as definite and certain as the statute, and this is sufficient. Shea v. City of Muncie, 148 Ind. 14.

Same—License no defense.—In a prosecution under such an ordinance for the violation thereof, a license issued to the defendant by the city under another and prior ordinance is no defense. Shea v. City of Muncie, 148 Ind. 14.

Same—Estoppel.—The payment of the license fee and the retention thereof by the city does not estop the city from enforcing such ordinance against selling in the residence portion of the city. Shea v. City of Muncie, 148 Ind. 14.

Same—"Residence portion" defined.—If a certain part of the city, large or small, is principally and chiefly used for residence purposes, families residing and having their homes therein, the same is a "residence portion" of the city. Such part of the city would not become a "business portion" of the city merely because a grocery or other business was here and there carried on therein. The decided preponderance of residences and families residing therein determines the character of such portion of the city. Shea v. City of Muncie, 148 Ind. 14.

Abridgment of police powers.—A law regulating or authorizing municipal corporations to regulate and impose restrictions upon the sale of intoxicating liquors is an exer-

cise of the police power of the state, and neither the state nor the municipality can, by any sort of contract, license, or permit, abdicate, embarrass, or bargain away its right to exercise the power in such a manner as it may thereafter deem the public welfare requires. Moore v. City of Indianapolis, 120 Ind. 483, 490.

Vested right, police power.—A permit by the state to sell intoxicating liquors is but an exercise of its police power, in which no one can acquire a vested right or contractual interest, and is revocable by the legislature at any time; and an ordinance in pursuance of a legislative act, which increases the fees for an unexpired license, is a valid ordinance. Moore v. City of Indianapolis, 120 Ind. 483, 491.

License not transferable.—A license to sell intoxicating liquors is not transferable, and the purchaser of a saloon from one who has been licensed to sell intoxicating liquors is not protected, in conducting such business, by the licenses of his vendor. Heath v. State, 105 Ind. 342; Strahn v. Hamilton, 38 Ind. 57; Pierce v. Pierce, 17 App. 107.

Agent and partner.—Under a license for the sale of intoxicating liquors the licensee may sell by an agent and the license will protect the agent in making the sale; but a license granted to one member of a copartnership, consisting of two or more persons, does not authorize a sale of intoxicating liquors belonging to such firm by an unlicensed member thereof, nor by all jointly, for their joint benefit. Shaw v. State, 56 Ind. 188; Keiser v. State, 58 Ind. 379, 382; Spaulding v. Natham, 21 App. 122.

License fees—Amount—Invalidity of ordinance—Recovery of.—Where license fees have been voluntarily paid under invalid ordinances of towns requiring a license to sell liquors, the same can not be recovered in an action against such town. Colglaizer v. Town of Salem, 61 Ind. 445; Town of Brazil v. Kress, 55 Ind. 14; Town of Edinburg v. Hackney, 54 Ind. 83; Board, etc., v. Kreuger, 88 Ind. 231; Town of Ligonier v. Ackerman, 46 Ind. 552; Town of Sullivan v. McCammon, 51 Ind. 264.

Where the town contracts to repay the fee, in case the ordinance is adjudged invalid, and the ordinance is thereafter held invalid, the person paying the fee may recover the same upon such contract. Town of Columbia City v. Anthes, 84 Ind. 31.

A vender of intoxicating liquors can not maintain an action for a mandate to compel a city treasurer to accept a license fee under an ordinance of a city, in order that he may, prior to the expiration of a license previously issued to him, demand of the city clerk a new license. Municipal authorities are not bound to issue a license to a person holding an unexpired license. State v. Bonnell, 119 Ind. 494.

Where municipal corporations are authorized to require a license from dealers in intoxicating liquors, and the law does not limit the amount to be paid therefor, such corporations may determine the amount. Wiley v. Owens, 39 Ind. 249; Sweet v. City of Wabash, 41 Ind. 7.

The act of March 11, 1889 (R. S. 1894, § 7282), empowering cities and incorporated towns to increase the sum theretofore required to be paid for a license to sell intoxicating liquors, is not invalid as violating § 21, art. 4 of the state constitution. Bush v. City of Indianapolis, 120 Ind. 476; Moore v. City of Indianapolis, 120 Ind. 483, 486.

The act of 1875 (R. S. 1894, § 7276, *et seq.*), regulating the sale of intoxicating liquors, saving § 7282, R. S. 1894, limiting the amount which cities may demand for license to sell intoxicating liquors, relates exclusively to licenses issued by the board of county commissioners, and therefore § 7284, R. S. 1894, providing that "No license herein provided shall be granted for a greater or less period than one year," applies only to licenses granted by the county board, and not to licenses granted by cities. Moore v. City of Indianapolis, 120 Ind. 483, 486.

Intoxicating liquor—Jurisdiction—Special tax.—The legislature may empower municipal corporations to lay a special tax upon persons engaged in selling intoxicating liquors, and it may also determine over what territory the jurisdiction of such corporations shall extend. Emerich v. City of Indianapolis, 118 Ind. 279, 280.

Restriction of business.—The object of this class of legislation is to restrict the business of liquor selling, and not to secure to the vendors the protection of the municipal

government, and therefore one is not exempted from the payment of the special tax because his place of business is outside of the corporate limits. Emerich v. City of Indianapolis, 118 Ind. 279, 280.

Prohibiting screens in saloons.—R. S. 1894, §§ 3541, 3615 (§ 124, clause 13, and *post*, § 210), which empower cities "to regulate and license all inns, taverns or other places used or kept for public entertainment; also, all shops, or other places kept for the sale of liquors to be used in and upon the premises," and "to regulate all places where intoxicating liquors are sold to be used on the premises," and the general welfare clause —do not empower cities to pass ordinances prohibiting the use of screens or other obstructions to the view at the doors and windows of saloons, and the courts may inquire into the reasonableness of an ordinance of such character. Champer v. City of Greencastle, 138 Ind. 339; Steffy v. Town of Monroe City, 135 Ind. 466.

Removal of screens—Municipal corporations.—A municipal corporation has not the power to make an ordinance requiring the removal, from the doors or windows of saloons, of all screens and other obstructions to the view of the interior of, and business transacted within, such saloon; such an ordinance being void, as being prohibitive of a lawful business, and not merely regulative. Steffy v. Town of Monroe City, 135 Ind. 466, 467.

An ordinance providing that any one keeping a saloon where intoxicating liquors are sold to be drunk on the premises shall close the same for the night at 11 o'clock P. M. of each day, at which time such person shall raise all door screens and remove any obstructions, so as to give an unobstructed view of the interior, and require all other persons to vacate said premises, and shall not reopen the same until 5 o'clock A. M. the following morning, is a valid ordinance. Such ordinance in no way infringes upon the business of the saloon-keeper, as he is entitled to carry it on under his license. Decker v. Sargeant, 125 Ind. 404; Davis v. Fasig, 128 Ind. 271.

Proximity of business to town and city.—The fact that the vendor's place of business is within two miles of both a town and a city does not impair the right of the latter to exact a license fee, as its jurisdiction extends so far, while that of the town does not. Emerich v. City of Indianapolis, 118 Ind. 279, 281.

Refusal to apply—Estoppel.—One who refuses to apply for a license under an ordinance passed in pursuance of R. S. 1894, § 7282, will be estopped to complain, while continuing to sell liquors in violation of the ordinance, that a section of the ordinance, by providing for a clerk's fee of one dollar, in addition to the license fee, has exceeded the authority of the council. Moore v. City of Indianapolis, 120 Ind. 483, 488.

Fermented cider an intoxicating liquor.—It seems that the sale of fermented cider, which is an intoxicating liquor, is a proper subject of municipal regulation. Wagner v. Town of Garrett, 118 Ind. 114, 118.

To sell, barter or give away.—An ordinance which prohibits the sale, barter or giving away of intoxicating liquor without a license, is valid. The substantive grant contained in the statute is the power to license, regulate and restrain the sale of intoxicating liquors, but as a necessary incident to this power is included the power to prohibit the bartering or giving away of intoxicating liquors. Vinson v. Town of Monticello, 118 Ind. 103, 104.

Bowling saloon.—Under the charter of the city of Madison, approved February 14, 1848, the council had the right, by ordinance, to suppress bowling saloons, or to permit them to exist under such restraints as the council chose to impose. Smith v. City of Madison, 7 Ind. 86.

Fourteenth. To regulate and restrain all tables, alleys, machines, devices or places of any kind for sports or games, kept for hire or pay, or to prohibit the use of the same as aforesaid, if deemed expedient, without a license first being obtained therefor; and if deemed neces-

sary to preserve peace, good order, and morality, to prohibit the use of the same, as aforesaid, by the infliction of such penalties as this act will permit, to be provided for by ordinance.

The word game, as used in this clause, is used in the sense in which it is employed in the criminal code, as meaning a game upon the result of which something of value is staked and must be lost and won. Williams v. City of Warsaw, 60 Ind. 457.

Fifteenth. To regulate and restrain all theatrical and other exhibitions and public shows for which money is demanded or received; and if deemed expedient to prohibit the same, without a license having been first obtained therefor.

Regulating place of amusement—License fees.—An ordinance in reference to the licensing of a place of amusement is invalid if a fixed and definite license fee is not named therein, which all persons engaged in like business must pay, and if it does not state the duration of the license to be issued. Bills v. City of Goshen, 117 Ind. 221; City of Richmond v. Dudley, 129 Ind. 112, 115.

Sixteenth. It is expressly provided that lectures on scientific, historic, benevolent or literary subjects, and the apparatus for the elucidations of the same and specimens of fine arts, shall not be deemed within the provisions of this act.

Seventeenth. To prevent immoderate riding or driving and cause the person guilty of the same to be stopped thereat by any officer of said city.

See clauses 39 and 42.

Regulation of travel on street.—It is the duty of town authorities, and they have ample power, to regulate public travel upon the streets so as to make their use at all times safe for those who have occasion to go upon them. This power extends to all reasonable regulations as to railroad crossings, running of hacks and omnibuses, to fast driving and to any other use of the street which may make travel upon it dangerous to the public. Scudder v. Hinshaw, 134 Ind. 56.

Law of road—Use of street.—The statute which provides that any person who shall, when driving any vehicle, fail to pass to the right when meeting another vehicle, etc., shall forfeit the sum of five dollars, etc., applies only to country roads. In cities and towns, in the absence of ordinances or a statute to the contrary, a person has the right to travel in and upon any part of the street, from curb to curb, so long as he does not interfere with the rights of other travelers. City of Decatur v. Stoops, Ind. App. Ct., Jan. 10, 1899.

Eighteenth. To prevent the incumbering of the streets, squares, sidewalks, and crossings with vehicles or any other substance or materials whatever, interfering with the free use of the same.

See clause 32, and note.

Obstruction of a street a misdemeanor.—The wrongful obstruction of a public street or sidewalk of a city is a misdemeanor punishable under the criminal law of the state, and a city can not enact an ordinance prescribing a penalty for any one who obstructs such street. The statute making it an offense to drive over the sidewalk of a "town" also makes it an offense to drive over the sidewalk of a "city," although the word city be not used therein. City of Indianapolis v. Higgins, 141 Ind. 1; Boyer v. State, 16 Ind. 451; State v. Berdetta, 73 Ind. 185.

Obstructions in street—Liability of city.—A city which permits an obstruction to remain an unreasonable length of time upon its streets or sidewalks, until the presumption arises that it had notice of such obstruction, is liable therefor to the same extent as if it had itself placed the same there in the first instance. Senhenn v. City of Evansville, 140 Ind. 675; Glantz v. City of South Bend, 106 Ind. 305.

Cities are required to keep the streets free from obstructions, or they will be liable for damages resulting therefrom. City of Indianapolis v. Gaston, 58 Ind. 225; City of Evansville v. Wilter, 86 Ind. 414.

Streets—Sidewalks—Crossings.—It is the duty of an incorporated city to keep all its streets, sidewalks and crossings in a reasonably safe condition and free from unnecessary and dangerous obstructions, so as not to endanger the safety of those lawfully using the same, and it is liable for negligently suffering them to become and remain unsafe to any one injured thereby. City of Lafayette v. Larson, 73 Ind. 367, 369; City of Delphi v. Lowery, 74 Ind. 520, 523; City of Crawfordsville v. Smith, 79 Ind. 308, 310; Murphy v. City of Crawfordsville, 83 Ind. 76, 77; Turner v. City of Indianapolis, 96 Ind. 51, 55; City of Aurora v. Bitner, 100 Ind. 396, 399; Glantz v. City of South Bend, 106 Ind. 305, 309; City of Ft. Wayne v. Patterson, 3 App. 34, 37; Park v. Board, etc., 3 App. 536, 539; City of Bloomington v. Rogers, 83 Ind. 261.

Streets—Sidewalks—Wrong-doer—Notice.—Where an obstruction is placed on a street or sidewalk by a wrong-doer, on account of which a passer-by is injured, the city can not be held liable for such injury unless it has actual notice of the obstruction, or the same has remained on such street or sidewalk such a length of time as to make it the duty of the corporate authorities to take notice of its existence. City of Warsaw v. Dunlap, 112 Ind. 576, 577; City of Ft. Wayne v. Patterson, 3 App. 34, 37; City of Lafayette v. Ashby, 8 App. 214.

Towns and cities, in the absence of contributory negligence, are liable for injuries resulting from the fright of horses of ordinary gentleness at objects naturally calculated to frighten them, and which the corporation has negligently placed, or permitted to be placed, and to remain upon the street. Town of Rushville v. Adams, 107 Ind. 475.

Presumption concerning obstructions.—The presumption is that an obstruction placed in a street is wrongfully placed and permitted to remain there. Senhenn v. City of Evansville, 140 Ind. 675.

Temporary obstructions—Building material.—Cities may permit a temporary obstruction of a portion of streets when necessary in the erection of buildings. Woods v. Mears, 12 Ind. 515; Senhenn v. City of Evansville, 140 Ind. 675.

A permit given by a city to obstruct a portion of a street temporarily, while a building is being erected, may be revoked at any time. City of Indianapolis v. Miller, 27 Ind. 394.

If a city grants the right to temporarily obstruct a street, the city must see that due care is used, or the city may be liable for damages caused by such obstruction. City of Indianapolis v. Doherty, 71 Ind. 5.

Permanent obstructions.—Cities have no authority to authorize the permanent obstruction of streets. Pettis v. Johnson, 56 Ind. 139; State v. Berdetta, 73 Ind. 185; Adams v. Ohio, etc., 131 Ind. 375; 2 Beach Conts., § 1190.

Cities should prohibit the construction or continuance of anything overhanging a sidewalk that will render the use of such walk dangerous, such as the cornice of a building which projects over a sidewalk and which is being constructed in such a manner as to be dangerous to persons using the sidewalk. Grove v. City of Fort Wayne, 45 Ind. 429.

Nuisance.—A municipal corporation is liable for torts the same as an individual, in certain classes of cases, among which is included nuisances. For a nuisance maintained upon its property the same liability attaches against a city as to an individual. City of New Albany v. Slider, Ind. App. Ct., Jan. 10, 1899; Haag v. Board, etc., 60 Ind. 511.

Nineteenth. To regulate the time and place of bathing in rivers or public waters of said city.

Twentieth. To restrain and punish vagrants, mendicants, street beggars, common prostitutes, and their associates.

Visiting houses of ill fame.—No power is conferred by this clause upon the common council to impose a penalty upon any person for visiting or residing within a house of ill fame outside of the corporate limits of the city. Robb v. City of Indianapolis, 38 Ind. 49.

Twenty-first. To regulate and prohibit the running at large of cattle, horses, swine, fowls and other animals, and to provide for the impounding, keeping, sale and redemption of the same, when found in violation of the ordinances in such cases provided.

Pound ordinance—Negligence of city authorities.—A pound ordinance is a police regulation authorizing summary proceedings, and must be strictly adhered to. For any negligence of its agents in the construction of a pound, or in any purely ministerial duty under a pound ordinance, a city is liable, just as a private person would be for the acts of his agents. City of Greencastle v. Martin, 74 Ind. 449.

It is not negligence in the owner of cattle to allow them to run at large in the streets of a town when an ordinance thereof permits it. Noblesville, etc., Co. v. Teter, 1 App. 322.

Impounding animals—Pleading.—A complaint against a city alleging, in substance, that the defendant so negligently and unskillfully constructed its pound fence that it was not high enough; that the defendant, by its servants, negligently tied the plaintiff's mare to said fence with a rope long enough to enable her to jump over said fence, and that thereby, without plaintiff's fault, the mare was injured, to his damage, etc., showed a good cause of action. City of Greencastle v. Martin, 74 Ind. 449, 452.

Conversion, when unsustained.—Where there was no proof of a wrongful appropriation, or of an attempt to make one, of an animal impounded by a city under an ordinance therefor, a finding against the city upon a complaint for conversion was not sustained by the evidence. City of Greencastle v. Martin, 74 Ind. 449, 450.

Animals standing loose in street—Ordinance.—Where a city ordinance declares, "that it shall be a nuisance and unlawful to suffer any animal, whether attached to any vehicle or not, to stand in any public way without being hitched," the manifest purpose of such ordinance was to prevent persons from leaving horses in a public way unattended by the driver or person in charge without being hitched, and was not intended to apply when the animal was in the presence and under the control of the person in charge. Louisville, etc., R. Co. v. Davis, 7 App. 222.

Twenty-second. To prevent the deposit of any unwholesome substance within the city limits, and punish the person guilty of the same. And to remove or destroy putrid animal or vegetable matter, and the common council shall have the right to collect the expense of removing any such unwholesome substance, putrid, animal or vegetable matter, from the person found guilty of a violation of the provisions of the ordinance of such city, in relation thereto, with ten per cent. damages thereon, and costs of suit therein. If the person occupying the premises, fail to do so upon notice given, the common council shall have power to remove such putrid animal or vegetable matter.

Removal of garbage—Ordinance—Cost.—Under the new Indianapolis charter the

city may provide by contract for the removal of slops, garbage, etc., and fix the price for removal of the same, and require the charges to be paid by the persons from whose premises such removal is made. Walker v. Jameson, 140 Ind. 591.

Cleaning street—Garbage.—A city has exclusive power over streets within the corporate limits, and the cleaning of its streets when duly exercised can not be controlled by the courts. In such work, if unavoidable injury results no liability ensues, because the doing of what the law authorizes can not be a nuisance so as to give a right of action. But collecting garbage and filth from the streets and depositing the same in a mass upon some other street may create a nuisance, and if it does the city must be responsible in damages. City of New Albany v. Slider., Ind. App. Ct., Jan. 10, 1899.

Nuisance—Street dump—Complaint.—A complaint which alleges that plaintiff is the owner, and with his family, is in possession of a house and lot in a city as a residence; that said city has caused to be deposited large quantities of garbage, rubbish and filth, gathered from its public ways, near to the premises of plaintiff, thereby creating a nuisance consisting of a huge pile of decomposed and decaying vegetable and animal matter, from which noxious vapors, disagreeable and unhealthy odors are generated and emitted, whereby the air in and about said premises of plaintiff is impregnated, injuring plaintiff's health and causing him and his family to become diseased and sick, destroying the comfortable enjoyment of said premises and greatly depreciating the value thereof to plaintiff's damage, presents a good cause of action for damages against the city. City of New Albany v. Slider, Ind. App. Ct., Jan. 10, 1899; City of New Albany v. Armstrong, Ind. App. Ct., March 8, 1899.

In such case, where the jury finds, in answer to interrogatories, and the undisputed evidence is, that there is no permanent injury to the property resulting from the nuisance, but that during the continuance of the nuisance the rental value of the property was depreciated, but there is neither finding nor evidence as to amount of the rental value, a verdict in favor of the plaintiff can not be upheld. City of New Albany v. Armstrong, Ind. App. Ct., March 8, 1899.

Chickens—Keeping—Feeding.—An ordinance making it unlawful to keep in any lot or enclosure within the corporate limits for the purpose of slaughtering or feeding for marketing or slaughtering, any cattle, hogs, sheep or other animals; or any geese, chickens, ducks, turkeys or other fowls exceeding fifty (50) in number, is not violated, by a person keeping 500 chickens in a warehouse in the city from Saturday until Monday awaiting shipment. Long v. City of Portland, 151 Ind. 442.

Twenty-third. To regulate the ringing of bells, crying of goods, and to restrain hawking and peddling.

Hawking and peddling—License.—The power to restrain carries with it the power to license. The city has power by ordinance to require a license for hawking and peddling in the city. City of South Bend v. Martin, 142 Ind. 31, 36; City of Huntington v. Cheesbro, 57 Ind. 74; Smith v. City of Madison, 7 Ind. 86.

Definition of hawking and peddling.—Any method of selling goods by outcry on the streets or public places in the city, or by attracting persons to purchase goods exposed for sale at such places by placards or signals, or by going from house to house, selling or offering goods for sale at retail to individuals not dealers in such commodities, whether they be carried along for present delivery, or the sales be made for future delivery, constitutes the person so selling a hawker or peddler within the meaning of the statute. Graffty v. City of Rushville, 107 Ind. 502; City of South Bend v. Martin, 142 Ind. 31.

Hawkers and peddlers.—A city has power to pass an ordinance requiring a license to hawk and peddle therein. One engaged in selling chairs within a city by going personally from house to house, selling the chairs and delivering them at the time of the

sale, is a peddler within an ordinance requiring peddlers to obtain a license. City of South Bend v. Martin, 142 Ind. 31.

Interstate commerce--Validity of ordinance.—An ordinance which prohibits any traveling merchant or peddler from selling, or offering to sell, any merchandise without having obtained a license, can not be enforced against one who makes negotiations for the sale of property situated and owned in another state. An ordinance requiring a license fee from agents representing citizens of another state, who offer goods not in this state for sale by sample, is void, because it assumes to establish a regulation affecting commerce between the states. McLaughlin v. City of South Bend, 126 Ind. 471; Martin v. Town of Rosedale, 130 Ind. 109; City of South Bend v. Martin, 142 Ind. 31; McCall v. California, 136 U. S. 104; Stoutenburgh v. Hennick, 129 U. S. 141; City of Huntington v. Mahan, 142 Ind. 695.

Distributing agent.—A city ordinance prohibiting peddling without a license is an unlawful interference with interstate commerce as to a salaried distributing agent of a publishing firm in another state, where orders for books in several localities are sent to such firm by another salaried agent, and on being received by the latter are repacked and shipped to various localities for distribution. City of Huntington v. Mahan, 142 Ind. 695.

An ordinance of a town requiring all traveling peddlers of goods to take out a license is not void on the assumption that it applies only to non-residents of such town for it equally applies to citizens thereof. But it is void as to residents of other states who are engaged in selling goods located in other states, even though the sale is only by sample, on the ground that it is an interference with interstate commerce. Martin v. Town of Rosedale, 130 Ind. 109.

An ordinance imposing a license on hawkers and peddlers does not interfere with interstate commerce in the case of a peddler of chairs imported into the state before his employment begins, even though the sale by him is conditional and the title remains in the foreign owner. City of South Bend v. Martin, 142 Ind. 31.

Discrimination against citizens and products of other communities.—A city ordinance, requiring a hawker and peddler, who is not a resident of the city, and who proposes to sell goods, wares or merchandise which are not grown or manufactured in the county in which the city is located, to procure a license and pay the fee therefor before he may lawfully follow his calling in such city, discriminates against the citizens and products of other communities and is unconstitutional and void. Graffty v. City of Rushville, 107 Ind. 502.

Under this clause any mode of selling goods which does not fall within the terms "to restrain hawking and peddling," can not be made unlawful by ordinance. Graffty v. City of Rushville, 107 Ind. 502.

Twenty-fourth. To remove or confine persons having infectious or pestilential diseases.

Negligence—Liability.—The city is not liable for the negligence of persons placed in charge of a small-pox hospital which the city has established. Ogg v. City of Lansing, 35 Iowa 495; Summers v. Board, etc., 103 Ind. 262.

Twenty-fifth. To regulate the keeping of bills of mortality and to provide penalties for the neglect of any person in violation of the same.

Twenty-sixth. To construct and establish works for furnishing the city with wholesome water; and for the purpose of drainage of such city, may go beyond the city limits, and condemn lands and material,

and exercise full jurisdiction and all the necessary power therefor. The common council may authorize any incorporated company or association to construct such works; and in such case, the city may become part stockholder in any such company or association.

See clause 43, and *post*, §§ 138, 1061–1089.

Corporate powers—Contract for construction of water-works.—This clause was not repealed either in terms or by implication by the act of March 25, 1879 (R. S. 1894, § 4250), to authorize cities and incorporated towns to construct, maintain and operate water-works, etc. (*post*, § 1061, *et seq.*). A contract of the city with a water company for the construction and maintenance of water-works is not *ultra vires* and void, and the city may become a stockholder in the company. City of Vincennes v. Callender, 86 Ind. 484; City of Valparaiso v. Gardner, 97 Ind. 1.

Supply—Creation of debt—Discretionary power.—While the power of a city to contract for a supply of water for public use is, in a general sense, a discretionary one, it can not be so exercised as to create a corporate debt beyond that limited by law, nor to surrender or suspend legislative power. City of Valparaiso v. Gardner, 97 Ind. 1; Town of Winamac v. Huddleston, 132 Ind. 217.

Indebtedness—Constitutional limit—Current revenue.—The constitutional limitation upon the indebtedness of any political or municipal corporation does not apply to water to be paid for as the water is furnished, provided the contract price can be paid from the current revenues as the water is furnished, without increasing the corporate indebtedness beyond the constitutional limit, or encroaching upon funds for other purposes.

The items of expense essential to the maintenance of corporate existence, such as light, water, labor and the like, constitute current expenses, payable out of current revenues, and where these are sufficient to discharge all current expenses without increasing the indebtedness, there is no corporate debt incurred for such expenses. City of Valparaiso v. Gardner, 97 Ind. 1; Quill v. City of Indianapolis, 124 Ind. 292, 300; Crowder v. Town of Sullivan, 128 Ind. 486.

Where a municipal corporation contracts for a usual and necessary thing, such as water or light, and agrees to pay for it annually as furnished, the contract does not create an indebtedness for the aggregate sum of all the yearly installments, since the debt for each year does not come into existence until the compensation for each year has been earned. Crowder v. Town of Sullivan, 128 Ind. 486; City of New Albany v. McCulloch, 127 Ind. 500.

Exclusive privileges to one corporation—Can not be granted.—A municipal corporation can not grant to a private corporation the exclusive privilege of using its streets for the purpose of supplying the corporation, or its citizens, with light, water, fuel or the like. Crowder v. Town of Sullivan, 128 Ind. 486; Indianapolis, etc., R. Co. v. Citizens', etc., Co., 127 Ind. 369; Citizens', etc., Co. v. Town of Elwood, 114 Ind. 332; 1 Beach Pub. Corp., §§ 553, 554.

Water-works stock—Sale.—A city incorporated under the general law of this state has the right to sell stock subscribed by it in a water-works company, and as an incident to decide upon the terms of sale. City of Terre Haute v. Terre Haute Water-Works Co., 94 Ind. 305.

Contract for construction—Independent contractor—Liability.—Where a city is engaged in the construction of a system of water-works for municipal purposes, and has entered into a contract with another person for the performance of the work, by the terms of which the exclusive control of such work rests in the contractor, such city, notwithstanding the contract, stands charged by law with a duty in the care and control of its streets, in and through which its water-works are in process of construction, to keep such streets in a safe condition for use in the usual manner; for a breach

of such duty, resulting in injury or death to a third person, it is liable in damages. City of Logansport v. Dick, 70 Ind. 65.

Not a nuisance per se—Negligence.—The construction of water-works by a city is not a nuisance *per se*, and neither such city nor its contractor can be held liable in damages for any injury resulting therefrom, unless it can be shown that such injury was caused by some act of negligence of the contractor or his servants, or some breach of duty by the city, and that there had been no contributory negligence on the part of the injured. City of Logansport v. Dick, 70 Ind. 65.

Water-course — Injunction — Mills—Estoppel.—Where the owner of water power stands by, and, not objecting, permits a city, without first assessing and paying his damages, to erect works for a water supply by drawing water from the stream and thus diminishing his power, he creates an equitable estoppel, so that he will not be protected by injunction, but will be left to assert his rights at law. City of Logansport v. Uhl, 99 Ind. 531.

Water-works bonds—Statute construed.—The above clause of the general act for the incorporation of cities gives to the common councils of cities no authority to issue, negotiate and sell bonds for the purpose of obtaining money to construct water-works. State v. Hauser, 63 Ind. 155. See Daily v. City of Columbus, 49 Ind. 169.

The act of 1871, legalizing bonds issued for the construction of water-works applies to all cities in the state. State v. Hauser, 63 Ind. 155.

Superintendent of water-works—Bond—Liability of surety.—In 1876 the council of the city of Lafayette elected a "superintendent" of water-works, there being no law or ordinance specifying his duties or requiring him to give any bond, but he gave bond, with sureties conditioned for the proper discharge of the duties of superintendent and the payment of all moneys that might come to his hands as such. Subsequently an ordinance was passed providing for the appointment of such superintendent, and defining his duties, one of which was the collection of water rents. He collected such rents and became a defaulter as to a large amount thereof. The sureties were not liable for the defalcation. City of Lafayette v. James, 92 Ind. 240.

Contract with water company—Ordinance—No privity of contract by citizens.—Where a city enters into a contract with a water company for supplying the city with water and for protection against fire, there is no privity of contract between a citizen and tax-payer of the city and the water company. The violation of such contract and ordinance by the water company, resulting in a loss by fire to the citizen by reason of the insufficient water pressure, where sufficient pressure might have been supplied and loss avoided, creates no liability in favor of the citizen against either the city or the water company. Fitch v. Seymour Water Co., 139 Ind. 214.

Drainage—Contract.—A municipal corporation can not make a contract to furnish drainage for the lands of a private person. Such a contract being a limitation upon the governmental functions is absolutely void. Hamilton v. City of Shelbyville, 6 App. 538.

Twenty-seventh. To establish and regulate pounds.

Impounding animals.—Ordinances providing for the impounding of animals running at large in the streets, and providing for the sale of the same, have usually been held valid both as to resident and non-resident owners, when express power has been granted to the municipality to impound, etc., but such power must be strictly pursued. 1 Dillon Munic. Corp., 4th ed., §§ 150, 348, 351; 2 Beach Pub. Corp., § 1242.

Twenty-eighth. To construct and establish gas-works, or to regulate the establishment thereof by individuals or companies, or to regulate the lighting of streets, public grounds, and buildings, and to provide by ordinance, what part, if any, of the expense of lighting any street or alley, shall be paid by the owners of lots fronting thereon, and in

what manner the same shall be assessed or collected, and to make the same a lien upon real estate.

See *post*, § 1136, *et seq.*

Expense of lighting.—The expense of lighting streets, referred to in this clause, relates only to the expense of lighting after the fixtures for lighting have been put up. Nelson v. City of La Porte, 33 Ind. 258.

Exclusive privileges to one corporation.—A municipal corporation can not grant to a private corporation the exclusive privilege of using its streets for the purpose of supplying the corporation or its citizens with light, water, fuel or the like. Crowder v. Town of Sullivan, 128 Ind. 486; Indianapolis, etc., R. Co. v. Citizens', etc., Co., 127 Ind. 369; Citizens', etc., Co. v. Town of Elwood, 114 Ind. 332; City of Rushville v. Rushville Nat. Gas Co., 132 Ind. 575, 578; Elliott Roads and Streets, pp. 331, 332.

Contract for lighting—Gas.—A city has power under this clause to contract with a gas company for light, and may exercise such power, within the limits of its franchise, according to its own discretion, and such contract, when made, must be regarded as made by such city in the exercise of its power to contract, and not in the exercise of its power to legislate, although the power to make the contract may be authorized by an ordinance. City of Indianapolis v. Indianapolis, etc., Co., 66 Ind. 396.

When by the terms of a contract between a city and a gas company, for lighting the streets, the city is not restricted in any respect from the legitimate exercise of its public power touching the subject-matter thereof, but expressly reserves its administrative authority to keep the posts, lamps and burners in good repair if the company shall fail to do so; and also reserves the right to test the quality of gas furnished by such company, and the capacity of the burners at all times; and is not restricted from extending its streets, establishing an additional number of lamps, obtaining gas from other sources, or establishing its own gas works, as the public interest may require, such contract, not being a restriction of its legislative power, nor fraudulent, nor against public policy, is valid and binding upon such city, and can not be repealed, impaired or changed by the city, by ordinance or otherwise. City of Indianapolis v. Indianapolis, etc., Co., 66 Ind. 396; City of Vincennes v. Citizens' Gas Light Co., 132 Ind. 114.

Period of contract.—A city has the power to contract for a supply of gas or water for a period extending beyond the tenure of office of the individual members of the common council making such contract. Twenty-five years is not an unreasonable time for which to contract for a supply of light or water, in the absence of express prohibitions in the statute. City of Vincennes v. Citizens' Gas Light Co., 132 Ind. 114; City of Valparaiso v. Gardner, 97 Ind. 1; 2 Beach Conts., §§ 1148, 1195.

Where a contract between a city and a gas company for lighting the city streets for a term of years provides that, if, at any time, the city shall determine that electric lights shall be substituted for gas lights, the company shall make the substitution, the price at which such electric lights shall be furnished to be fixed by an equitable agreement between the city and company, the contract is not sufficiently certain to be specifically enforced. In such case, if the city determines to substitute electric lighting, prior to the expiration of the contract, injunction will not lie at the suit of the gas company, to restrain the city from proceeding to secure such lighting by competitive bids. The Gas Light, etc., Co. v. City of New Albany, 139 Ind. 660.

Lighting streets—Implied power.—The power to light the streets and public places of a municipality is one of its implied and inherent powers, necessary to properly protect the lives and property of its inhabitants, and as a check on immorality. No statute is necessary to give it this power. City of Crawfordsville v. Braden, 130 Ind. 149.

The power to light carries with it incidentally the further power to procure or furnish whatever is necessary for the production and dissemination of the light. City of Crawfordsville v. Braden, 130 Ind. 149.

Discretion—Not controlled by courts.—The discretion of municipal corporations

within the sphere of their powers respecting the lighting of the streets and public places, is not subject to judicial control, except in case of fraud or where the discretion has been grossly abused to the oppression of the inhabitants. City of Crawfordsville v. Braden, 130 Ind. 149; 2 Beach Conts., § 1196.

City may own works—Private consumers.—A city has the power to establish works for lighting its streets, and may, in connection therewith, furnish private consumers such light by contract. It may contract for lighting the streets, or buy and operate plants and machinery for such purpose. City of Crawfordsville v. Braden, 130 Ind. 149; Rushville Gas Co. v. City of Rushville, 121 Ind. 206; 2 Beach Conts., § 1199.

This clause granting general power as to lighting of streets and public grounds is construed with act of March 3, 1883 (*post*, §§ 1136–1140). Said act did not affect existing contracts. Rushville Gas Co. v. City of Rushville, 121 Ind. 206; City of Crawfordsville v. Braden, 130 Ind. 149, 152.

Electric light companies occupying streets—Duties and liabilities of company and city.—Where a corporation has been authorized by the city to erect and maintain poles, wires, lamps and cables in the streets for electric lights, it is the duty of such corporation to keep watch over these appliances, and the city is liable only in cases wherein, after actual or constructive notice of the existence of danger growing out of or caused by some defect in the poles, wires or other appliances, it fails to use diligence in obviating the danger thus created; the corporation occupying the streets for such purpose is not an insurer of the safety of the public against all dangers arising from the lawful placing in the streets of such appliances, but it is bound to know the dangers which may naturally be caused by such use of the streets, and to guard against the same by the exercise of all the foresight and caution which can be reasonably expected of prudent men under such circumstances. City of Denver v. Sherret, 88 Fed. Rep. 226.

Notice of defect.—If an employe of an electric light company occupying the streets, whose duty it is to report defects to the company, while in the line of his employment discover defects, such discovery is notice to the company. City of Denver v. Sherret, 88 Fed. Rep. 226.

Twenty-ninth. To regulate the management of all public property, markets, and market spaces, and sales of fresh meats, fish and vegetables; to prevent, by ordinance, the offense of regrating and forestalling; to appoint market masters and invest them with powers to make arrests for the violation of city ordinances in their view; and to make councilmen and all other city officers conservators of the peace within such city, with power to arrest in like manner.

Improvement of market place—Injunction.—The city council has no jurisdiction to improve the property of the city, held and used for market purposes, at the expense of owners of adjoining lots, and injunction will lie to prevent it from doing so. City of Ft. Wayne v. Shoaff, 106 Ind. 66.

The city can not authorize the occupancy of a street for a market. The abutting lot owner may enjoin such use. City of Richmond v. Smith, 148 Ind. 294; 1 Dillon Munic. Corp., 4th ed., § 383; 2 Dillon Munic. Corp. § 660*n*.

Regulation and control.—The power to establish, regulate and control public markets is a part of the police power, which may be delegated by the state to municipal corporations. The extent of the power possessed by a particular corporation depends upon its charter. 1 Dillon Munic. Corp., § 380, *et. seq.*; 1 Beach Munic. Corp., § 566, *et seq.*; Natal v. State, 139 U. S. 621.

Thirtieth. To regulate and protect fire engines, hose, hook and ladders.

Thirty-first. To regulate the selling, weighing and measuring of hay, wood, coal and other articles:

This clause confers no power upon a city to authorize the obstruction of a street by the establishment of scales thereon. City of Tell City v. Bielefeld, 20 App. 1.

Thirty-second. To organize a board of public improvements and empower such board to grant permits to build houses or additions thereto; to prevent the erection of wooden buildings in such parts of the city as the common council may determine; to condemn any building or structure liable to fall and endanger life or property, and provide for the removal and taking down of the same; to take from all persons to whom such permit is granted, or with whom the city shall contract for any improvement, liable to endanger person or property, a bond with sufficient sureties, conditioned that the owner or contractor shall pay all damages that may be sustained by any person or persons by reason of any carelessness or negligence in the manner of making such improvements, and property, from injuries thereby.

See clause 18 and note, and *post*, §§ 211 and 256, *et seq.*, and notes.

Fire limits and ordinances.—Cities in this state possess ample power to enact and enforce reasonable ordinances to secure protection against fire. In the absence of express statutory authority, the enactment and enforcement of reasonable regulations of this character are recognized as a legitimate exercise of the police power necessary to the safety of the city. In addition to the power thus possessed, the statutes of this state confer express authority upon cities to establish fire limits, and prevent the erection of wooden buildings in such parts of the city as the common council may determine. The statutory power thus conferred is not a limitation upon the common law power of the city in this particular. Clark v. City of South Bend, 85 Ind. 276, 277; Baumgartner v. Hasty, 100 Ind. 575, 580; Hasty v. City of Huntington, 105 Ind. 540, 542; Corporation of Bluffton v. Studabaker, 106 Ind. 129, 133; First Nat. Bank v. Sarlls, 129 Ind. 201, 206; City of Rushville v. Rushville, etc., Co., 132 Ind. 575, 581; Kaufman v. Stein, 138 Ind. 49; 1 Beach Pub. Corp., §§ 578, 579; 1 Dillon Munic Corp., §§ 143, 405

Dangerous walls—Liability of city.—A municipal corporation is not liable to a citizen, whose building stands on a public alley, for damages sustained by him by reason of the walls of a building, standing on the opposite side of the alley, belonging to another citizen, and negligently permitted by him to become dangerous, falling upon his building and destroying it. City of Anderson v. East, 117 Ind. 126, 128.

Building—Duty to keep safe.—The owner of a building in a populous city does not owe it as a duty at common law, independent of any statute or ordinance, to keep such building safe for firemen or other officers who, in a contingency, may enter the same under a license conferred by law; but such duty may be imposed either by statute or by ordinance. Woodruff v. Bowen, 136 Ind. 431, 443.

Dangerous buildings and structures.—Where a city ordinance declares that "It shall be unlawful for any person to construct, erect or maintain any unsafe, insecure and dangerous wall, building, or structure within the limits of this city, and it shall be the duty of all persons owning premises upon which there is any dangerous, unsafe and insecure wall or building to make the same safe and secure, either by properly repairing the same or by rebuilding the same within twelve hours after receiving notice from the chief fire engineer," etc., and declaring what walls, buildings, and structures shall be deemed unsafe, such ordinance has reference to walls and buildings in immediate danger of falling or in immediate danger of taking fire, and the evident purpose of the ordinance was to protect the city against fire, and to protect the citizens and those

whose business required them to be in the vicinity of such walls and buildings, and could not have been intended for the safety of firemen, if, in response to their duty, they are called to such building or structure, to extinguish a conflagration. Woodruff v. Bowen, 136 Ind. 431, 444.

Owner's liability for personal injury.—Where, in the absence of any statutory requirements, but under the ordinance as above set out, a person has erected a building which, under ordinary circumstances, was reasonably safe for the purposes of commerce and trade, and it becomes unsafe only by reason of the fact that it was stored with a large quantity of goods, by a tenant, and by reason of the additional fact that in an extraordinary emergency by fire, large quantities of water were thrown into and upon the building and goods, thereby causing it to collapse, whereby firemen in the discharge of their duty were killed, the owner of such building is not responsible in damages for the death of the firemen who were on the premises under a license conferred by law only. Woodruff v. Bowen, 136 Ind. 431, 445.

Removal of wooden buildings—Injunction.—A property owner may maintain a suit to enjoin the removal of a wooden building to a place within the fire limits, in violation of a city ordinance forbidding it, where it is to be located dangerously near the plaintiff's frame house. Kaufman v. Stein, 138 Ind. 49.

When fire limits are established, it is presumed that it is with reference to the existing location of buildings within such limits, and the subsequent removal of a wooden building to a point twenty-five feet distant upon the same lot is within the inhibition. Kaufman v. Stein, 138 Ind. 49.

Building permits.—The common council has power to enact an ordinance making it unlawful to erect a building within the city without first making application to the clerk of the board of public improvements. Hasty v. City of Huntington, 105 Ind. 540.

Cities may permit a temporary obstruction of a portion of streets when necessary in the erection of buildings. Such permit may be revoked at any time. Wood v. Mears, 12 Ind. 515; Senhenn v. City of Evansville, 140 Ind. 675; City of Indianapolis v. Miller, 27 Ind. 394.

Repairs of building.—If the owner of a building proposes to make repairs or additions to it of such material or in such manner as to clearly menace the public safety or to greatly endanger adjacent property, the city authorities have ample power to interfere and prevent the making of such repairs or addition. First National Bank, etc., v. Sarlls, 129 Ind. 201.

Deprivation of power to make repairs—Invalidity of ordinance.—A municipal ordinance is invalid which arbitrarily attempts to take from the owner of a frame or wooden building all power to make repairs necessary for its preservation or necessary for its enjoyment, regardless of the effect which such repairs may have upon the public, upon adjacent property, or upon the rights of others. First National Bank, etc., v. Sarlls, 129 Ind. 201.

A building permit, which requires the party to whom it is issued to protect the public from the dangers of the obstructions authorized by the permit, does not relieve the city of the duty of exercising such reasonable diligence as the circumstances require, to prevent the street from being occupied in such way as to endanger passers-by in their use of it in all proper ways. Cleveland v. King, 132 U. S. 295.

A city is not liable for the acts of persons it licenses to use its streets, unless the thing authorized is intrinsically dangerous, or the municipal authorities have notice of the negligence of its licensees. City of Warsaw v. Dunlap, 112 Ind. 576.

Erection of building—Injunction.—Where it is shown that the erection of a building, if permitted, will be in express violation of a valid municipal ordinance, although it would not be a nuisance per se, an individual who shows such fact, and shows in addition that its erection will work special and irreparable injury to him and his property, is entitled to relief by injunction. First National Bank, etc., v. Sarlls, 129 Ind. 201.

Buildings erected in violation of a valid ordinance may be removed; not necessarily because the buildings thus erected are a nuisance, but because the erection was in violation and defiance of the law. First National Bank, etc., v. Sarlls, 129 Ind. 210.

The erection within the "fire limits" of a city of a building from a forbidden material is per se a nuisance, which may be abated by the city without notice to the owner; and where such building is erected after the fire limits have been established, the city may destroy it without incurring any liability. Miller v. City of Valparaiso, 10 App. 22.

The ordinance of a city establishing "fire limits" is the best evidence of what such limits are. Miller v. City of Valparaiso, 10 App. 22.

Nuisance—Abatement of.—The legislature has power to invest municipal corporations with authority to abate public nuisances without resorting to judicial proceedings. Baumgartner v. Hasty, 100 Ind. 575, 583.

A municipal corporation has no power to forfeit the property of a citizen, but the abatement of a public nuisance by the tearing down of a wooden building, which constitutes a nuisance, is not a forfeiture of property. Baumgartner v. Hasty, 100 Ind. 575, 584.

A wooden building is not in itself a nuisance, but it may become so when it endangers surrounding buildings, and a municipal corporation may enact an ordinance providing for the summary removal of such a building. Baumgartner v. Hasty, 100 Ind. 575, 576.

Cities are not liable for property destroyed by fire because they do not exercise the powers conferred by law in regard to providing protection from fire; nor are they liable for the negligence of the fire department. Brinkmeyer v. City of Evansville, 29 Ind. 187; Robinson v. City of Evansville, 87 Ind. 334; City of Lafayette v. Timberlake, 88 Ind. 330; Faulkner v. City of Aurora, 85 Ind. 130; Kistner v. City of Indianapolis, 100 Ind. 210; City of Anderson v. East, 117 Ind. 126.

Thirty-third. To erect and establish market houses and market places, engine houses, houses of refuge, pest houses and hospitals.

Hospitals.—The word "hospitals" used in this clause means *public hospitals*. A hospital is not prima facie or per se a nuisance. Neither this nor the general welfare clause authorizes common councils of cities to enact ordinances to license and regulate the establishment of *private* hospitals within the city limits. Bessonies v. City of Indianapolis, 71 Ind. 189; Barnard v. Sherley, 135 Ind. 547, 567.

Markets.—The statute contemplates the use by the city of its own lands for the location of public markets. It can not establish public markets in the streets, against the protest of abutting property owners. City of Richmond v. Smith, 148 Ind. 294.

Thirty-fourth. To establish and construct wharves, docks, piers and basins; and to regulate landing places, and fix the rates of landing, wharfage, and dockage on all public grounds belonging to said city. All claims for landing, wharfage and dockage accruing to said city shall be a lien upon the boat, vessel or water-craft contracting the same, and after a demand by the wharf master upon the owner or master, clerk of consignee thereof, and refusal of payment, may be enforced by attachment before the mayor of said city where the amount does not exceed one hundred dollars, in the same manner and to the same extent that liens on boats and other water-craft are now enforced under the general laws of this state, and all proceedings shall be conformable thereto as far as practicable, and the common council shall have power to compel property owners owning any lots or parts of

lots or lands bordering on any navigable stream, basin or harbor, made so by nature or artificial means, to build and construct sea walls for the protection of the banks thereof in such manner as the common council by ordinance shall prescribe, provided such navigable water harbor or basin shall have been improved and used therefor. And for landing further up or beyond, and if it be deemed necessary to protect the banks of said stream, harbor or basin, along any such lot or parts of lots by sea walls or otherwise, and upon the failure of such property owners, to make such sea walls as shall be prescribed by such common council, the common council are hereby empowered to cause such sea walls to be built by contract let to the lowest bidder; and the cost of constructing the same shall be a lien upon the property bordering upon such harbors, navigable streams or basins, or deemed benefited by such improvements, and the lien of the city shall be enforced in the same manner as provided now by law for the enforcement of liens for the improvements of streets and sidewalks; *provided*, that thirty days' notice of the improvement to be made and the manner thereof shall be given to resident property owners by notice served by the city marshal, and by publishing in the corporation newspapers, four weeks to non-resident property owners; *provided*, that the owners of property affected shall have the same remedies by injunction and appeal that is now given by section 71, paragraph 3165 (R. S. 1894, § 3628), *and provided further*, that four weeks notice by publication in the corporation newspaper shall be given by the common council of their intention to pass such ordinance.

Water-craft—Wharfage.—Where the common council of a city passes an ordinance fixing the rate of wharfage to be paid by boats, etc., it is not necessary to the enforcement of a lien against a boat for delinquent wharfage that the ordinance should provide for such enforcement. When such delinquency occurs, the city may proceed under the provisions of R. S. 1894, § 7239, which fixes the lien, and have a judgment *in rem* against the boat for the amount due. Coal Float v. City of Jeffersonville, 112 Ind. 15, 18.

Right of city to construct—Wharfage.—Cities have power to construct wharves and collect wharfage. City of Jeffersonville v. Steam Ferry Boat, etc., 35 Ind. 19; City of Jeffersonville v. Louisville, etc., Ferry Co., 27 Ind. 100; 1 Dillon Munic. Corp., §§ 27, 103; 1 Beach Pub. Corp., §§ 564, 565.

Repairs.—The city can be compelled to repair a wharf and is liable for damages occasioned by the neglect to repair; but if one avails himself of the use of the wharf, although out of repair, he is still liable for wharfage; and the voluntary expenditure of money by a stranger in repairing a wharf of a city will not create a liability against the city. City of Jeffersonville v. Steam Ferry Boat, etc., 35 Ind. 19; City of Jeffersonville v. Louisville, etc., Ferry Co., 27 Ind. 100.

A city has no right to charge wharfage against one who is the owner of a ferry right, when the claim arises out of the exercise of the right of ferriage. City of Jeffersonville v. Louisville, etc., Ferry Co., 27 Ind. 100.

Jurisdiction.—A claim for wharfage against a domestic vessel is not of admiralty jurisdiction, and the state courts have jurisdiction to enforce such claim. City of Jeffersonville v. Steam Ferry Boat, etc., 35 Ind. 19.

The right to erect a wharf has its foundation either in the ownership of the soil or the right of eminent domain. When a wharf is built by individuals it is private property;

when built by a city, under the general law, it is under the jurisdiction and control of the city authorities. City of Jeffersonville v. Louisville, etc., Ferry Co., 27 Ind. 100.

A city incorporated under a charter authorizing the common council "to regulate all wharfage on the shore of the Ohio river adjoining said city," can not by ordinance define the line of high water mark and declare the erection of buildings below said line a nuisance and impose a fine upon persons erecting such buildings on their own land. City of Evansville v. Martin, 41 Ind. 145.

Under the general act for the incorporation of cities of 1857, the common council could not require the owner of a ferry within the city limits to take out a license. Shallcross v. City of Jeffersonville, 26 Ind. 193; Duckwall v. City of New Albany, 25 Ind. 283.

Same—Evansville—Wharf.—The city of Evansville, under her former special charter, had the power, as a police regulation, to establish water lines and to make reasonable provisions for the protection of navigation, and for this purpose could prohibit the erection of buildings below high water mark which would have a tendency to obstruct navigation; but this power did not extend to private wharves above high water marks. Martin v. City of Evansville, 32 Ind. 85.

Riparian owner—Navigable waters.—For law authorizing riparian owners to build, maintain and occupy piers, wharves, docks and harbors, upon navigable waters, see Acts 1899, p. 133.

Riparian owner—Ohio river—Title.—The title of the riparian owner on the Ohio river extends to low water mark, subject only to the easement in the public of the right of navigation. Martin v. City of Evansville, 32 Ind. 85; Sherlock v. Bainbridge, 41 Ind. 35.

The Ohio river being a "common highway," the owner of the soil along its banks, although his title may extend to low water mark, can not so construct his wharf as to materially interfere with the navigation of the river. His title to the soil of the shore, or under the water, does not authorize him to obstruct, in any way, the free use of the river by the public as a highway. Sherlock v. Bainbridge, 41 Ind. 35.

Riparian owner—Non-navigable waters—Title.—The title of riparian proprietors on non-navigable streams and lakes extends to the thread of the stream. Ross v. Faust, 54 Ind. 471; Ridgway v. Ludlow, 58 Ind. 248.

Wrongful use of wharf—Injunction.—Where a corporation for purely private purposes has entered upon a strip of land used for wharf purposes, and has begun the construction of a log-way and raised platform thereon, and threatens to use a steam engine in the prosecution of its businsss on said wharf, one who lives in the immediate vicinity of the wharf may enjoin such a use of the wharf, his complaint showing injury to the use and enjoyment of his dwelling-house therefrom, and consequent depreciation in its value, and the interference of its comfortable enjoyment by dust, smoke and offensive odors. The common council of a city can not authorize such an obstruction of the wharf. Adams v. Ohio Falls, etc., Co., 131 Ind. 375, 378.

Right in common with public.—The plaintiff in such a case has no right of action on account of the deprivation of the right which he in common with the general public has to use and drive over that part of the wharf occupied by the obstruction. Adams v. Ohio Falls, etc., Co., 131 Ind. 375, 379.

Comfortable enjoyment of dwelling.—It is not necessary to a right of action by the plaintiff that his dwelling-house will be injured by the proposed use of the wharf, but if its comfortable enjoyment will be essentially interfered with by dust, smoke and offensive odors, relief by injunction will be awarded. Adams v. Ohio Falls, etc., Co., 131 Ind. 375, 380.

Thirty-fifth. To establish a board of health, and to invest it with the power necessry to attain its object.

See *post*, §§ 1153, 1154.

For general law creating state and local boards of health, see R. S. 1894, §§ 6711, *et seq.*; Burns' Supp. 1897, § 6416.

Scope of power—Health and quarantine.—As to the scope of power which may be delegated to municipal corporations respecting the preservation of public health and safety, see 1 Dillon Munic. Corp., §§ 141, 144; 2 Beach Pub. Corp., § 983, *et seq.*

The exercise of this power is subject to the restrictions of the state and federal constitutions. Railroad Co. v. Husen, 95 U. S. 465; City of Crawfordsville v. Braden, 130 Ind. 149; 1 Dillon Munic. Corp., 4th ed., §§ 141, 142.

Service of city board as physicians.—A city ordinance requiring the board of health to have persons vaccinated as a protection against small-pox does not thereby impose upon the board or its members the duty to do service as physicians, but only to provide for the doing thereof. City of Ft. Wayne v. Rosenthal, 75 Ind. 156, 159.

Member of city board an officer—Contract.—A member of the board of health of a city, appointed under authority of § 48 of the act of March 14, 1867 (R. S. 1894, § 3533), for the incorporation of cities, is an officer within the meaning of § 52 of said act (R. S. 1894, § 3539), and can not be interested in any contract by which an indebtedness is created against the city. City of Ft. Wayne v. Rosenthal, 75 Ind. 156, 161; City of Ft. Wayne v. Lake Shore, etc., R. Co., 132 Ind. 558, 564; McGregor v. City of Logansport, 79 Ind. 166.

Vaccinating public pupils, pay.—Services rendered by a physician who is a member of the board of health of a city, in vaccinating pupils of the public schools, are voluntary, and the city is not liable therefor. City of Ft. Wayne v. Rosenthal, 75 Ind. 156, 162.

Thirty-sixth. To establish stands for hackney coaches, cabs and omnibuses, to enforce the observance and use thereof; and to fix the rates and prices for transportation of persons and property from one part of the city to another.

Hacks and other vehicles.—A city has power to enact ordinances authorizing police officers to prescribe the places where omnibuses, hacks and other vehicles shall stand at a railroad depot and requiring drivers to obey the directions of such officers. Veneman v. Jones, 118 Ind. 41.

Thirty-seventh. To regulate or prohibit runners at wharves, steamboat landings, railroad depots, and stations and other places.

Thirty-eighth. To regulate the sale of all kinds of property at auction, in the streets, stores, shops or elsewhere in the city, and to license auctioneers, and require them to pay a reasonable per cent. on the amount of sales.

Licensing auctioneers.—The common council has power to adopt a penal ordinance requiring an auctioneer to procure a license from the city. City of Goshen v. Kern, 63 Ind. 468.

A person who sells his own goods, as well as one who sells the goods of another, at public auction, is an auctioneer within the meaning of the statute. City of Goshen v. Kern, 63 Ind. 468.

It was held in Schuman v. City of Ft. Wayne, 127 Ind. 109, that a city under the general act of incorporation could not require pawnbrokers to procure license, but since this decision there has been legislation empowering cities and towns so to do. R. S. 1894, § 4313. See *post*, § 1148.

Thirty-ninth. To regulate the speed of horses, carriages, locomotives and other vehicles within the city.

See clauses 17 and 42.

Fortieth. To regulate all bridges, culverts, sewers, canal or draw-bridges, and the location thereof, and to maintain, regulate and collect tolls on any plank road heretofore built, and abandoned by the owners in any such city.

See *post*, § 218, note, Bridges,—also R. S. 1894, § 3283.

Navigable waters—Federal control.—Congress may provide for the erection of bridges, or for the removal of the same, over navigable waters; and may prescribe their height, location and other matters affecting navigation. See § 1, *ante*, n.; Elliott Roads and Streets, p. 25.

In towns and cities—Who may build.—While the act of 1885 (R. S. 1894, § 3283), imposes the duty of constructing bridges in towns and cities in certain cases upon the board of commissioners, still this act does not withdraw all power from towns and cities to build bridges, in such cases, when they deem it proper to do so. City of New Albany v. Iron Substructure Co., 141 Ind. 500.

Estoppel.—Where a city, without taking any steps to have the county commissioners to build a bridge, procured a bridge to be built, and the contractor entered into the contract and constructed the bridge in good faith, the city can not set up in defense of the payment of the price therefor, that its action in executing the contract and procuring the construction of the bridge was *ultra vires*. City of New Albany v. Iron Substructure Co., 141 Ind. 500.

County commissioners—Mandamus.—Under the act of 1885 (R. S. 1894, § 3283), a city can not compel the county commissioners, by mandate or otherwise, to build a bridge at any point deemed desirable or convenient by the city government. That must be left to the sound discretion of the commissioners, except in cases of extraordinary public necessity. And even if a public necessity should be shown for the bridge, it is the judgment of the board, and not that of the city authorities, which is to determine what kind of a bridge shall be built. Board, etc., v. City of Washington, 141 Ind. 187.

Under said act of 1885, which makes it the duty of boards of county commissioners to build all bridges within the corporate limits of any city or town within the state, the estimated cost of which exceeds $500, the absolute control of the city over the bridges is not interfered with, nor does it relieve cities from the duty of keeping the bridges within their corporate limits in repair. City of Goshen v. Meyers, 119 Ind. 196, 199; Board, etc., v. Washington Tp., 121 Ind. 379, 380; Spicer v. Board, etc., 126 Ind. 369, 371; City of Wabash v. Carver, 129 Ind. 552.

County bridge—Acceptance by city.—It is the duty of a city, in this state, to keep a public bridge, within its limits and of which it takes control, in repair, although such bridge may have been originally built and maintained by the county as part of a public highway, and its failure to do so renders it liable to one who suffers injury without contributory negligence. City of Goshen v. Myers, 119 Ind. 196, 200.

Within city limits—County liability.—A complaint in an action against a county for a personal injury resulting from the negligence of the county in failing to properly guard a bridge within the city limits, while making repairs thereon, which does not show that the bridge belonged to the county, or that it was its duty to keep it in repair, is bad. The fact that the county had built the bridge, and had contracted for its repair, did not disclose the county's liability to maintain it. Spicer v. Board, etc., 126 Ind. 369, 371.

Outside but adjoining a town.—A bridge outside the corporate limits, connected with a free gravel road, and constructed by the county, does not, by the fact that it leads up to and joins a street at the corporate line of the town, become a town bridge in such a sense as to relieve the county from the general duty of using reasonable care to keep it in a reasonably safe condition for passage. The town is excluded from the control of

a bridge so situated, the right of control being vested in the county. Board, etc., v. Washington Tp., 121 Ind. 379, 380.

Town—When charged with maintaining.—A town is chargeable with the duty of maintaining a bridge built by the county only when the bridge becomes the bridge of the town. Board, etc., v. Washington Tp., 121 Ind. 379, 380.

Repairs—Negligence.—It is the duty of cities to keep the bridges within their corporate limits in repair and safe for travel, no matter by whom or under what authority the same are erected, and they will be liable for negligence for not doing so to persons injured without their fault. City of Wabash v. Carver, 129 Ind. 552; Lowrey v. City of Delphi, 55 Ind. 250; City of Logansport v. Justice, 74 Ind. 378; City of Goshen v. Myers, 119 Ind. 196.

The above doctrine criticised, see Elliott Roads and Streets, pp. 44, 45.

Notice to councilmen.—Notice to a councilman of a defective bridge is notice to the city. City of Logansport v. Justice, 74 Ind. 378.

Diligence in making repairs.—A city is responsible only for reasonable diligence to repair defects in its streets or bridges, or to prevent accidents therefrom after such defects are known, but where, on failure, after notice in due time to have made repairs of such defects, an injury occurs therefrom, the city is liable. City of Logansport v. Justice, 74 Ind. 378.

Notice to a city of a defective condition of a bridge therein will be presumed from the continuance of such condition a sufficient length of time for the officers of such city to have had an opportunity to learn of such defect. City of Logansport v. Justice, 74 Ind. 378.

Latent defects.—In the construction of a bridge a municipal corporation is not liable for latent defects, which could not have been discovered by the use of reasonable diligence. Board, etc., v. Chipps, 131 Ind. 56.

Extraordinary use.—One who uses a bridge in an unusual manner and subjects it to an unusual or extraordinary load or strain and is thereby injured, can not recover damages for such injury. Board, etc., v. Chipps, 131 Ind. 56.

A general allegation that the plaintiff was without fault is not overcome by specific averments showing that plaintiff attempted to pass over the bridge with a traction engine and threshing machine. The appellate court will not take judicial notice that such use of a bridge is unusual and unsafe. City of Wabash v. Carver, 129 Ind. 552; Board, etc., v. Brod, 3 App. 585.

Forty-first. To regulate the building of party walls and partition fences, within the limits of said city, and prescribe by ordinance in what proportion the adjoining owners shall bear the expense of the same, and in what manner such expenses shall be levied and collected, and define the terms upon which partition walls and fences already constructed, may be used by adjoining owners.

Party walls and fences.—A power conferred upon a municipal corporation "to authorize the erection of party walls and fences, and to regulate them," includes the power to authorize their erection upon the application of either owner, and without the consent of the other; and such an ordinance is not unconstitutional because compensation is not provided for the land occupied by the wall. 1 Dillon Munic. Corp., § 151; Hunt v. Ambruster, 17 N. J. Eq. 208.

See, generally, upon the subject of party walls, Briggs v. Klosse, 5 App. 129; Conduitt v. Ross, 102 Ind. 166; Bloch v. Isham, 28 Ind. 37; Greenwood v. Kappes, 31 Ind. 216; Eckleman v. Miller, 57 Ind. 88.

Forty-second. To regulate the speed of railroad trains through the

city; and also provide by ordinance for the security of citizens and others from the running of trains through any city, and to require railroad corporations to observe the same, and also to require such corporations to keep clean the gutters and crossings of the streets along which the railways pass.

See clauses 17, 39; also § 1331, *post*.

Police power.—The franchise of a railroad company is subject to the exercise of the police power. All contracts between the railroad company and the municipality, and all rights granted for the use of the streets, are subject to the exercise of this power, and all reasonable regulations and ordinances enacted by virtue thereof. 3 Elliott Railroads, §1082, and cases.

Ordinance regulating speed of trains—Validity.—An ordinance of a city requiring all trains within the city limits to be run at a speed not over four miles an hour, when authorized by a statute, is valid, and evidence will not be heard that such ordinance is unreasonable, and therefore void. Cleveland, etc., R. Co. v. Harrington, 131 Ind. 426; Whitson v. City of Franklin, 34 Ind. 392; Kistner v. City of Indianapolis, 100 Ind. 210.

Right to regulate speed.—The speed of trains of a railroad company organized under a special law of the state may be regulated by municipal ordinance enacted in pursuance of a general statute, although no reservation to regulate the speed of such company's trains is inserted in such special charter. Cleveland, etc., R. Co. v. Harrington, 131 Ind. 426; Elliott Roads and Streets, pp. 607, 608; 2 Elliott Railroads, § 668; 3 Elliott Railroads, § 1082.

Failure to enforce ordinance—Defense.—A railway company violating an ordinance by running its trains at a rate faster than is allowed by the terms of such ordinance, can not set up as a defense that the officers and citizens of a city have never enforced such ordinance, although it has been enacted many years. Cleveland, etc., R. Co. v. Harrington, 131 Ind. 426.

It does not excuse one who attempts to cross in front of a locomotive which he sees approaching at no great distance, that the speed was eighteen miles an hour where a municipal ordinance limited the speed at that point to ten miles an hour. Korrady v. Lake Shore, etc., R. Co., 131 Ind. 261.

Penalty recovered of company.—An action brought by a municipal corporation to enforce a penalty for the violation of an ordinance regulating the rate of speed of railroad trains within the corporate limits is not a criminal proceeding, but essentially a civil action, and where the ordinance is violated by an engineer of a railroad company the penalty may be recovered by an action against the company. City of Hammond v. New York, etc., R. Co., 5 App. 526.

The penalty may be recovered from the engineer, and he is not excused by the fact that the conductor was responsible for the rate of speed. Whitson v. City of Franklin, 34 Ind. 392.

Ordinance constitutional—Territorial jurisdiction.—Such an ordinance is authorized by the statute and is not unconstitutional, and applies equally to all the territory within the corporate limits over which a railroad runs, including that not laid off in lots, streets, or alleys, or occupied with buildings, and including lands owned by railroad companies. Whitson v. City of Franklin, 34 Ind. 392.

Mail trains.—A prosecution for a violation of such an ordinance can not be defended on the ground that the railroad company was engaged in carrying the mail under a contract with the United States, and was required by said contract to transport the mail within a prescribed time, which could not be done if the towns and cities through which the road ran were allowed to regulate the speed of trains in passing through them. Whitson v. City of Franklin, 34 Ind. 392.

Faster than ordinance rate—Negligence per se.—It is negligence per se to run a train of cars in violation of a city ordinance, and if any one is injured in consequence

of such negligence, without being himself guilty of contributory negligence, he may recover damages for such injury. Pennsylvania Co. v. Horton, 132 Ind. 189; Shirk v. Wabash R. Co., 14 App. 126; St. Louis, etc., R. Co. v. Mathias, 50 Ind. 65; Pennsylvania Co. v. Hensil, 70 Ind. 569; Pennsylvania Co. v. Stegemeier, 118 Ind. 305; Louisville, etc., R. Co. v. Davis, 7 App. 222; Elliott Roads and Streets, pp. 605, 606; 3 Elliott Railroads, § 1160. As to speed of street cars see Thompson v. Citizens', etc., R. Co., Ind. Sup. Ct., April 20, 1899.

Evidence.—The ordinance need not be exhibited by copy with the complaint, but under proper averments in the complaint may be introduced in evidence in an action against the railroad company brought by a person injured by such negligence. Madison, etc., R. Co. v. Taffe, 37 Ind. 361; Simons v. Gaynor, 89 Ind. 165; St. Louis, etc., R. Co. v. Mathias, 50 Ind. 65.

The negligent acts of the servants of a railroad company, in running the train at a higher rate of speed than the city ordinance permits, can not in any way excuse a person about to go upon the track from using proper precautions to avoid injury; for such conduct could not be considered as misleading to a person, when he might easily have seen the approaching train if he had but looked in the direction whence it was coming. Pittsburgh, etc., R. Co. v. Bennett, 9 App. 92.

Signals—Failure to ring bell.—It is conclusive negligence on the part of a railroad company to fail to comply with a city ordinance requiring the ringing of the bell at certain places. Louisville, etc., R. Co. v. Davis, 7 App. 222. See 3 Elliott Railroads, § 1206.

Regardless of a city ordinance, a railroad company is required to run its trains over frequented crossings in such a manner as to have due regard to the safety of the people who cross its track, the rate of speed to be guided by the circumstances of each case. Chicago, etc., R. Co. v. Spilker, 134 Ind. 380.

Street crossings—Gates and safeguards.—Under the above clause the common council of a city may provide, by ordinance, for the security of citizens and others from the running of trains through the city, and may require a railroad company to provide and use suitable safeguards at the intersections of streets, highways or alleys, or elsewhere, within such city; but such city is not liable in damages for injuries to persons or property which may result from the non-exercise of such legislative power by its common council. Kistner v. City of Indianapolis, 100 Ind. 210; City of Shelbyville v. Cleveland, etc., R. Co., 146 Ind. 66.

Where a railroad company, in pursuance of a city ordinance, has erected gates and stationed a watchman at the street crossing, a traveler who approaches the crossing and finds the gates open and receives no warning from the watchman, has the right to assume that there are no approaching trains, and if, acting upon this assumption, he enters upon the crossing and is instantly confronted by trains going in opposite directions, and in the confusion caused by the unexpected danger into which he is thus led, is struck and killed, the railroad company is liable. Pennsylvania Co. v. Stegemeier, 118 Ind. 305.

Where a railroad company crosses a street or highway with its track the company must maintain the street or highway in a reasonably safe condition for the use of the public. Pennsylvania Co. v. Frund, 4 App. 469.

The approaches to the part of the street and sidewalk crossing the track or right of way are a part of the crossing, and it is incumbent upon the company to place and maintain the approaches, as well as the crossing, in a condition reasonably calculated, in contemplation of the surrounding circumstances, to insure the safety of persons passing over the track and upon the street and sidewalk at the crossing. Cincinnati, etc., R. Co. v. Claire, 6 App. 390.

When a railroad company is empowered and ordered by a city ordinance to raise its track at a crossing of an intersecting street, it has the right and it becomes its duty to do so, but it must restore the street and its sidewalks to their former condition of use-

fulness, so far as it can by the exercise of reasonable care and diligence, and failing to do so, it is guilty of maintaining a nuisance, and is liable to a traveler who, by reason thereof, sustains an injury without fault on his part. Cincinnati, etc., R. Co. v. Claire, 6 App. 390.

Flagman at crossing.—When a railroad company is required by an ordinance to keep a watchman at a crossing, a failure to do so is negligence; and it may be negligence on the part of the railroad company, when the crossing is a dangerous one, not to keep such watchman at such crossing, even in the absence of an ordinance requiring it. Pennsylvania Co. v. Hensil, 70 Ind. 569; Pittsburgh, etc., Co. v. Yundt, 78 Ind. 373; Chicago, etc., R. Co. v. Boggs, 101 Ind. 522, 527; City of Shelbyville v. Cleveland, etc., R. Co., 146 Ind. 66. See 3 Elliott Railroads, § 1157.

Power conferred upon a city "to require railroad companies to keep flagmen at railroad crossings of streets, and provide protection against injury to persons and property in the use of such railroads," etc., confers plenary power over railroads within the corporate limits, in order that by such requirements as in its discretion it may prescribe, and as are within the just limits of police regulation, the municipal authority may provide protection against injury to persons and property likely to arise from the use of railroads. Under such power railroads may be required to place barriers or guards between their tracks and public parks and highways. Hayes v. Michigan Central R. Co., 111 U. S. 228.

Forty-third. To construct and regulate sewers drains and cisterns and provide for the payment of the cost of constructing the same; to cause the same to be done by contract given to the best bidder after advertising to receive proposals therefor; to provide for the estimate for the cost thereof, and the assessment of the same upon the owners of such lots and lands as may be benefited thereby in such equitable proportions as the common council may deem just, which estimate shall be a lien upon such lots and lands, and may be enforced by the sale of the same in such manner as the common council may provide: *Provided, however*, That not to exceed ten per cent. of the value of such lots or lands as the same is valued and assessed upon the tax duplicate, for state and county or city taxes, shall be assessed against such lots or lands in any one year.

See clause 26 and *post*, §§ 127 and 183, *et seq.*; also *post*, §§ 1090 *et seq.* and 1107 *et seq.*

Authority to construct drains and sewers—Implied power.—The authority to construct sewers is incident to the general right of a municipal corporation to maintain streets and highways. This power resides in all municipal corporations unless expressly denied them by the legislature. Leeds v. City of Richmond, 102 Ind. 372; City of Ft. Wayne v. Coombs, 107 Ind. 75; Kinser v. DeWitt, 7 App. 597, 602; Coburn v. Bossert, 13 App. 359, 362; Elliott Roads and Streets, p. 362; 2 Dillon Munic. Corp., 4th ed., § 805, *et seq.*

Lands and easements for sewers—Express and implied powers.—The statute in express terms confers exclusive jurisdiction upon municipal corporations over all highways within their limits, and also confers broad powers respecting drains and sewers. There is, therefore, a general authority vested in cities to construct sewers, and this power involves all subsidiary powers essential to make it effective. The city, therefore, as incident to the power to construct sewers, has the right to acquire land by ordinary methods needed for such sewers or drains, or the outlets thereof, or may acquire an easement in land for such purposes. Schipper v. City of Aurora, 121 Ind. 154; Leeds v. City of Richmond, 102 Ind. 372.

City—Jurisdiction—Drainage commissioners.—The cities of this state have exclusive

jurisdiction of the matter of drainage within their limits, and there is no authority for the construction of drains in cities by drainage commissioners, under the direction of the circuit court. Anderson v. Endicott, 101 Ind. 539; State v. Jackson, 118 Ind. 553; Scruggs v. Reese, 128 Ind. 399, 403.

The jurisdiction of the circuit court to establish a ditch, under the drainage law of 1881, partly within the limits of an incorporated city, and levy assessments upon city property, can not be questioned by a property owner in a suit to collect an assessment. State v. Jackson, 118 Ind. 553.

Sewers, how built and paid for.—A municipal corporation is not bound to let all public work to contractors; but sewers, bridges and the like may be built by the officers of the city, if the governing corporate officers deem it expedient. Cummins v. City of Seymour, 79 Ind. 491. See City of Aurora v. Fox, 78 Ind. 1. But as to sewers, see R. S. 1894, § 4273, *et seq.*, *post*, § 1090, *et seq.*

Sewers and drains—When part of street improvement.—When the sewer or drain is a necessary part of the street improvement, and is adapted and intended to remove the surface or storm water from the street, it may be constructed under street improvement proceedings and contract, and paid for as a part of the street improvement. City of Elkhart v. Wickwire, 121 Ind. 331; Kirkland v. Board of Public Works, 142 Ind. 123.

Sewers—City not liable for—Liability on property benefited.—Under the act approved March 8, 1889, as amended March 6, 1891, (R. S. 1894, § 4288, *et seq.*, Barrett law; *post*, §§ 1107–1119), the city assumes no obligation to pay for the construction of a sewer, but the same is to be paid for out of assessments on the property benefited thereby. If bonds are issued in pursuance of this act, they do not create an indebtedness against the city. Robinson v. City of Valparaiso, 136 Ind. 616; Quill v. City of Indianapolis, 124 Ind. 292; City of New Albany v. McCulloch, 127 Ind. 500.

Barrett law—Amendment—Sewers.—The act approved March 8, 1889, known as the Barrett law (Acts 1889, p. 237), "providing the mode and manner of making street and alley improvements and building sewers," and the act approved March 6, 1891, amending the former act (Acts 1891, p. 323) constitute one act. The latter act is blended with the former. The amended section took the place of the original section, which it amended. (*Post*, §§ 1107–1119.) Robinson v. City of Valparaiso, 136 Ind. 616.

Construction of sewers—Liability of city.—In the construction of sewers and other public works authorized by law, cities are liable for consequential injuries resulting from negligence only. Peck v. City of Michigan City, 149 Ind. 670; City of Richmond v. Test, 18 App. 482; City of Terre Haute v. Hudnut, 112 Ind. 542.

Legislative and judicial powers—Error.—A city is not liable for error in the exercise of merely legislative or judicial powers, and therefore it can not be held for failure to undertake the construction of sewers and drains, unless they be made necessary by its own acts; nor for errors of judgment in the absence of negligence. City of Evansville v. Decker, 84 Ind. 325; Cummins v. City of Seymour, 79 Ind. 491, 494; Stackhouse v. City of Lafayette, 26 Ind. 17; City of Logansport v. Wright, 25 Ind. 512; Roll v. City of Indianapolis, 52 Ind. 547; Dooley v. Town of Sullivan, 112 Ind. 451; City of Terre Haute v. Hudnut, 112 Ind. 542; City of North Vernon v. Voegler, 103 Ind. 314; Rozell v. City of Anderson, 91 Ind. 591; 1 Beach Pub. Corp., § 764.

Where a municipal corporation, by its own act, makes a sewer or drain necessary, the duty then rests upon it to provide the same, and it will be liable in damages for failure to do so. Elliott Roads and Streets, p. 363; City of Crawfordsville v. Bond, 96 Ind. 236; City of Indianapolis v. Lawyer, 38 Ind. 348; Cummins v. City of Seymour, 79 Ind. 497; City of New Albany v. Lines, 21 App. 380.

Plans—Error of judgment—Ministerial act—Negligence.—A municipal corporation is not liable for mere error of judgment as to the plan of a public improvement, but is responsible for negligence in devising the plan of an improvement, as well as for negligence in executing the work. When the work is undertaken it becomes a minis-

terial one, and the corporation must exercise ordinary care and skill in devising the plan and performing the work. Weis v. City of Madison, 75 Ind. 241, 250; Cummins v. City of Seymour, 79 Ind. 491; City of Evansville v. Decker, 84 Ind. 325; City of Crawfordsville v. Bond, 96 Ind. 236; City of North Vernon v. Voegler, 103 Ind. 314, 316; Rice v. City of Evansville, 108 Ind. 7, 8; City of Terre Haute v. Hudnut, 112 Ind. 542; City of Seymour v. Cummins, 119 Ind. 148; City of New Albany v. Ray, 3 App. 321; City of Valparaiso v. Ramsey, 11 App. 215; City of Vincennes v. Richards, 23 Ind. 381; City of Peru v. Brown, 10 App. 597; Elliott Roads and Streets, pp. 365, 366; 1 Beach Pub. Corp., §§ 766, 767.

Contributory negligence.—In actions against municipal corporations for injuries resulting from the negligent construction or maintenance of sewers, the plaintiff must show that he was free from contributory negligence. Roll v. City of Indianapolis, 52 Ind. 547, disapproved; City of Ft. Wayne v. Coombs, 107 Ind. 75; City of Valparaiso v. Ramsey, 11 App. 215. See citations under preceding note. See, also, City of North Vernon v. Voegler, 89 Ind. 77.

But by the act of 1899 the above rule is changed so that the burden of showing contributory negligence is on the defendant. Acts 1899, p. 58.

Where the city is charged with having committed a positive aggressive wrong, as the maintenance of a nuisance, it is liable to the person whose property is damaged thereby, regardless of the question of contributory negligence. City of Lebanon v. Twiford, 13 App. 384; Stein v. City of Lafayette, 6 App. 414.

Sewers—Damages for negligent construction—Nuisance.—If deposits from a sewer constructed and maintained by a city cause peculiar injury to the owner of docks, by preventing or materially interfering with the accustomed and lawful use of such docks, the city is liable in damages. Peck v. City of Michigan City, 149 Ind. 670.

The following principles with respect to the liability of municipal corporations in ordaining, planning and constructing sewers are well established:

1. That municipal corporations are not liable to individuals for judicial errors, although private rights may be injured thereby.

2. They are not liable to individuals for the exercise of their ordaining powers, however mistaken, or even corrupt, their policy may be, and although private injuries may result therefrom.

3. They are liable to individuals for wrongful acts or dereliction of duty, in the exercise of their ministerial acts, whenever injury to private rights is the direct and natural consequence.

4. When liable, they are liable the same as individuals would be under the same circumstances. But it is often difficult to distinguish between the judicial, ordaining and ministerial acts, as these powers and duties are frequently blended, and it is quite impossible to derive much light from the analogy to personal liabilities, for individuals are seldom clothed with the powers, or charged with the duties, which belong to municipal corporations. Roll v. City of Indianapolis, 52 Ind. 547, 553.

Capacity of sewers—Liability.—Where there is no negligence in devising the plan of a sewer or in constructing it, a municipal corporation is not liable for an injury to private property resulting from overflows caused by the insufficient capacity of the sewer. Rice v. City of Evansville, 108 Ind. 7; City of Terre Haute v. Hudnut, 112 Ind. 543: Rozell v. City of Anderson, 91 Ind. 591; Roll v. City of Indianapolis, 52 Ind. 547.

Skill required in plan for sewer.—Where the authorities of a municipal corporation undertake the work of constructing a sewer or system of sewers, it is their duty to use reasonable care to procure the services of men skilled in such matters to prepare the plans for the same, and, if there is a lack of such care, by reason of which the plans are defective, they are guilty of negligence, for which the corporation must answer in case of damage resulting from such defective plan. City of Terre Haute v. Hudnut, 112 Ind. 542; Elliott Roads and Streets, pp. 365, 366.

The skill and care which is incumbent relates as well to the plan as to the execution

of the work, and to the capacity of the sewer as well as to the mechanism in its construction. City of Indianapolis v. Huffer, 30 Ind. 235.

Defective plan—Evidence.—Where a recovery is sought for injuries caused by a defective sewer, or by a sewer of inadequate size, the defect or insufficiency being caused by a defect in the plan, it is competent for the municipal corporation to show that reasonable care was exercised in the employment of a competent engineer or expert to prepare the plan, and that ordinary care was used in seeing to it that he exercised skill, and, to this end, evidence of consultation with experts, so employed, or of examination of plans by councilmen, is competent, though not in writing. City of Terre Haute v. Hudnut, 112 Ind. 542, 548.

When no liability.—Where, however, reasonable care is exercised by the municipal authorities in securing the employment of fair care and skill in the preparation of plans for a sewer, and ordinary care is used to see that such skill is brought into exercise, then there is no negligence, and there can be no liability, although when the plan is carried into effect a defect may be developed which destroys or impairs its efficiency. City of Terre Haute v. Hudnut, 112 Ind. 542, 546.

Plans by property owner.—Where a municipal corporation makes use of private property for the purpose of constructing a sewer, and in order to obtain the privilege of using the property submits to the demand of the owner to construct the sewer according to the plans and specifications prepared by him, it is liable for negligence in the construction and maintenance of such sewer. City of Ft. Wayne v. Coombs, 107 Ind. 75, 78.

Ordinary care required.—Where a municipal corporation constructs a sewer, it is bound to use ordinary care and skill, and it is not necessary that it should be averred in a complaint for injuries resulting from the defective construction thereof, that the corporate authorities had notice of defects caused by want of skill or care in doing the work. City of Ft. Wayne v. Coombs, 107 Ind. 75, 77; City of Ft. Wayne v. Patterson, 3 App. 34, 38.

Damages, how paid.—Damages arising from injuries occasioned by negligence in the construction of a public sewer by a municipal corporation are not part of the expense of constructing the sewer, and can not be assessed against private property, but must be paid out of the general treasury. Leeds v. City of Richmond, 102 Ind. 372, 381.

Abandonment of plan—Effect.—The city of Aurora, to drain one of its streets terminating at the river bank, adopted a plan which contemplated the construction of a stone gutter to extend from low water mark to the top of the bank. Plaintiff, for the protection of this work, agreed to make a filling, at either side of the gutter, in consideration of the grant of the land over which the city had acquired an easement for the purpose of this drainage, to be used for a private landing. Owing to a change in the plan of the work it was found that no landing could be made. The plaintiff, while not entitled to recover damages for the breach of the contract, being bound to take notice of the city's right to change the plan of the work, could recover for work done under the contract, it being a contract not prohibited by statute, or in violation of public policy. Schipper v. City of Aurora, 121 Ind. 154, 158.

Defective drainage—Unskillful plan.—Where an imperfect and unskillful plan was adopted, the execution of which caused a large body of surface water to collect in a basin excavated in the alley adjacent to a house without any outlet whatever, and the water thus collected was discharged into the cellar, the city was liable. City of New Albany v. Ray, 3 App. 321, 323.

Proper plan—Contractor's negligence.—If a city adopts a proper plan of drainage and lets a contract for the doing of the work, the contractor to use his own methods and means for the construction of the drain, the city is not liable for damages resulting from the contractor's negligence; but if the city adopts a defective plan, and the work is constructed according thereto, and a special injury results to a property owner by reason of negligence in devising the plan, the city is liable. City of Seymour v. Cummins, 119 Ind. 148, 152.

Who can recover damages.—In such case the damages accrue to the person who owns the property at the time of the injury, and his right to maintain an action therefor is not affected by the fact that he parts with the title to the real estate after the commencement of the action. City of Seymour v. Cummins, 119 Ind. 148, 153; Stein v. City of Lafayette, 6 App. 414; City of New Albany v. Lines, 21 App. 380.

Drainage—Nuisance—Special injury.—Where a city constructs an open ditch upon a street, so near to a plaintiff's lot as to cause portions thereof to fall into the ditch, and so as to deprive him of access to his residence, and to affect the healthfulness of his property by causing filthy water and sewage to become stagnant adjacent thereto, it is liable in damages. City of Seymour v. Cummins, 119 Ind. 148, 149.

Insufficient defense—Ordinance.—Where such injury is caused by grading a street, the fact that such grading was done in pursuance of an ordinance of the city in no manner exonerates the city from liability for such injury, and a request, in an action to recover damages therefor, to thus instruct the jury, was properly refused. City of North Vernon v. Voegler, 89 Ind. 77, 80.

Outlet a necessary part.—The outlet is a necessary part of a sewer, and whenever a municipal corporation, by its system of sewerage, renders an outlet necessary, it must provide one, and it must be constructed with ordinary care and skill. City of Evansville v. Decker, 84 Ind. 325, 329; City of Crawfordsville v. Bond, 96 Ind. 236, 242; Leeds v. City of Richmond, 102 Ind. 372, 380; City of Ft. Wayne v. Coombs, 107 Ind. 75, 81; Patoka Tp. v. Hopkins, 131 Ind. 142, 143; City of New Albany v. Ray, 3 App. 321, 322; Town of Monticello v. Fox, 3 App. 481, 488.

Pollution of stream.—Where sewers are constructed by a city with due care and skill where public necessity requires them to be, and upon modern, improved plans, and without negligence or malice in their construction or operation, the city is not liable for damages because the sewage, when combined with other agencies, pollutes the waters of a stream and annoys the owners of a factory several miles further down the stream. City of Richmond v. Test, 18 App. 482.

Surface water—Injury by.—A city is not liable for injuries consequent merely upon the careful and skillful improvement of its streets, whereby surface water is thrown upon private property, but it is liable if it collect the water in a channel and pour it upon another's land, within or without its corporate boundaries. Weis v. City of Madison, 75 Ind. 241, 248; City of Evansville v. Decker, 84 Ind. 325, 328; City of North Vernon v. Voegler, 89 Ind. 77, 79; City of Crawfordsville v. Bond, 96 Ind. 236, 242; Davis v. City of Crawfordsville, 119 Ind. 1, 2; Town of Monticello v. Fox, 3 App. 481, 488; City of New Albany v. Ray, 3 App. 321; Patoka Township v. Hopkins, 131 Ind. 142; City of Indianapolis v. Lawyer, 38 Ind. 348; City of Indianapolis v. Tate, 39 Ind. 282; Elliott Roads and Streets, p. 363.

The collecting of surface water into one channel by a city and causing it to flow upon another's land, is an actionable injury, being a ministerial and not a legislative or judicial act. Weis v. City of Madison, 75 Ind. 241, 251; City of New Albany v. Lines, 21 App. 380.

Culvert—Water discharged.—If a city, by the use of a culvert not constructed by it, damage a citizen by reason of discharging the drainage of its streets upon his lot, it is liable. City of Crawfordsville v. Bond, 96 Ind. 236, 240.

A complaint against a city alleging, with reasonable certainty, that the municipal authorities, by the improvement of a street, collected in one channel the surface water falling upon divers streets, and flowed it against an insufficient culvert, and thus unlawfully cast the water in a body upon the private property of the plaintiff, contained facts sufficient to constitute a cause of action. Weis v. City of Madison, 75 Ind. 241, 254.

Culvert built by railroad company—Liability.—Where a municipal corporation has granted a right of way through a street to a railroad company, and the company, solely for its own use, erects a culvert on the street, the municipal corporation is not liable for

an injury resulting to an individual from an overflow of water caused by the defective construction of the culvert. Stackhouse v. City of Lafayette, 26 Ind. 17.

While the city will not be liable for injury resulting from defective sewers and culverts constructed for the exclusive use of the railroad company, if the city adopt them for its own use, and they prove insufficient, or become out of repair, the city will be liable for injury resulting to adjoining property by reason of such insufficiency. The city can not delegate her general power and adopt the work of the railroad company as a part of her general system without responsibility for defects in the work. City of Indianapolis v. Lawyer, 38 Ind. 344; City of Indianapolis v. Tate, 39 Ind. 282; State v. Board, etc., 80 Ind. 478; Lostutter v. City of Aurora, 126 Ind. 436.

Culvert—Error in judgment.—A city is not liable in damages for an overflow of land caused by a defective culvert in one of its streets, unless negligence is shown in the plan or construction of such improvement. In such case an error in judgment will not create liability. City of Peru v. Brown, 10 App. 597.

Culvert—Negligent construction.—If a municipal corporation negligently construct a culvert, and damages are sustained by property owner because of the overflowing of his property on account of such negligent construction, the culvert being insufficient to carry off the water at that point, the property owner being without fault, may recover damages. City of Valparaiso v. Ramsey, 11 App. 215; Town of Boswell v. Wakley, 149 Ind. 64.

The fact that the city promised to repair the defect, and the reliance of the property owner on such promise, will not relieve the property owner from negligence during the period of such reliance. City of Valparaiso v. Ramsey, 11 App. 215.

Municipalities are liable for negligence of officers in construction and repair of bridges, culverts, etc., even if counties are not. Town of Boswell v. Wakley, 149 Ind. 64.

Repairs—Negligence.—A city having constructed sewers and drains is bound to keep the same in repair, and is liable for damages caused without the fault of a property owner, by its negligence in failing to keep the same in repair. City of South Bend v. Paxon, 67 Ind. 228; City of Ft. Wayne v. Coombs, 107 Ind. 75; City of Valparaiso v. Cartwright, 8 App. 429; Elliott Roads and Streets, p. 364.

Complaint.—Where the gist of an action stated in the complaint is negligence of the municipality in failing to keep a drain or open ditch in repair, by carelessly and negligently allowing the same to fill up with sand and other obstructions, and by building across the drain approaches to adjoining alleys without placing drains under the approaches, by reason of which obstructions the water overflowed the drain and flowed into plaintiff's cellar, keeping it damp and unhealthful, injuring the foundation of the house and destroying large quantities of personal property mentioned, the complaint states a cause of action. City of Valparaiso v. Cartwright, 8 App. 429.

Condemnation of private property—Eminent domain.—Under the above clause the power to condemn and appropriate private property for the construction of sewers does not exist. The right of eminent domain lies dormant in the state until legislative action is had pointing out the occasion, mode, conditions and agencies for its exercise; and the statute has not expressly conferred the power. Allen v. Jones, 47 Ind. 438; Leeds v. City of Richmond, 102 Ind. 372, 377; Kinser v. Dewitt, 7 App. 597, 602; City of Richmond v. Test, 18 App. 482. The case of Allen v. Jones, *supra*, modified. Jackson v. Smith, 120 Ind. 520.

Beyond corporate boundaries.—A city may extend its drains beyond the corporate boundaries. The authority to do so is expressly conferred by the statute, but without a statutory provision to that effect the right exists. City of Evansville v. Decker, 84 Ind. 325; Cummins v. City of Seymour, 79 Ind. 491.

Highway beyond corporate limits—Use for drainage.—A municipal corporation has authority to use a public highway lying outside of its boundaries for the purpose of drainage, without paying or tendering damages to adjacent property owners, and for

consequential damages resulting from the proper and reasonable exercise of such authority there can be no recovery. Cummins v. City of Seymour, 79 Ind. 491; City of Ft. Wayne v. Coombs, 107 Ind. 75, 80; Elliott Roads and Streets, p. 362.

Extraordinary freshets.—In planning and constructing sewers and drains, a city is not bound to provide for extraordinary freshets, but as to such as may be reasonably anticipated, though only at long and irregular intervals, it is so bound. City of Evansville v. Decker, 84 Ind. 325, 328; City of Madison v. Ross, 3 Ind. 236.

The degree of care and foresight which is necessary to use is that which a discreet and cautious man would or ought to use, if the risk and loss were to be exclusively his own; and it should be in proportion to the nature and magnitude of the injury likely to follow from its omission. City of Madison v. Ross, 3 Ind. 236.

Assessments.—The above clause is in no wise affected by the act of April, 1885 (R. S. 1894, § 3626, *post* § 221), in relation to the apportionment and collection of assessments for street improvements. City of Elkhart v. Wickwire, 121 Ind. 331.

Ten per cent. limit.—Assessments for the construction of sewers, drains and cisterns which exceed ten per cent. of the assessed value of the property appearing on the tax duplicate, prohibited by the proviso in the above clause relating to their construction, are void only as to the excess; and one seeking to annul the assessment can not complain in collateral proceedings until they have paid, or offered to pay, all except the excess. City of Elkhart v. Wickwire, 121 Ind. 331.

Under above clause, the ordinance having provided how the assessments should be made and the proportion to be paid by the property holders and by the city, declaring the assessments liens upon the property, and providing the mode of their collection, it was proper for the city to pay the contractors and levy the assessments in installments, thereby lessening the burden of the property holders. In such case the assessments may be made for the benefit of the city and precepts issued in its name, notwithstanding the ordinance did not provide in whose name the precepts should issue. City of Elkhart v. Wickwire, 121 Ind. 331.

Benefits—Judgment and discretion of council.—The question of benefits to property in a city from the construction of a sewer having once been passed upon by the common council, no other court or tribunal has any power to review or pass upon it. When the council has decided by its estimate and assessment what property is benefited, and in what proportion, that decision is final and complete, and there is no power in any judicial tribunal to interfere, unless for fraud or corruption in making the assessment. City of Ft. Wayne v. Cody, 43 Ind. 197; Cole v. State, 131 Ind. 591, 596; Robinson v. City of Valparaiso, 136 Ind. 616; Crawfordsville, etc., Assn. v. Clements, 12 App. 464.

If a sewer is established by an ordinance defining the route along which it shall be constructed, the material to be used, and size of the sewer, declaring what real estate would be benefited by the construction of the same, and directing that the cost be assessed against the owners of the real estate benefited, the common council can not thereafter, by another ordinance, provide for the extension of the sewer, changing also the character of the material to be used, as well as the size of the sewer, but not declaring any change in the real estate benefited, and still charge the cost of the sewer upon the same property which would have been benefited by the construction of the sewer provided for in the first ordinance. City of Columbus v. Storey, 35 Ind. 97.

Property exempt from taxation.—A building and the ground upon which the same is situated, used for religious purposes, are not liable to assessment to contribute to the cost of the construction of sewers in a city. Such property not being valued and assessed upon the tax duplicate for state and county or city taxes, no method is provided by law for its assessment for the purpose of sewerage. First Presbyterian Church, etc., v. City of Ft. Wayne, 36 Ind. 338. *Contra* as to street improvements, Rausch v. Trustees, etc., 107 Ind. 1. See also subsequent legislation, R. S. 1894, § 4288, *et seq.* (*post*, §§ 1107–1135).

Assessments—Waiver of irregularities under Barrett law.—A property owner who, in consideration of the right to pay his assessment in semi-annual installments, has agreed that he will waive all irregularities in the assessment, can not question the validity of the provision of the act known as the Barrett law (R. S. 1894, § 4288, *et seq.*; *post*, § 1107, *et seq.*), that "no suit shall lie to restrain or enjoin the collection of such assessment," and that the validity of such assessment shall not be questioned. Such provision applies only to those persons who, in consideration of their right to pay in installments, agree in writing, to be filed with the city clerk, that they will make no objection to the legality or regularity of their respective assessments, and is constitutional. Quill v. City of Indianapolis, 124 Ind. 292.

Lien of local assessment—Notice.—Notice at some stage of the proceedings prior to a conclusive judgment is requisite in order to authorize the subjection of property to a special lien for a local assessment, but it is competent for the legislature to prescribe the kind of notice, and the tribunal before which it may be heard. McEneney v. Town of Sullivan, 125 Ind. 407; Garvin v. Daussman, 114 Ind. 429; Kuntz v. Sumption, 117 Ind. 1; Kiphart v. Pittsburgh, etc., R. Co., 7 App. 122; Killian v. Andrews, 130 Ind. 579; Law v. Johnston, 118 Ind. 261; Johnson v. Lewis, 115 Ind. 490.

Void assessments—Injunction.—An assessment for a public sewer made under the statute for street improvements, and placing the assessment not according to the benefits received but according to the lineal measurement of the property fronting on the sewer, is void. Crawfordsville, etc., Assn. v. Clements, 12 App. 464.

Where there is no legal authority to make an assessment, its enforcement and collection may be enjoined. City of Terre Haute v. Mack, 139 Ind. 99; Crawfordsville, etc., Assn. v. Clements, 12 App. 464; Balfe v. Lammers, 109 Ind. 347; City of Ft. Wayne v. Shoaff, 106 Ind. 66; Goring v. McTaggart, 92 Ind. 200.

Estoppel—Improvement not made under color of statute.—A property owner has the right to assume that his property will be assessed for improvements at least under color of the statute, and where the remedy sought is not a collateral one but a direct proceeding attacking the assessment, there is no estoppel. Crawfordsville, etc., Assn. v. Clements, 12 App. 464.

Railroad right of way—Assessment of.—The right of way of a railroad company which abuts upon a street may be assessed for the construction of a sewer; also for the improvement of the street. Such right of way can not be sold to enforce the lien of the assessment, but personal judgment may be taken against the company for the amount of the assessment, and execution levied upon personal property. Pittsburgh, etc., R. Co. v. Hays, 17 App. 261; Lake Erie, etc., R. Co. v. Bowker, 9 App. 428.

City council proceedings—Sewer assessment—Evidence—Appearance—Waiver.—In an action to enforce a sewer assessment lien, it was not error to admit in evidence, over defendant's objection, because of certain descriptions therein and misnomer of defendant, the transcript of proceedings of the city council upon which the alleged lien was predicated, where it appears that during the proceedings before the council, which resulted in the assessment of benefits, for which the lien is sought to be enforced, and before the same were finally settled and confirmed upon the report of the civil engineer, the defendant, by its attorneys, made a full appearance to the proceedings and filed a remonstrance, no objection then being offered to the description and alleged misnomer. Such facts constituted a waiver to the objection, even if it ever had any merits. Lake Erie, etc., R. Co. v. Bowker, 9 App. 428.

Injunction.—The matter of constructing sewers, and accepting the same when completed, is placed in the hands of the council, and the judgment of the council can not be questioned by collateral attack by way of injunction to restrain the city from accepting a system of sewers and from paying therefor by assessment or otherwise, on account of the defective construction thereof. The law affords the property owner a full and complete remedy therefor, and injunction will not lie. Robinson v. City of Valparaiso,

136 Ind. 616; McEneney v. Town of Sullivan, 125 Ind. 407; City of Ft. Wayne v. Cody, 43 Ind. 197; Crawfordsville, etc., Assn. v. Clements, 12 App. 464.

In an injunction suit, in such case, only defects or irregularities affecting the jurisdiction can be made available. Questions as to the manner in which the work was done under the contract, and kindred questions, can not be considered in such suit, for they do not go to the jurisdiction. McEneney v. Town of Sullivan, 125 Ind. 407.

As long as the corporate authorities keep within the discretion conferred upon them they are the exclusive judges of the plan and method of constructing drains and sewers, and courts can not interfere with the exercise of such discretion; but they can prevent by injunction the corporation from collecting water in one body or channel and pouring it upon the property of a citizen. Town of Sullivan v. Phillips, 110 Ind. 320; Leeds v. City of Richmond, 102 Ind. 372; City of Kokomo v. Mahan, 100 Ind. 242; Elliott Roads and Streets, pp. 362, 363.

Injunction—Collateral attack—Presumption.—In a collateral attack upon the right of the city to enforce its assessments for the construction of a sewer every presumption will be taken in favor of the action of the city and its officers, and unless the complaint discloses a state of facts which show clearly that the assessments are void, the right to enforce their collection will be presumed. City of Elkhart v. Wickwire, 121 Ind. 331.

Action to quiet title—Collateral attack.—An assessment for construction of sewer drainage is within the subject of the jurisdiction of the common council, and can not be declared void in a collateral attack to quiet title to land sold for the assessment, unless it appears there was no authority over the particular improvement ordered or the particular property assessed. Jackson v. Smith, 120 Ind. 520.

One who seeks to quiet title to land sold for an assessment for drainage is not entitled to a general decree while any part of the assessment is due; one who would save his title must pay, or tender payment, of the lien. Unless the assessment is wholly void he is not entitled to a general decree. Jackson v. Smith, 120 Ind. 520.

Sewers, when not required.—Private persons, by so improving their lots as to interfere with the flow of surface water, can not impose on a city the duty of undertaking the construction of sewers. City of Evansville v. Decker, 84 Ind. 325, 331.

Liability to person tapping.—A municipal corporation is liable to one who, for his private benefit, connects his premises with a sewer constructed by such corporation, for injuries resulting from the negligent construction or maintenance thereof. City of Ft. Wayne v. Coombs, 107 Ind. 75, 83; Town of Monticello v. Fox, 3 App. 481,489. See Roll v. City of Indianapolis, 52 Ind. 547.

Right of abutting owner to dig trench in alley—Consent of municipal authorities—Ordinance prohibiting excavation.—An abutting property owner may dig a trench in a public alley for the purpose of making a sewer connection without the consent of the municipal authorities, unless there is an ordinance to the contrary, and the existence of the ordinance must be made to appear by the party having the burden of proof. Zimmerman v. Baur, 11 App. 607.

Permit for sewer tapping—Conditions—Liability.—Where a permit granted by a municipal corporation to a property owner, under which he made connection with sewer, contained the proviso: "*Provided, however,* and this permit is hereby granted only on the express condition, that the owners and tenants for whose benefit such drain and connection are made, and each succeeding tenant, in consideration of the privileges hereby granted and hereafter enjoyed, shall hold the city of Indianapolis harmless from any loss or damage that may in any wise result from, or be occasioned by, the construction, use or existence of such tapping and connection," it was optional with the property owner to tap the public sewer, or not, with his private drain, according to the terms offered him by the ordinance, and having voluntarily accepted the terms of the ordinance the city was not liable to the property owner, or his tenant, for damages resulting from the insufficient size and capacity of the sewer. Roll v. City of Indianapolis, 52 Ind. 547.

Failure to provide drainage.—A ditch was established by decree of court, upon petition of a property owner. The ditch in part ran through a town, but the town had nothing to do with its construction, and never repaired it or drained into it, and had no relation to it save that the greater portion thereof, if not all of it, so far as it was completed, was within the corporate limits, and the town had been assessed for benefits to certain of its streets and had paid such assessments. The owner of property in the town which was damaged by reason of defects in said ditch could not maintain an action against the town, since a municipal corporation is not responsible for failure to exercise its power to provide drainage. Town of Monticello v. Fox, 3 App. 481, 487.

Drainage contract, when void.—The governmental functions and powers of a municipal corporation must remain free and untrammeled, to be exercised for the benefit of the inhabitants as the emergencies may arise, and under this rule a municipal corporation can not make a contract to furnish drainage for the lands of a private person. Such a contract, being a limitation on the governmental functions, is absolutely void. Hamilton v. City of Shelbyville, 6 App. 538, 543. City of Peru v. Gleason, 91 Ind. 566.

Defective drainage—Pleading.—In an action against a city for damages for wrongfully collecting a large body of surface water upon a public alley, by artificial means, without providing any outlet therefor, whereby the plaintiff's premises were overflowed, where the complaint alleged that the defendant wrongfully excavated alongside of the plaintiff's house in said alley a hole, and caused to be drained therein the water falling and flowing upon said alley, without providing any outlet therefor, thereby causing said hole to fill up with water and overflow plaintiff's cellar, etc., the complaint sufficiently showed that the city was engaged in a municipal undertaking from which the alleged injury resulted. City of New Albany v. Ray, 3 App. 321.

Lots below adjacent streets.—If surface water flow upon a lot in a street because of its being below the level of adjacent streets or lots, the owner can not recover damages therefor from the city. Weis v. City of Madison, 75 Ind. 241, 249.

Negligence—Evidence.—In an action against a city to recover for injuries caused by a defective sewer, constructed by the corporate authorities, evidence of a break in the sewer about one hundred feet distant from the point where the break occurred which caused the injury for which recovery was sought, was competent for the purpose of charging the city with knowledge, as well as for the purpose of showing the defective character of the work and materials employed, and that by reason of time and use the sewer had got out of repair. City of Ft. Wayne v. Coombs, 107 Ind. 75.

In such case it is not error to permit the plaintiff to give in evidence the ordinance, advertisements, bids and contracts relating to the building of the sewer, as tending to show that the same was constructed by the city; and it is not necessary for the plaintiff to prove that the ordinance directing the construction of the sewer was regularly adopted. It is enough to show that the city had assumed to adopt it, and under it had constructed the sewer. City of Ft. Wayne v. Coombs, 107 Ind. 75.

Liability of corporation for torts and on contracts—Sewers.—Municipal corporations are not responsible for the torts of their officers, nor for breach of contract, when the acts of the officers are beyond the general powers of the corporation; but they are responsible when the acts of the officers are within the general corporate powers, and the construction of a public sewer is an act within the scope of the general powers of a municipal corporation, and in such case the corporation is liable for the negligence of its officers in the construction of a sewer. Leeds v. City of Richmond, 102 Ind. 372.

Independent contractor—Damages.—The general rule is that a municipal corporation is not responsible for the negligence of an independent contractor; but this general rule does not apply where the corporation secures a right of way through private property for a sewer and expressly contracts to pay all damages occasioned by construction of the same; in such case the maxim *respondeat superior* applies. Leeds v. City of Richmond, 102 Ind. 372.

Contractor—Trespass upon abutting land—Damages.—When a city confers power on persons to construct a sewer along one of its streets, such power does not authorize them to go beyond the limits of the street and enter upon the abutting premises, nor to put earth upon such premises to the inconvenience or injury of the owner thereof, and for any such injury the contractors are liable in damages. Kinser v. DeWitt, 7 App. 597.

Damages—Measure of.—In an action against a city to recover damages resulting from the overflow by water several times of the plaintiff's lot and dwelling thereon, used by him as a residence for his family, such overflows being caused by an insufficient and carelessly constructed sewer built by the city, the jury made up the amount of damages by ascertaining the loss suffered by the plaintiff by reason of injury to his realty, garden crops and personal property, such as household goods and family supplies, and adding thereto a certain sum on account of the decrease in the rental value of the premises during the period caused by the back water. The damages were excessive. City of Indianapolis v. Huffer, 30 Ind. 235.

Measure of damages.—Where a stream of living water previously flowing freely across the plaintiff's lot was so obstructed by the negligent construction and repair by the city of its streets and sewers as to back water upon the plaintiff's premises and destroy his cellar, it was proper to instruct the jury that, if they found for the plaintiff, the measure of damages would be the fair rental value of the premises, or such part as they found from the evidence the plaintiff had been deprived of, during such time as such deprivation necessarily existed; and that if they found that the value of the premises had been permanently diminished, the plaintiff is entitled to compensation therefor. City of South Bend v. Paxon, 67 Ind. 228.

Profits as an element of damages.—Where an established business of a permanent character, as a mill for the manufacture of grain into meal, hominy or the like, is suspended by the overflow, and machinery used therein so injured that in order to make repairs a cessation of business is necessary, the net earnings or profits of the present and past are competent to be considered by the jury in estimating the owner's damages during the period that his business was interrupted. City of Terre Haute v. Hudnut, 112 Ind. 542.

Probable profits, not remote or merely speculative, may be admitted in proof, not as the measure of damages, but to aid the jury in estimating the damages. Niagara Fire Ins. Co. v. Greene, 77 Ind. 590, 594; City of Terre Haute v. Hudnut, 112 Ind. 542.

All damages must be recovered in one action.—All damages, present and prospective, caused by the negligence of a municipal corporation in the construction of a public work of a permanent character, such as sewers, street improvements and the like, must be recovered in one action. A second action can not be maintained. Fresh damages without fresh injury will not authorize a second or subsequent action. City of North Vernon v. Voegler, 103 Ind. 314; Town of Elkhart v. Ritter, 66 Ind. 136; City of Terre Haute v. Hudnut, 112 Ind. 542, 558; Steinke v. Bentley, 6 App. 663; City of Lafayette v. Nagle, 113 Ind. 425.

Successive actions when—Nuisance.—Municipal corporations can not exercise their powers in the construction and maintenance of sewers so as to create a public or private nuisance, and for the creation and maintenance of a nuisance are liable as natural persons. When the nuisance is a continued one, recovery does not bar subsequent actions, every continuance of such nuisance being a fresh injury; but if that which produces the injury may be lawfully continued, and can not be abated, it ceases to be a nuisance, and there can be but one recovery for damages, present and prospective, and that by the owner of the property when the injury occurred. 2 Dillon Munic. Corp., § 1047; 16 Am. & Eng. Ency., p. 988 n.; City of Valparaiso v. Moffitt, 12 App. 250; Stein v. City of Lafayette, 6 App. 414; Steinke v. Bently, 6 App. 663; City of North Vernon v. Voegler, 103 Ind. 314; City of Lafayette v. Nagle, 113 Ind. 425; City of Seymour v. Cum-

mins, 119 Ind. 148; Haag v. Board, etc., 60 Ind. 511; City of New Albany v. Lines, 21 App. 380.

Nuisance—Limitation of action.—Where a nuisance is of a character so permanent that it may fairly be said that the entire damage accrues in the first instance, the statute of limitation begins to run at this time. On the other hand, where the nuisance is a continuing source of injury, there is a continuing right of action. Peck v. City of Michigan City, 149 Ind. 670.

Statute of limitations—Damages.—An action for damages by reason of overflow water caused by the construction of lateral drains, thereby overtaxing the main ditch with water that would naturally flow therein, is not barred by the six-year statute of limitations where it does not appear from the complaint that the lateral drains had been constructed six years prior to the commencement of the action. City of Lebanon v. Twiford, 13 App. 384.

For construction of the provisions upon the subject of sewers of the general act of 1859, for the incorporation of cities, see Board, etc. v. Silvers, 22 Ind. 491.

Forty-fourth. To erect a prison or prisons within the limits of said city, and it shall be lawful to imprison therein, persons convicted of offenses against the laws of such incorporation or for offenses against the penal laws of this state and also persons charged with offenses punishable by indictment or presentment, temporarily until they can be conveniently removed to the county jail. So far as the same may be applicable, the laws governing county jails shall be the laws of such city prison, and in all cases where the county jail is convenient, it may be used for city purposes until a city prison shall be erected.

See **ch. 8, art. 7,** Prisons, *post*, § 1437, *et seq.*

Board of prisoner.—A city is liable for the expense of receiving, boarding and discharging a prisoner convicted of a breach of a provision of its charter or by-laws and confined in the county jail. Board, etc., v. Chissom, 7 Ind. 688.

Forty-fifth. To purchase, hold, or convey real estate for the purpose of constructing public buildings thereon, or using the same for a public park or other public purposes. And if designated for a public park, cemetery, water works, or fair, such real estate may be purchased and held by said city, although lying without the limits of the corporation, and such city may by ordinance, provide for the protection thereof, and access thereto, and for the manner in which, and the persons by whom, the same may be used and occupied, and any conveyance heretofore made of real estate to any such city for any of the purposes aforesaid, lying without the limits of such city, is hereby legalized and confirmed.

See *post*, § 132.

Purchase of real estate—Credit—Bonds.—Conferring on cities the general power, without restriction, to purchase real estate for the purpose of constructing buildings thereon, gives by implication the exclusive right to determine the expediency of the purchase, the power to purchase on credit, and also to issue its negotiable bonds for the purchase-money. City of Richmond v. McGirr, 78 Ind. 192.

A municipal corporation, with authority to purchase property, may issue its bonds in payment, unless there is some statutory or constitutional prohibition. Rushville, etc., Co. v. City of Rushville, 121 Ind. 206.

A purchase of real estate on credit is not a loan within the meaning of the statute. City of Richmond v. McGirr, 78 Ind. 192.

Oral contract—Resolution directing purchase.—A resolution by a common council directing the mayor to purchase certain real estate, upon terms stated, the offer to sell being by parol, can not be held to be a purchase. An oral acceptance of the terms of the resolution will not create an enforcible obligation. The resolution of the common council, in such case, not having the qualities of a contract, can not be reformed so as to give it the quality and force of a contract. Carskaddon v. City of South Bend, 141 Ind. 596.

School property.—A city organized under the general law for the incorporation of cities has no power to buy and give its promissory notes for a county seminary, though for school purposes in the city. That power belongs to the school corporation of the city. State v. City of Terre Haute, 87 Ind. 212.

Sale of real and personal estate—Implied power.—A municipal corporation possesses the incidental or implied right to alienate or dispose of the property, real or personal, of the corporation of a private nature, unless restrained by charter or statute, but it can not dispose of property of a public nature in violation of the trust upon which it is held. There is a distinction between property purchased for a public use, and not yet dedicated, and property purchased for that purpose and actually dedicated to that use. City of Ft. Wayne v. Lake Shore, etc., R. Co., 132 Ind. 558; Shannon v. O'Boyle, 51 Ind. 565; City of Terre Haute v. Terre Haute, etc., Co., 94 Ind. 305; O'Boyle v. Shannon, 80 Ind. 159; 2 Beach Conts., § 1157.

Sales of property made by municipal corporations in the exercise of discretionary power can not be annulled for the reason that the bargain was improvident. City of Terre Haute v. Terre Haute, etc., Co., 94 Ind. 305.

Proceedings of council—Presumption.—Where the common council by resolution accepts a proposition for the sale of property, the regularity of the proceedings by which such resolution is adopted will be presumed, and averments showing the particular manner of its adoption are unnecessary. Over v. City of Greenfield, 107 Ind. 231; City of Logansport v. Dykeman, 116 Ind. 15.

Forty-sixth. To regulate the planting, maintaining and protection of shade trees along the streets and in the public grounds, and to compel the owners of lots bordering on any street or part thereof, to plant, maintain and protect trees, and on failure so to do, to cause the same to be done; and the expense thereof shall be a lien on such property, and collected in the same manner as street improvements.

Forty-seventh. The common council of any city may upon a petition of a majority of the legal voters of such city sell any public square or public landing of such city, or part thereof, and convey the same by deed under the hand of the mayor and seal of such city, and any moneys arising from such sale shall be deposited in the treasury of such city, to be expended in the purchase of any other public square or public landing, and for the improvement of the same.

See *post*, § 135.

Forty-eighth. To compel the city school trustee or trustees to make a report to the common council.

Forty-ninth. To exempt an amount of real property owned by any resident householder of such city, not exceeding three hundred dollars in value, from sale for street improvement.

Fiftieth. To punish contempts, and contemptuous and disorderly demeanor in the council room.

Fifty-first. To provide on what terms real estate in such city may be drained, by means of surface or under drains, over and across other real estate therein. [As amended, Acts 1895, p. 180. In force June 28, 1895.] Burns' Supp. 1897, § 3541.

This clause relates to the construction of drains by one land owner over and across the lands of another, and not to the construction of public sewers. Allen v. Jones, 47 Ind. 438.

[Acts 1897, p. 113. In force April 14, 1897.]

125. Licensing and regulating business by cities.—1. That common councils of incorporated cities shall have the power to enact and enforce ordinances:

First. To regulate and license clairvoyants, street fakirs and itinerant dealers.

Second. To license, tax and regulate vehicles.

Third. To regulate and control the kind and location of poles used by telegraph, telephone, electric light, and street railway companies, within the corporate limits of any such city.

Fourth. To license, tax and regulate branch stores or establishments and department stores and all other concerns established in said cities for temporary business only. Burns' Supp. 1897, § 3541*a*.

The above act is general in its terms, and, perhaps, applies to all the cities of the state.

[Acts 1891, p. 368. In force June 3, 1891.]

126. Grades of railroad tracks.—1. That common councils of incorporated cities shall have the power to enforce ordinances to establish the grade for railroad tracks on a level with improved streets or on streets being improved, and provide a penalty for the violation of such ordinance on the refusal of any railroad company to comply with its provisions. R. S. 1894, § 3542.

See *post*, § 218 note, Railroads—Street railways.

Railroad crossing—Change of grade—Restoration of street.—When a railroad company is empowered and ordered by a city ordinance to raise its track at the crossing of an intersecting street, it is its right and it becomes its duty to do so, but with the exercise of this privilege and the discharge of this duty, it must assume the obligation imposed by the statute, to restore the street and its sidewalks to their former condition of usefulness so far as it can by the exercise of reasonable care and diligence, and failing to do so, it is guilty of maintaining a nuisance, and liable to the traveler who, by reason thereof, sustains an injury without fault on his part. Cincinnati, etc., R. Co. v. Claire, 6 App. 390; Evansville, etc., R. Co. v. Crist, 116 Ind. 446; 3 Elliott Railroads, § 1105.

Mandate.—A mandate will lie to require a railroad company to make their tracks on streets conform to the grade of the streets, and to make the crossings of streets and highways over the tracks safe and convenient. Indianapolis, etc., R. Co. v. State, 37 Ind. 489; Cummins, etc., v. Evansville, etc., R. Co., 115 Ind. 417; 3 Elliott Railroads, § 1096.

If a railroad company occupying the streets under an ordinance which requires it to

do the grading of the street upon the sides of their tracks fails to do the same, the city may do such grading and recover the cost thereof from the company. Indianapolis, etc., R. Co. v. City of Lawrenceburg, 34 Ind. 304.

[Acts 1893, p. 340. In force March 4, 1893.]

127. Sewer, gas and water connections.—1. That the common council of any city having a population of less than one hundred thousand inhabitants shall have power to enact ordinances to regulate the making of private connections with sewers, gas and water pipes, and to compel owners of property to bring such connections inside of the curb of streets before permanent improvement thereof; and in default of the owner making such connections to authorize the city to do so at the owner's expense. And to make such expenses a lien on the property, and collectible in the same manner as assessments for street improvements are now collectible. R. S. 1894, § 3543.

See *ante*, § 124, clauses 26 and 43, and *post*, § 183.

[Acts 1857, p. 96. In force August 24, 1857.]

128. Market-houses.—1. It shall be unlawful for the common council of any city in the state of Indiana to erect upon any street of any city in said state any market-house, without having first obtained, in writing, the consent of two-thirds of all the owners of lots or parts of lots on such street, opposite to the place whereon such market-house is proposed to be constructed. R. S. 1894, § 3544.

129. Market-houses.—2. It shall be unlawful for such common council to maintain any market-house which now is or may be erected upon any street of any city in this state, without the written consent of two-thirds of all owners of the lots or parts of lots opposite the place where the same is erected. R. S. 1894, § 3545.

130. Market-houses—Nuisance.—3. Every market-house so erected or maintained without such consent of two-thirds of all the owners of the lots or parts of lots opposite to such market-house is hereby declared a nuisance; and it shall be the duty of the common council of the city where such market-house is so erected to abate and remove the same; and if such common council shall fail to remove it, it shall be lawful for any owner of a lot or part of a lot opposite to such market-house, to abate and remove the same, and he may, by proper action, recover of and from such common council the amount of money expended by him in and about the abatement and removal of the same. R. S. 1894, § 3546.

Market grounds—Improvement.—The city council has no jurisdiction to improve the property of the city, held and used for market purposes, at the expense of the owners of adjoining lots. City of Ft. Wayne v. Shoaff, 106 Ind. 66.

The city has no power to establish markets upon the public streets. The abutting property owner may enjoin the use of the public streets for such purpose. City of Richmond v. Smith, 148 Ind. 294.

[Acts 1881 S., p. 103. In force April 6, 1881.]

131. Pipes for heating, etc.—1. The incorporated cities of this state are authorized, by ordinance or contract, to grant to any person or corporation the right to lay down pipes in their streets, lanes, alleys, thoroughfares, and public grounds, for the purpose of supplying the inhabitants thereof with steam, gas, or water for heating and motive power. R. S. 1894, § 3547.

See *ante*, § 124, clause 28, and *post*, § 1136.

[Acts 1873, p. 62. In force March 7, 1873.]

132. Selling real estate.—1. Any city or cities incorporated under any general law of this state for the incorporation of cities, and owning real estate, shall have power to alienate, sell and convey such real estate in whole or in parcels, as the common councils of such city or cities may deem expedient. R. S. 1894, § 3548.

See *ante*, § 124, clause 45.

133. Vote necessary—Deed.—2. Such alienation, sale, and conveyance shall be made by the common council of such city or cities by a vote of two-thirds of all the members of such common council. When any alienation and sale shall be made by such common council, they shall order and direct the mayor of such city to execute and deliver a deed of conveyance to the purchaser, which shall be in the usual form, and shall be executed in the name of such city and signed by the mayor in his official capacity, and sealed with the seal of the city; and, when thus executed, acknowledged, and delivered, shall convey all the right, title, and interest of the city in and to the premises so conveyed. R. S. 1894, § 3549.

134. Appraisement.—3. No such property shall be sold until the same has been appraised by three disinterested freeholders of such city, to be appointed by the judge of the circuit court of the county in which such city may be situated, neither of whom shall be members of the city council or officers or employes of such city. Said appraisers shall be first sworn to make a just and true valuation of such property, and shall return their appraisement, in writing, to the mayor or common council of such city; and no such property shall be sold for less than the full appraised value thereof. R. S. 1894, § 3550.

Sales and conveyances of real estate by cities, where such sales and conveyances were made upon a majority vote of the common council, and without appraisement, were legalized and made valid by act of 1885, Acts 1885, p. 108.

Sale of real estate—Implied power.—A municipal corporation possesses the incidental or implied right to alienate or dispose of the property, real or personal, of the corporation, of a private nature, unless restrained by charter or statute, but it can not dispose of property of a public nature in violation of the trust upon which it is held. There is a distinction between property purchased for a public use, and not yet dedicated, and property purchased for that purpose and actually dedicated to that use. City of Ft. Wayne v. Lake Shore, etc., R. Co., 132 Ind. 558; Shannon v. O'Boyle, 51 Ind. 565; City of Terre Haute v. Terre Haute, etc., Co., 94 Ind. 305; O'Boyle v. Shannon, 80 Ind. 159; 2 Beach Conts., § 1157.

[Acts 1895, p. 151. In force March 7, 1895.]

135. Conveyance of public grounds.—1. That any city in this state having a population of more than two thousand and less than two thousand two hundred as shown by the United States census of 1890, may by vote of a majority of the common council of such city grant and convey to any corporation or body politic, any public square, market square, market place, fractional piece of ground, or public park owned or held by such city or within its corporate limits, to be held by such city or within its corporate limits, to be held by such corporation or body politic and devoted for any public purpose. Burns' Supp. 1897, § 3541*b*.

See *ante*, § 124, clause 47.

136. Deed, how executed—Title conveyed.—2. Whenever a resolution directing such grant and conveyance shall be passed by a majority vote of the common council of such city, it shall be the duty of the mayor of such city to at once make and execute to the corporation or body politic named in said resolution a deed conveying the market square, public square, market place, fractional piece of ground, or public park, and such deed shall vest in such corporation or body politic full and complete title to said real estate together with all the buildings and structures thereon. Burns' Supp. 1897, § 3541*c*.

[Acts 1885, p. 94. In force March 17, 1885.]

137. Real estate for sanitary purposes.—1. That it shall be lawful for incorporated cities in this state to purchase and hold real estate without the limits thereof for sanitary purposes; and any conveyance heretofore made of real estate to any such city for any such purpose, within or without the limits of any such city, together with any and all bonds and obligations issued in payment therefor, or to raise revenue with which to pay therefor, are hereby legalized. R. S. 1894, § 3551.

[Acts 1873, p. 63. In force March 7, 1873.]

138. Water-works.—1. The common council of any city engaged in establishing and constructing water-works for furnishing such city with wholesome water, may, by a vote of two-thirds of the members of such council, at any regular or adjourned meeting thereof, issue the bonds of such city, payable at such times as the common council may direct, and bearing interest at any rate not exceeding ten per cent., and may negotiate the same upon the best terms they can obtain, not less than ninety-seven cents on the dollar; and the proceeds of such bonds shall be applied only to the construction of said water-works. R. S. 1894, § 3552.

See § 124, *ante*, clauses 26 and 43; also §§ 1061–1089, *post*.

Water-works companies, powers, etc., see § 1377, *post*.

Under clause 26 of § 53 of the general law for the incorporation of cities (*ante*, § 124, clause 26), the common councils of cities have no authority to issue, negotiate and sell bonds

for the purpose of obtaining money to construct water-works. State v. Hauser, 63 Ind. 155.

Bonds for construction of water-works.—Where a city negotiated bonds to raise money to construct water-works, and the city treasurer misapplied a part of the funds so realized, leaving debts unpaid on account of such works, it was competent for the city council to issue and sell other bonds to make up such deficiency, and to provide for payment of ten per cent. interest thereon. Daily v. City of Columbus, 49 Ind. 169.

The sole power to sell and negotiate bonds of a city for water-works purposes rests in the city council. It may employ an agent to act for it. State v. Hauser, 63 Ind. 155.

[Acts 1867, p. 33. In force March 14, 1867.]

139. Infirmary for poor.—55. The city council shall have power to erect, establish, maintain, and regulate an infirmary for the accommodation of the poor of said city, either within the limits of such city or within the county in which it may be situated; and, for such purpose may purchase and hold any real estate that may be deemed necessary. The management and government of any such infirmary, and the quantity of out-door relief to the poor, under such rules and regulations as the council may prescribe, may be vested in a board of three directors, to be elected by the city council, who shall hold their office for the term of three years; but it shall be so provided that one of said directors shall be elected annually. The city council may elect, or the said directors shall appoint, an overseer in each ward, who shall perform such duties in respect to the care of the poor and their removal to said infirmary, as the council may prescribe. R. S. 1894, § 3553.

[Acts 1873, p. 64. In force March 10, 1873.]

140. Large cities may borrow money.—1. Any incorporated city of this state containing a population of fifteen thousand or over, may borrow money to an amount not exceeding two per cent. of the taxable property of such city, as the same shall appear upon the tax duplicates of such city for the year in which such loan may be effected: *And provided*, That the entire money borrowed shall not, at any time, exceed two per cent. of the taxable property of such city. R. S. 1894, § 3554.

See constitutional limitation, *ante*, § 39 and notes.

141. Purpose of loan.—2. Such loans shall be made only for the purpose of procuring money to be used in the legitimate exercise of the corporate powers of such city, as the same are prescribed and defined in laws providing for the incorporation and government of cities: *And provided*, That nothing in this act contained shall be in any wise construed as authorizing any city to contract any debt or liability for any other than a legitimate corporate purpose; but such loans may be made to procure money to pay debts already contracted in the due exercise of corporate powers conferred by the laws of the state. R. S. 1894, § 3555.

142. Ordinance for loan.—3. The city assessor, city clerk, and city

treasurer shall, before any such bonds are ordered to be issued, join in an affidavit, stating therein the total value of the taxable property of such city, as shown by the tax duplicate, and also the fair valuation thereof, which affidavits shall be reported by the city clerk to the common council of such city. The common council shall thereupon cause an ordinance to be introduced providing for such loan, and the said ordinance shall be, thereupon, referred to such committee as the common council may deem proper, and said committee of such council shall, at the next regular meeting of such common council, report such ordinance to the common council, with such recommendations as they may deem expedient. If the common council determine, by a two-thirds vote of all the members thereof, to make such loan (which determination shall be evidenced by the passage of such ordinance), the mayor of such city shall order and direct the requisite number of blank bonds to be prepared, and these he shall sign and deliver to the city clerk, taking his receipt therefor, and the city clerk shall countersign the same, and attach the corporate seal thereto, and deliver them to the city treasurer, and shall take from such treasurer a receipt for such bonds, and in such receipt shall be particularly described the said bonds as to date, number, amount and time of payment. The bonds so received by such treasurer shall be, by him, safely kept; and, at the next meeting of the common council, he shall report the receipt thereof to that body. Upon the report of such treasurer, the common council may authorize a committee thereof to negotiate a sale of said bonds, of which committee the treasurer shall be a member, and all moneys received from the sale of such bonds shall be, by such treasurer, received and kept, to be paid out under the order and direction of the common council as money derived from other sources is directed by law to be paid out. And such treasurer shall, in a proper book, register said bonds, note the day of sale thereof, the moneys realized therefrom, and, at all times, keep a plain, correct, and fair account of such transaction, so that the same may be readily understood; and shall, at all times, keep the same open and accessible to the public. It shall be the duty of the treasurer, within one week after the negotiation of such bonds, to report the same to the common council, stating all the particulars of such transaction; which report the said treasurer shall duly verify by oath or affirmation. The said treasurer shall faithfully pay over and account for all moneys by him received from the sale of such bonds. R. S. 1894, § 3556.

143. Interest—Sale of bonds.—4. The common council may provide the rate of interest, not exceeding 10 per cent. per annum, which said bonds shall bear, and may prescribe the time and manner in which said bonds and interest may be payable: *Provided,* That no bonds shall be issued payable at a period of more than twenty years: *And provided,* That at no time shall there be outstanding of such bonds an amount in excess of 2 per cent. of the taxable property of such city. The common council shall have power to dispose of said

bonds as hereinbefore provided; but the same shall in no case be sold at less than par. The committee of the common council appointed to sell said bonds, as hereinbefore provided, shall, upon the sale thereof, report to the common council the date of sale, the amount sold for, and the disposition of the proceeds of such sale or sales. The committee shall cause a publication to be made, for such time as they may deem proper, in a newspaper of general circulation, inviting proposals for such bonds, and shall sell the same to the highest and best bidder, provided the same shall not be sold at a less rate than that hereinbefore prescribed. R. S. 1894, § 3557.

Bonds for school buildings, see *post*, § 1518, *et seq.*

Bonds—Authority to issue—When valid and void.—A municipal corporation can not issue and sell bonds unless expressly or impliedly authorized so to do by statute. 2 Beach Conts., § 1175; State v. Hauser, 63 Ind. 155; Brenham v. German, etc., Bank, 144 U. S. 173.

A municipal corporation with authority to purchase property may issue its bonds in payment, unless there is some statutory or constitutional prohibition. Rushville, etc., Co. v. City of Rushville, 121 Ind. 206; Miller v. Board, 66 Ind. 162.

But see, as to implied power to issue bonds, 2 Beach Pub. Corp., § 884, *et seq.*

When bonds bear reference on their face to the authority under which they are issued, all persons are bound to take notice of the extent of the powers of the agent who issued them. City of Aurora v. West, 22 Ind. 88; Myers v. City of Jeffersonville, 145 Ind. 431.

A municipal corporation can not, without special authority, subscribe stock and issue bonds in payment of it, in a railroad corporation. But such authority may be conferred upon a city, when it is expedient; and when it is given by statute in any case, it must be executed, as prescribed in the grant, if executed at all. The terms of the grant can not be legally departed from or exceeded. Bonds issued without authority are void as to all persons. City of Aurora v. West, 22 Ind. 88.

Cities may be authorized by statute to take stock in corporations organized for the purpose of constructing works of public benefit and to issue bonds for such stock. Such statutes are strictly construed. City of Aurora v. West, 9 Ind. 74; Thompson v. City of Peru, 29 Ind. 305; City of Mt. Vernon v. Hovey, 52 Ind. 563; Mayor, etc., v. State, 57 Ind. 152; Indiana, etc., R. Co. v. City of Attica, 56 Ind. 476.

Bonds—Commercial paper.—Bonds of a municipal corporation duly issued under authority of law, payable to bearer for definite sums of money at specified times, are regarded as commercial paper, and are governed by the law merchant. City of Bloomington v. Smith, 123 Ind. 41; Board, etc., v. Bright, 18 Ind. 93; New Albany, etc., Co. v. Smith, 23 Ind. 353; Gardner v. Haney, 86 Ind. 17; City of Mt. Vernon v. Hovey, 52 Ind. 563; City of Aurora v. West, 22 Ind. 88; Myers v. City of Jeffersonville, 145 Ind. 431; Hainer's Munic. Securities, §§ 251, 254, 258.

Recovery upon lost bonds—Indemnity.—Recovery may be had upon bonds shown to have been lost before maturity, and while they were held and owned by the plaintiff, and when an offer is made by the plaintiff to indemnify the city against loss on account of the inability of the plaintiff to present or return the bonds for cancellation, and an approved bond is brought into court for the indemnity of the city. City of Bloomington v. Smith, 123 Ind. 41.

Injunction.—A citizen and tax-payer of a city may prevent, by injunction, the city authorities from illegally issuing negotiable bonds, and where they have been issued, and remain in the hands of the one who received them with notice, may maintain a suit to restrain their transfer and to cancel them. City of Madison v. Smith, 83 Ind. 502; Mayor v. Smith, 57 Ind. 152; State v. Mayor, 108 Ind. 74; 2 Elliott Railroads, §§ 850, 863, 874, 917; 2 Beach Conts., § 1171.

When bonds have been issued by a city, and a tax levied to pay the same, payment can not be enjoined unless it is shown that the city has a valid defense to the bonds in the hands of the present owners. Wilkinson v. City of Peru, 61 Ind. 1.

The collection of the tax may be enjoined when the bonds are void. Wilcoxon v. City of Bluffton, Ind. Sup. Ct., June 14, 1899.

Negotiable bonds.—Municipal bonds, when negotiable, coming into the hands of an innocent purchaser for value, without notice of infirmities, may be transferred by such innocent holder to another who has notice of such infirmities, and the bonds will not be subject to defense on account of such infirmities. Whenever negotiable paper has passed into the hands of a party unaffected by previous infirmities its character as an available security is established and its holder can transfer it to others with immunity. Scotland County v. Hill, 132 U. S. 107; Cromwell v. County of Sac, 96 U. S. 51.

Express and implied power—Statute strictly construed—Taxes.—Bonds of a municipal corporation are void unless there be express or implied authority to issue them. Coffin v. City of Indianapolis, 59 Fed. Rep. 227; Barnett v. Denison, 145 U. S. 135; Wells v. Supervisors, 102 U. S. 625; Claiborne County v. Brooks, 111 U. S. 400; Concord v. Robinson, 121 U. S. 165; Kelly v. Milan, 127 U. S. 139; Hopper v. Covington, 118 U. S. 148; Hill v. Memphis, 134 U. S. 198; Hainer's Munic. Securities, § 409.

The provisions of the statute authorizing them must be strictly pursued; the purchaser or holder of such bonds is chargeable with notice of the requirements of the law under which they are issued. Barnett v. Denison, 145 U. S. 135; Ogden v. County of Daviess, 102 U. S. 634; South Ottawa v. Perkins, 94 U. S. 260; Coler v. Cleburne, 131 U. S. 162; 2 Beach Conts., § 1175.

Where a statute requires that the bonds issued shall express upon their face the purpose for which they are issued, and bonds are issued without any purpose appearing at all upon their face, a purchaser will take them at the risk of their being issued for an illegal purpose, and, if that prove to be the case, they are as void in his hands as if he had received them with express notice of their illegality. Barnett v. Denison, 145 U. S. 135.

When authority is granted by the legislative branch of the government to a municipality, or a subdivision of a state, to contract an extraordinary debt by the issue of negotiable securities, the power to levy taxes sufficient to meet, at maturity, the obligation to be incurred, is conclusively implied, unless the law which confers the authority, or some general law in force at the time, clearly manifests a contrary legislative intention. Ralls County v. United States, 105 U. S. 733; Scotland County Court v. Hill, 140 U. S. 41.

A general law which limits the annual tax levy for general expenses to a certain per centum on the taxable property does not apply to such extraordinary debt. Ralls County Court v. United States, 105 U. S. 733.

Effect of recitals in bonds.—Where a statute confers power upon a municipal corporation, upon the performance of certain precedent conditions, to execute bonds in aid of the construction of a railroad, or for other like purposes, and imposes upon certain officers (invested with authority to determine whether such conditions have been performed) the responsibility of issuing them when such conditions have been complied with, recitals by such officers that the bonds have been issued "in pursuance of," or "in conformity with," or by "virtue of," or "by authority of," the statute, as to bona fide purchasers for value, import full compliance with the statute, and preclude inquiry as to whether precedent conditions had been performed before the bonds were issued. City of Evansville v. Dennett, 161 U. S. 434; Town of Coloma v. Eaves, 92 U. S. 484; Commissioners v. Bolles, 94 U. S. 104; Mercer Co. v. Hacket, 1 Wall. 83; Commissioners v. Beal, 113 U. S. 227; Cairo v. Zane, 149 U. S. 122; Van Hostrup v. Madison City, 1 Wall. 291; Moulton v. City of Evansville, 25 Fed. Rep. 382; Livingston County v. Portsmouth Bank, 128 U. S. 102; Town of Pana v. Bowler, 107 U. S. 529; City of South St. Paul v. Lamprecht Bros. Co., 88 Fed. Rep. 449· Hainer's Munic. Securities, §§ 428, 429 and cases; 2 Beach Conts., § 1173, *et seq.*

When municipal bonds recite facts which, if true, show that they were issued upon the conditions and for a purpose authorized by law, the bona fide purchaser, without any notice of any infirmity therein, may safely rely upon such recitals. Waite v. City of Santa Cruz, 89 Fed. Rep. 619.

If a municipal corporation make a false certificate on the face of its negotiable bonds, or a false record that they were issued in accordance with the law for a lawful purpose, it is estopped to deny the validity of the bonds in the hands of an innocent purchaser, who has bought in reliance upon the certificate or record. Board, etc., v. Ætna, etc., Co., 90 Fed. Rep. 222.

But if the recitals are made by officers, and it is not within the general scope of the authority of such officers to determine whether or not the particular conditions have been complied with, the recitals will not estop the city from pleading the invalidity of the bonds. Hainer's Munic. Securities, § 436 and cases; 2 Elliott Railroads, §§ 900, 902.

A purchaser of municipal bonds is bound to ascertain if the municipality has authority to issue them, and no recital contained in a municipal bond can cure such a defect as an utter want of power in the municipality to execute it. Dixon Co. v. Field, 111 U. S. 83; Town of Coloma v. Eaves, 92 U. S. 484; Coffin v. Board, etc., 57 Fed. Rep. 137; Katzenberger v. Aberdeen, 121 U. S. 172; Myers v. City of Jeffersonville, 145 Ind. 431, 437; Hainer's Munic. Securities, §§ 399, 409.

Constitutional limitation.—Where the constitution of the state limits the amount of indebtedness which may be incurred by a municipal corporation, it is not within the power of the legislature to dispense with such limitation, either directly or indirectly. Hainer's Munic. Securities, §§ 37, 38, 418. See *ante*, § 39 and cases.

Void bonds legalized—Recovery of consideration.—Where a city issues and sells bonds without authority of law, and receives the consideration therefor, the money received may be recovered, in a proper action, though an action upon the bonds, because of their invalidity, can not be maintained, and bonds thus issued, where the city has received and enjoyed the proceeds, may be legalized by subsequent act of the legislature. Read v. City of Plattsmouth, 107 U. S. 568; New Orleans v. Clark, 95 U. S. 644; Louisiana v. Wood, 102 U. S. 294; 2 Elliott Railroads, § 911.

But there can be no recovery of the consideration paid for the bonds when their issue was forbidden by law. Litchfield v. Ballou, 114 U. S. 190; 2 Elliott Railroads, § 912.

Bona fide holders—When void in hands of—Irregularities—Power.—Where municipal bonds have passed into the hands of bona fide holders (that is, holders for value, without notice of mere irregularities in the exercise of existing power to execute the bonds), they hold them as other commercial paper, and subject to no defense by reason of such irregularities. But where there is an absence of power to execute the bonds they are void, and subject to defense in the hands of whomsoever they may come. Myers v. City of Jeffersonville, 145 Ind. 431.

Absence of power.—Even a bona fide holder of a municipal bond is bound to show legislative authority in the issuing body to create the bond. Recitals on the face of the bond, or acts *in pais* operating by way of estoppel, may cure irregularities in the execution of statutory power, but they can not create it. If legislative authority is wanting, the bond has no validity. Hayes v. Holly Springs, 114 U. S. 120; Myers v. City of Jeffersonville, 145 Ind. 431; Schneck v. City of Jeffersonville, Ind. Sup. Ct., Dec. 20, 1898.

Municipal corporations having power to issue bonds may attach coupons thereto for accruing interest, and such coupons constitute a part of the contract, and may constitute a cause of action when due. Town of Cicero v. Clifford, 53 Ind. 191.

[Acts 1877, p. 14. In force February 13, 1877.]

144. Large cities—Funding bonds.—1. Where the aggregate indebtedness of any city in this state having a voting population of over sixteen thousand, as shown by the votes cast for governor at the last preceding election, amounts to or exceeds, at the date of the passage

of this act, 2 per cent. upon the total of the taxables upon the city tax duplicate for the current year, it shall be lawful for the common council of any such city, on or after May 1, 1877, to fund so much of said indebtedness as may be outstanding on said first day of May, 1877 (whether such indebtedness be then due or is thereafter to become due), in the bonds of such city, drawing not exceeding 6 per cent. per annum interest, payable semi-annually, at such place and time as the common council of said city may, by ordinance, provide; which bonds such common council is hereby authorized to issue: *Provided, however,* That such funding bonds shall be used only in taking up and canceling warrants and bonds of such city, previously issued to creditors, or sold and delivered, as may be outstanding on said first day of May, 1877. And to that end it shall be the duty of the common council to cause a full and complete statement to be made of the said bonds and warrants outstanding at that date; which statement shall be signed by the mayor, treasurer and clerk, and be spread on the record of the proceedings of the council, and published in one or more newspapers in such city; and the aggregate of the funding bonds issued shall not exceed the amount of such indebtedness outstanding on said first day of May, 1877. And whosoever shall issue, or aid or abet in issuing, bonds exceeding in amount the amount herein authorized, or shall apply, aid, or abet in applying the same to any other purpose than the purposes herein authorized, shall be deemed guilty of a felony, and shall be punished by imprisonment in the state prison not less than one nor exceeding ten years, and be fined in any sum less than ten thousand dollars; and if he be an officer of such city, suit may also be brought upon his official bond for the amount issued or misapplied contrary to the provisions of this act. R. S. 1894, § 3558.

Funding bonds, sinking fund, see *post*, § 1001, *et seq.*

Refunding bonds create no new debt.—The issuing of new bonds to provide, at their par value, for the payment of an old debt, or the substitution of new evidence of a pre-existing debt, is not, in any legal or proper sense, the creation of a new indebtedness. Powell v. City of Madison, 107 Ind. 106; Bowlus v. Phenix Insurance Co., 133 Ind. 106, 114; Myers v. City of Jeffersonville, 145 Ind. 431.

145. Limit of debt.—2. When the aggregate indebtedness, funded or otherwise, of any city of this state having a voting population of over sixteen thousand, as shown by the vote cast for governor at the last preceding election, amounts to or exceeds two per cent. upon the taxables borne upon the city tax duplicate for the current year, it shall not be lawful to increase such indebtedness in any manner or form whatever, except only by temporary loans in anticipation of the revenue of the then current year, and not exceeding two-thirds of the amount of the city tax duplicate for the preceding year, payable out of said revenue and within the current year; and no temporary or other loan upon the revenue of any year thereafter shall be made until all temporary loans upon the revenue of any preceding year have been fully paid; and any ordinance or resolution, warrant, certificate, obligation, note, contract, or other evidence of indebtedness, by whomso-

ever made, or in whatsoever form, to increase the indebtedness of any such city, except as herein provided, shall be absolutely null and void. R. S. 1894, § 3559.

See constitutional limitation, *ante*, § 39 and notes.

Constitutional and statutory limitations distinguished.—The rule which applies to a constitutional limitation is not usually applicable when the limitation is only statutory. When the limitations are imposed by the constitution it may not be within the power of the legislature to dispense with them by the creation of a ministerial commission whose findings shall be taken in lieu of the facts; but when the limitations are imposed by the statute only, the legislature, being the source of the limitation, may create a board authorized to determine the questions of fact upon which the limitation depends, and its findings will be conclusive in favor of bona fide purchasers of bonds. Chilton v. Town of Gratton, 82 Fed. Rep. 873; Sherman Co. v. Simons, 109 U. S. 735; Lake Co. v. Graham, 130 U. S. 674.

When the limit of issue under the statute is to be ascertained from records or data which are peculiarly within the knowledge and control of the officers of the municipality, then the bonds will be valid in the hands of a bona fide holder. Chilton v. Town of Gratton, 82 Fed. Rep. 873.

146. Limit of tax levy.—3. It shall not be lawful for the common council of any city in this state having a voting population of over sixteen thousand, as shown by the votes cast for governor at the last preceding election, to levy and assess a tax, for any one year, exceeding, in the aggregate, ninety cents upon the hundred dollars returned for taxation upon the city tax duplicate for the current year; and it shall not be lawful for the board of school commissioners of any such city to levy or assess taxes for any one year exceeding, in the aggregate, twenty cents on the hundred dollars of property returned upon the city tax duplicate for the current year: *Provided, however,* In addition to the sum of twenty cents aforesaid, said board of school commissioners may levy a tax, each year, for the support of free libraries, as now provided by sub-section 3 of section 4 [R.S.1894, § 5939] of an act providing for a general system of public schools in all cities of thirty thousand or more inhabitants, and for the election of a board of school commissioners of such cities, and defining their duties and prescribing their powers, and providing for common school libraries within such cities, approved March 3, 1871. And so much of any law as requires the levy of a tax by the common council for a sinking fund is hereby repealed as to such city; and any money in the city treasury of such city, on account of such sinking fund, may be appropriated by the city council for general city purposes. R. S. 1894, § 3560.

See *post*, §§ 201, 203, *et seq.*, and 214, *et seq.*

Funding bonds and sinking fund, see *post*, § 1001, *et seq.*

[Acts 1877, p. 14. In force February 13, 1877.]

147. Orders forbidden.—4. No warrant or order for money shall be drawn upon the treasurer of any such city after May 1, 1877, if at the time there be no money in the treasury; and, to that end, it shall be the duty of the city treasurer to keep the clerk, auditor, or other

officer authorized to draw orders or warrants, informed when there is no money in the treasury; and, failing to do so, he shall be liable, on his official bond, for the amount of orders or warrants drawn during such failure, with interest thereon, to the person in whose favor such order or warrant was drawn. If the clerk, auditor, or other person authorized to draw orders or warrants upon the treasurer, shall draw any order or warrant upon the treasurer, knowing there is no money in the treasury, he shall be liable, on his official bond, for the amount, with interest thereon, to the person to whom such order or warrant was made payable. R. S. 1894, § 3561.

148. Appropriations forbidden.—5. It shall not be lawful for the common council of any such city, after May 1, 1877, to make any appropriation of money, unless, at the time of making such appropriation, the money be in the treasury with which to pay the same. R. S. 1894, § 3562.

[Acts 1889, p. 32. In force February 23, 1889.]

149. Sinking fund commissioners.—1. That in all cases where any city organized and incorporated under the general laws of the state of Indiana, and having a population of ten thousand or more inhabitants, shall be indebted to the amount of one hundred thousand dollars, or more, evidenced by the bonds of such city, there may be appointed in the manner hereinafter provided two commissioners who shall be known and designated as the "sinking fund commissioners." R. S. 1894, § 3563.

150. Politics of commissioners—Election—Oath—Bond.—2. Such commissioners shall be of opposite politics, and shall be selected from the two political parties casting the greatest number of votes at the last preceding general election for state and county officers. Said commissioners shall be elected by the common council of said city, and before entering upon the discharge of the duties of their office they shall severally execute bond to the state of Indiana with at least two sufficient freehold sureties to the satisfaction of the judge of the circuit court of the county in which such city is situated, in a penalty of one hundred thousand dollars conditioned for the faithful and honest discharge of their duties, and the accounting for all such sums of money and property that may come into their hands; and in case the bonds or other negotiable instruments or money in excess of one hundred thousand dollars are to come into their hands during their term of office, before the reception thereof, they shall be required by said common council to file an additional bond in a penalty of double the amount of such additional property with sureties and conditions as aforesaid, to the approval of such judge.

They shall take an oath to faithfully and honestly discharge the duties of their trust, and to faithfully and honestly account for and pay over to the person or persons, officer or officers, entitled thereto,

all the money which may come into their hands as such commissioners, and their oath shall be endorsed on the certificate of their appointment, such bond and oath shall be filed in the office of the county clerk and such bond shall be recorded in the order book of said court. Such commissioners shall hold their respective offices for a term of four years unless sooner removed by the order of the court having jurisdiction in that behalf. [As amended, Acts 1895, p. 15. In force February 16, 1895.] Burns' Supp. 1897, § 3564.

151. Treasurer's duties—Disposition of funds.—3. It shall be the duty of the city treasurer at the end of each calendar month to furnish to the said commissioners a statement in writing, verified by his affidavit, showing the whole amount of taxes collected by him during the preceding month, and the proportion thereof collected on account of the sinking fund for the redemption and payment of all the outstanding bonds of the city, and also the amount collected by him on account of the fund for the payment of the interest on such bonds, and the treasurer shall, at the time of rendering such statement, pay over to the commissioners the full amounts so collected by him on account of each of said funds. The said funds and moneys so received by the said commissioners shall on the day they are received by such commissioners be deposited by them in two or more national banks in the city owing the bonds, such deposits to be made in the joint names of such commissioners in their official character, and not otherwise, and no check or draft shall be paid by such banks out of said funds unless signed by each and both of said commissioners. If any interest or other compensation shall be allowed or paid, directly or indirectly, by any bank or banks for or on account of such deposit, such interest or compensation shall constitute a part of such trust funds, and in no event shall such commissioners receive or derive any profit or advantage from such fund or deposits. R. S. 1894, § 3565.

152. Statement to be published.—4. It shall be the duty of said commissioners to publish in a daily newspaper of general circulation in the city where they are appointed, on the last Monday in June and the last Monday in December of each year, a statement and report of the amount of money in their hands as such commissioners, and the objects to which the same is to be applied, which statement and report shall be verified by their affidavit, and one copy thereof shall be forthwith filed in the office of the city clerk, and by him recorded in the minutes of the proceedings of the common council, and one copy of such statement and report shall by such commissioners be filed with the clerk of the circuit court. R. S. 1894, § 3566.

153. Interest—Use of funds—Penalty for misapplication.—5. It shall be the duty of such commissioners to pay out of the funds in their hands, collected on account of interest on the indebtedness of such city, the interest on the bonds of such city as the same becomes due and payable, and as the bonds mature, the said commissioners shall pay them out of the fund provided for that purpose, and held by them. No part of the fund collected for the payment of interest on the bonds shall be used for the payment of the principal sum of

any bond or bonds, and no part of the funds collected for the redemption or payment of the principal of such bonds shall ever be used for the payment of interest on such bonds: *Provided, however,* That whenever the funds which shall come into the hands of said sinking fund commissioners for the payment and redemption of the principal of such bonds shall amount to the sum of $5,000, it shall be the duty of such sinking fund commissioners to purchase such bonds of the holders thereof at the best cash price for which they may be able to obtain the same, not in excess of the market price thereof, but no such purchase shall be made without the approval of the common council, and said commissioners shall, in case they are compelled to purchase said bonds at a premium, pay said premium out of the funds in their hands for the redemption of the principal or the funds in their hands for the payment of the interest thereon, at the discretion of such sinking fund commissioners. For any misapplication or diversion of any moneys coming to their hands, the said commissioners shall be liable upon their bonds, and the judgment in every such action shall, in addition to the principal sum recovered, include a penalty of ten per cent. on such sum and an attorney's fee of ten per cent. on such principal sum and penalty. Any person or persons aggrieved by the misapplication or diverson of such funds may maintain an action on the bonds of the said commissioners as relators in such action, and such action may, at the option of the person aggrieved, be prosecuted against either or both of such commissioners at the same time. [As amended, Acts 1891, p. 393. In force June 3, 1891.] R. S. 1894, § 3567.

154. Compensation of commissioners.—6. The said commissioners shall be allowed and paid for all their services such per centum per annum upon the total amount actually paid out by them as may be determined by the common council, and no more, such payment to be made out of the city treasury upon the order of the common council. R. S. 1894, § 3568.

155. Removal.—7. Such commissioners in any city may be removed from their trust by the judgment of the circuit court having jurisdiction, upon the complaint of any tax-payer of such city, or of any person holding any bond, or interest warrant, payable out of the funds in the hands of such commissioners, upon proof of any neglect or violation of the duties of such trust. R. S. 1894, § 3569.

156. Vacancies.—8. Vacancies in the office of such commissioners shall be filled by election by the common council of said city. R. S. 1894, § 3570.

[Acts 1877, p. 17. In force March 3, 1877.]

157. Funding by small cities.—1. Any city of said state having an indebtedness of not less than thirty thousand dollars, evidenced by bonds, notes, or city orders, or any or either of them, may, for the purpose of funding its indebtedness, reducing the rate of interest on its pre-existing obligations, compromising with any creditor or creditors, or taking up and canceling its bonds, notes or other securities

already due, or which shall hereafter become due, upon the vote of two-thirds of the members of its common council, issue its bonds, with or without coupons, not exceeding in the aggregate the whole amount of the indebtedness of such city; which bonds may be of any denomination, and payable at any time and place, and bear any rate of interest not exceeding ten per cent. per annum, payable semi-annually. And said city may negotiate said bonds at any market or place, at any rate of discount not exceeding ten per cent.; and after such bonds shall have been negotiated, no action or proceeding shall be instituted, nor any defense to any action interposed, by said city, or by any person or persons, the object of which shall be to impair the validity or security or depress the value of said bonds. R. S. 1894, § 3571.

Authorized indebtedness—Funding and refunding.—Bonds issued under the above section, in funding an authorized city indebtedness, which have passed into the hands of innocent and good faith purchasers, are not subject to defense by the city. "A municipality, by the issue of new bonds, waives any defense it may have had to the old bonds." 2 Beach Pub. Corp., § 929; Myers v. City of Jeffersonville, 145 Ind. 431.

Unauthorized indebtedness—For court-house, etc.—Invalidity of bonds.—A city can not legally borrow money, and issue bonds evidencing the loan, for the purpose of the removal of a county seat, the purchase of a lot for, and the erection thereon of, a court-house. Bonds issued for such purpose are invalid. Injunction will lie in favor of a tax-payer to prevent the refunding of such bonds. A tax-payer may object to the refunding of any indebtedness created without any authority of law. Myers v. City of Jeffersonville, 145 Ind. 431; Schneck v. City of Jeffersonville, Ind. Sup. Ct., Dec. 20, 1898.

Unauthorized bonds—Legalizing.—When the legislature has the power to authorize the issue of bonds, and they have been issued by the municipal corporation without authority, the legislature may validate the same. The act of 1897 (Acts 1897, p. 108), legalized bonds issued by the city of Jeffersonville. The effect of said act on the validity of the bonds is the same as though authority to issue the same had been conferred by the legislature prior to the issue of the bonds. Schneck v. City of Jeffersonville, Ind. Sup. Ct., Dec. 20, 1898.

158. Tax—Sinking fund.—2. The common council of said city shall, annually, add to the tax duplicate a levy sufficient to pay the yearly interest on said bonds, with an addition of not less than five cents on the one hundred dollars, to create a sinking fund to provide for the liquidation of the principal thereof; which fund, with all the increase thereof, shall be applied to the payment of said bonds, and to no other purpose: *Provided*, That the provisions of this act shall not apply to any city having a voting population of sixteen thousand or over, as shown by the votes cast for governor at the last preceding election. R. S. 1894, § 3572.

[Acts 1879 S., p. 85. In force May 31, 1879.]

159. Surrender of charter.—1. The tax-payers of any city in this state with a population of less than seven thousand inhabitants may surrender the charter and organization of such city as a municipal

corporation, in accordance with the provisions of this act. R. S. 1894, § 3573.

160. Petition—Proceedings.—2. Whenever two-thirds in number of the resident tax-payers, male and female, of such city, over the age of twenty-one years, shall file in the clerk's office of the circuit court of the county a petition, addressed to the judge of said court, desiring to surrender the charter or municipal organization (in which petition, the said municipality, by its corporate name, shall be made a party, against which summons shall be issued, returnable as in civil actions), it shall be the duty of the judge of said court, at the next term of said court, on proof of the signatures of the petitioners to said petition, to declare and decree the charter or municipal organization of such city, from thenceforth, to be null and void. R. S. 1894, § 3574.

161. Official acts cease with decree.—3. After the entering of the decree mentioned in the preceding section by the judge, it shall be unlawful for any officer to assume or take upon himself the right to perform any duty or act as such officer of such city. R. S. 1894, § 3575.

162. Vested rights not affected.—4. Nothing contained in this act shall be construed as affecting any vested right or contract made by such city before the rendition of the decree by the judge mentioned in section 2 (R. S. 1894, § 3574); but all such vested rights or contracts shall have the same force and effect as though such surrender or decree had never been made, and the remedies therefor shall continue and be enforcible against said municipality in its original corporate name. R. S. 1894, § 3576.

[Acts 1875, p. 25. In force March 9, 1875.]

163. Constructing harbor.—1. Any incorporated city in this state, situated upon or adjoining any harbor connected with a navigable stream or lake, or upon any natural water-course which, by dredging or otherwise, may be made into a harbor, is hereby authorized to construct an entirely new harbor, or may extend, widen, deepen, repair, or otherwise improve any harbor now made, partially made, or in process of construction, and for that purpose may loan the credit of the city as is now provided by law in cases of public improvements. R. S. 1894, § 3577.

164. City may do the work.—2. Such city may undertake and perform the work without sub-letting, if the common council shall deem it best; in which case the work shall be under the supervision of a committee of the common council appointed for that purpose, to which committee may be added the city engineer. All estimates of work upon which payment is demanded shall be certified to be correct by the city engineer; and no payment for work or materials furnished shall be anticipated. Appropriations for the payment for such work and materials shall be made, from time to time, by the common council, out of the funds raised for such purpose, as may be necessary for an expeditious prosecution thereof. R. S. 1894, § 3578.

165. Contract.—3. Such city may let such work to any person or

company, by first publicly advertising in such manner as the common council may deem best; and the work shall be let to the lowest responsible bidder. But before the work is commenced, and before such contractor shall be entitled to payment for any work or labor done or materials furnished, he shall make and enter into bonds, with adequate penalty, with good and sufficient security, to be approved by the committee in charge of said work, for the faithful performance of his contract; and, during the progress of the work, such contractor shall not be entitled to receive within twenty per cent. of the value of the work done or materials furnished until the completion of the whole; and in no case shall the city engineer certify the correctness of any bill beyond eighty per cent. of the value of the work done or materials furnished. R. S. 1894, § 3579.

[Acts 1877, p. 19. In force March 3, 1877.]

166. Map and profile—Estimate.—4. Before any bonds shall be issued or work done under the provisions of this act (R. S. 1894, §§ 3577–3587), the common council shall cause the city engineer to make a map and profile of the work proposed to be done, and an estimate of the cost thereof, which shall be filed in the office of the city clerk; which map and profile shall be notice, to any and all parties interested, of the manner in which they are affected by said contemplated work. If any such harbor or natural water-course be or shall be crossed by any railroad, before the commencement of the work in this act authorized, the map and profile of the improvement contemplated shall include and show such bridge, railroad tracks, side-tracks, railroad ground, and switches over and across such harbor or natural water-course, and for a sufficient distance on each side thereof, to indicate and show all contemplated changes of the location of said bridge, railroad tracks, side-tracks, railroad ground, and switches, also all such contemplated changes, and all additional lands for right of way for depositing earth (commonly called right of waste) deemed necessary by such change, and to enable the same to be properly made. And the city shall have the power to appropriate the lands, so included in said map, for such additional right of way or waste; and when such appropriation is made, it shall inure and belong to and become the property of the company owning or in the possession of said railroad, upon payment to said city of all costs therefor, in the same manner and to the same extent as if taken by such company under and in pursuance of its charter. R. S. 1894, § 3580.

[Acts 1875, p. 25. In force March 9, 1875.]

167. Appropriation of land.—5. All incorporated cities in this state shall have power to appropriate so much of the land belonging to any person or persons abutting on or adjoining any natural water-course which it is proposed to make into a harbor, necessary to the construction and completion thereof; and the land which is appropriated shall be particularly described on the plat and profile aforesaid. R. S. 1894, § 3581.

168. Condemnation.—6. Such appropriation shall be deemed to be made as soon as such plat and profile is filed in said clerk's office; and thereafter, if the city and the land owners affected thereby shall be unable to agree upon the value of the land taken and damages sustained or benefits arising therefrom, or if the owner be a non-resident of the county, an infant, lunatic, or idiot, the said city may condemn the land thus appropriated in the same manner as lands are now condemned by cities for streets and alleys, and the committee appointed by the common council for such purpose shall be constituted the appraisers for condemning land, as in this act provided. R. S. 1894, § 3582.

169. Notice of appraisement.—7. Whenever the common council shall, by resolution, recite the fact that the city is unable to agree with any land owner or owners as to the value of the land taken or damages sustained or benefits accruing, or that any of the owners are infants, lunatics, or idiots, said resolution shall be sufficient authority for said commissioners to proceed to appraise the land appropriated, the damages sustained, and benefits accruing; but before such appraisement shall be made, ten days' notice by publication in any newspaper of general circulation in the county, shall be given of the time and place when and where said commissioners will meet to make said appraisement; which notice, verified by the affidavit of the publisher or owner of said paper, shall be returned with their appraisement by said commissioners. R. S. 1894, § 3583.

170. Report.—8. The value of the lands appropriated, together with the benefits and damages, shall be considered by such commissioners and determined by them, who shall return the same to the city clerk within five days after making and completing it; which report of said commissioners shall describe the land appropriated, the value thereof, and the damages and benefits which will accrue to the owner by reason of the proposed improvement or the appropriation thereof, and all lands adjacent or near said proposed work, and directly benefited thereby, may be assessed for benefits which will accrue by reason of the proposed work. R. S. 1894, § 3584.

171. Possession after tender.—9. The city shall be entitled to the possession of the land, for the purpose aforesaid, as soon as a tender of the money shall have been made to such owner, or if he be under disability, then to his guardian; and if there be none, or the owner be a non-resident, then by the payment thereof to the clerk of the circuit court of the county in which said land is situate, who shall receive the same and hold it by virtue of his office, for such owner or his legal guardian. R. S. 1894, § 3585.

172. Appeal.—10. Either party may appeal from such assessment within thirty days after such assessments are filed, and shall be governed in such appeal as is now provided by law for appeals from assessments for streets and alleys. R. S. 1894, § 3586.

173. Assessments are liens—Foreclosure.—11. All assessments of benefits shall be collected by installments, in such manner as the common council shall, by resolution, provide, and shall be liens upon the

lands against which they are assessed; and it shall be the duty of the commissioners, in returning said assessments, to describe particularly the lands benefited. All assessments for benefits shall belong to the city, and may be foreclosed, whenever any installment shall become due and remain unpaid, in the name of the city, in the same manner as foreclosures of mortgages are enforced, and shall be collected without relief from valuation or appraisement laws. R. S. 1894, § 3587.

[Acts 1877, p. 20. In force March 3, 1877.]

174. Harbors—Slips—Docks—Regulating.—1. All incorporated cities within the state, adjacent to and within which any public harbor may be located and constructed, shall have power to regulate all harbor channels, slips, or other water-thoroughfares and docks, and to repair those already constructed, bordering upon such channel, slip or thoroughfare and dock property within a distance of eighteen feet back from the water-front of such property situated upon such harbor, and may, by proper ordinance, compel all land or lot-owners whose land or lots border or front upon such channel, slip or thoroughfare, to make and construct proper docks or revetments, so as to prevent the washing or filling in of earth or other substances into such channel, slip or thoroughfare. R. S. 1894, § 3588.

175. Owners to repair.—2. It shall be the duty of the common council to provide, by ordinance, in what manner and within what time all docking shall be done, and, by resolution, in what manner and within what time all necessary repairs shall be done; and upon service of notice upon any property-owner of the passage of any ordinance or resolution requiring the construction or repair of any dock in front of any land, lot or lots owned by any party, it shall be the duty of such owner to construct or repair such dock in accordance with the requirements of such ordinance or resolution. R. S. 1894, § 3589.

176. Notice.—3. All notices required by this act shall be in writing, and issued and signed by the city clerk, and shall be served by the city marshal. Notice of ten days shall be given in all cases where notice is required by this act to be given, except where the property owner is a non-resident of the county, or is an infant, idiot, or lunatic, when such notice shall be by publication in some newspaper in said city, of general circulation, if there be any, and if not, in some newspaper of general circulation nearest thereto, published in the state of Indiana, for three successive publications, which publications shall be deemed equivalent to personal service of notice. R. S. 1894, § 3590.

177. Construction.—4. If any such owner or owners, after legal service of notice to construct or repair their respective docks, shall fail or refuse so to do within a reasonable time, such city may, at its option, construct such docks or make such repairs, or, by advertisement for bidders, published in some newspaper of general circulation in any such city, let such construction or repairs, by contract, to the

lowest responsible bidder; and the cost thereof, in either case, shall be assessed against the property of such owner or owners so fronting or abutting on said harbor or thoroughfare, by the city commissioners, as other property is now assessed for benefits for public improvements: *Provided,* Said commissioners shall not be confined in making assessments for the construction of docks to the property immediately fronting on such harbor, but may assess any other property adjoining such frontage which will be benefited thereby: *And provided, further,* That in cases of repairs only, the cost thereof must be confined to the property immediately fronting on said harbor or thoroughfare. R. S. 1894, § 3591.

178. Plan and estimate.—5. Before the work is commenced, a plan and specifications of the work contemplated, together with an estimate of the cost thereof, shall be made with the city civil engineer, approved and adopted by the common council, and filed with the city clerk; and no more shall be assessed against the property benefited by such improvement than shall be necessary to complete the work contemplated. R. S. 1894, § 3592.

179. Return of assessment.—6. When said commissioners shall have made their assessments, they shall return them to the city clerk's office within ten days thereafter, who shall lay them before the common council at their first meeting thereafter; and the said common council shall, within thirty days thereafter, either adopt or reject such asesssments. If adopted, said assessments shall become a lien, from that time, upon the lands against which the assessments are made. The common council may also provide for the payment thereof in installments, in such sums and at such times as they may deem best. R. S. 1893, § 3593.

180. Assessments, how collected.—7. The said assessments shall be collected by said city, and in its name; and the said several amounts so assessed shall be payable without relief from valuation or appraisement laws. The proceedings shall conform to and shall be enforced in the manner now provided by law for the collection of mechanics' liens or the foreclosure of mortgages. R. S. 1894, § 3594.

181. Liability of city—Superintendent.—8. No city shall be liable to any contractor beyond the liability of such property owner to such city, and all contracts shall be at the risk of the contractor. The work shall be under the superintendence of the city engineer. R. S. 1894, § 3595.

182. Proceedings.—9. In all cases not specially provided for in this act, all persons interested may have the benefit of the proceedings provided for under an act approved March 9, 1875, entitled "An act to authorize incorporated cities in this state to construct, extend, widen, deepen, repair and improve harbors, and, for that purpose, to condemn the lands of persons through or adjoining which such harbor may run, and to assess damages and benefits against adjoining owners, where and when the same may be applicable." R. S. 1894, § 3596.

[Acts 1881, p. 391. In force April 14, 1881.]

183. Sewers—Drains—Cisterns.—3. The common council shall have power to construct and regulate sewers, drains, and cisterns, and provide for the payment of the cost of constructing the same; and, when, in its opinion, the construction of any sewer would be of public benefit to the city and necessary for the improvement of any street or streets, for the removal of surface or storm water therefrom, may, by a two-thirds vote, cause to be paid out of the city treasury such portion of the cost of the construction of such sewer as, in the opinion of said council, would be equitable and just. R. S. 1894, § 3597.

See *ante*, § 124, clauses 26 and 43, and *ante*, § 127; also *post*, §§ 1099, *et seq.*, and 1107, *et seq.*

The above section is not an amendment of any other statute, but is a new and independent section, and so much of it as follows the semicolon should be construed with the provisions of the statute relating to street improvements, the same being applicable in connection with the improvement of streets, and when necessary to remove the surface water from the street. City of Elkhart v. Wickwire, 121 Ind. 331, 338. See Kirkland v. Board of Public Works, etc., 142 Ind. 123.

[Acts 1895, p. 190. In force March 9, 1895.]

184. Sewers—Cost in cities less than 35,000.—1. That in all cities of this state which had a population of less than thirty-five thousand inhabitants, as shown by the last preceding United States census, whenever the common council of any such city shall desire to construct sewers or make sewer improvements, and whenever any such sewer shall from its size and character be intended and adapted only for local use by property holders along the line of the street or alley on which it is constructed, and in the opinion of such common council is not intended or adapted for receiving sewerage from collateral drains, then, and in that case, the whole cost of the improvement shall be paid for by the property holder abutting on such street or alley in the same manner and to the same extent as street improvements are paid for, except that such city shall not be liable for the portions of such local sewer which cross other streets or alleys, but the total cost shall be apportioned *pro rata* against property holders. *Provided, however,* That any part, or all of the cost of such improvement may be ordered by such common council, if it deem the same expedient, to be paid out of the general fund of such city. Burns' Supp. 1897, § 3597*a*.

185. Main sewers—Assessment of costs.—2. Whenever in the opinion of such common council any sewer or drain ordered to be constructed, or any enlargement of one already constructed, shall from its size and character be intended and adapted not only for use by abutting property holders along such drain or sewer, but it is also intended and adapted for receiving sewerage from collateral drains already constructed, or which may be constructed in the future, then, and in that case, such common council shall make a division of the cost of such work. So much of such cost as shall be equivalent to the construction of an adequate sewer not adapted to receiving sewerage

from collateral drains or sewers shall be paid for exclusively by the abutting property holders, in the same manner and to the same extent as local sewers are paid for by them. The excess of cost over and above what would be equivalent to the cost of a local sewer shall be assessed against each piece of property beneficially affected in proportion to the benefits received, including abutting property holders, as well as the holders not situated on the line of such drain or sewer, but in the opinion of the common council beneficially affected by the construction of such sewer, either directly or immediately or indirectly, and by way of the advantage which shall be realized in the future when collateral drains may be constructed from such property to such main sewer. *Provided, however*, That any part or the whole of the cost of such improvement may be ordered by such common council, if it deem the same expedient, to be paid out of the general fund of such city. Burns' Supp. 1897, § 3597*b*.

186. Laws governing assessments—Bonds—Payment.—3. The provisions of the acts of the general assembly of the state of Indiana, relating to the assessment for street improvements shall govern such common council in making assessments for the cost of any local sewer or drain, or the equivalent thereof. In the construction or enlargement of any sewer or drain adapted for more than local use the provisions of the acts of the general assembly of the state of Indiana relating to the assessments of benefits in the laying out of streets shall govern such common council in assessing benefits: *Provided*, That in the case of sewers the assessments may be made to run twenty years, and the bonds issued to anticipate said assessments may also be issued payable during a period of twenty years: *And provided, further*, That if such common council deem it expedient, any part of the whole cost, or the whole cost of any of the improvements mentioned in this act may be paid out of the general revenue of such city. Burns' Supp. 1897, § 3597*c*.

[Acts 1891, p. 304. In force June 3, 1891.]

187. Drains, inlets and outlets—Damages.—1. That whenever the common council of any city shall find it necessary for the successful drainage of said city to construct any drain as an inlet or as an outlet, leading into or out of said city, they shall cause a survey of said proposed inlet or outlet to be made and platted, therein showing the commencement, course, distance, terminance [termination], depth, width, and whether open or covered; also, the names of the owners of said lands without said city, that will be affected thereby, described in tracts of forty acres, according to fractions of government survey, or less tracts when they exist, together with a description of any highway that will be benefited by said inlet or outlet. Said survey and plat shall be made by stations of not more than one hundred feet. Said city shall also cause an estimate of benefits and damages of the lands without said city to be made in favor of and against said lands or the owners, including the benefits to said city, and the benefits to any highway affected thereby. Said city shall, at least three days before making such

estimates of benefits and damages, notify in writing the owners of said affected lands, and also when any public highway will be benefited said city shall notify the trustee of the township in which said highway is located that, on a day and hour named in said notice, that said city, by a committee of three disinterested householders or freeholders of said county, to be selected by said city, will be on said lands and then and there view the said proposed inlet or outlet and the lands affected thereby, and that said owners, or any of them, are requested to be present, with a right to be heard for or against any assessment that shall be made or proposed to be made against said lands. Said committee shall have power to adjourn from time to time by openly announcing said adjournment and the time and place to which said adjournment is made. When said committee shall have completed said estimates of benefits and damages, including benefits to said city, said committee shall report the same in writing to said city mayor, duly subscribed and sworn to as being, in the opinion of said committee, just, fair and equal by and between all the parties, including any estimate of benefits to any highway without said city that will be affected thereby. Upon the return of said report said common council shall approve of said survey and said report, if it be found to be substantially correct, and cause a record of said approval to be duly entered of record in the journal of said city. It shall thereupon be lawful for said city, by order of its council, to file a petition in the circuit court of the county in which said city is situated, therein setting forth that such inlet or outlet is necessary to effectually drain said city; that the survey, plat and assessments of benefits and damages are, as said council believes, correct, just and fair between the parties interested in such drainage. Such petition shall be signed by a majority of the members of said council, to which shall be attached a certificate of the mayor of said city, showing that the petitioners are members of said council, and that they constitute a majority thereof, and which certificate shall be attested by the seal of said city and the signature of the clerk of said city. That said petition shall be conclusive of every fact herein required to be alleged, except as to assessments of benefits or damages, which shall be prima facie conclusive thereof. Such petition shall be sufficient to give the court jurisdiction of all the lands therein described without said city to be affected by said proposed drainage, and power to fix a lien thereon for such sum or sums as may be found just and equitable, and to adjudge any damage found to be due any remonstrant, and to determine the rights, liabilities and equities of each and every person or persons, corporations affected thereby. R. S. 1894, § 3598.

Statute construed—Drainage—Sewerage.—This act is to be liberally construed, and the word "drainage," as used therein, includes "sewerage," and by procedure under this statute a drain may be constructed to drain and carry off the sewage of a city by furnishing an outlet for sewers. City of Valparaiso v. Parker, 148 Ind. 379.

It is not required by this statute that a drain constructed thereunder shall commence at the city limits, but the same may be constructed from a point within the city limits. City of Valparaiso v. Parker, 148 Ind. 379.

Committee to assess benefits and damages—Objections to.—Objections to the qualifications of a member of the committee to assess benefits and damages must be made at the earliest opportunity, and if not so made they will be deemed waived. Where a party was notified and requested to appear before such committee, but failed to do so until after said committee had reported to the common council, and the petition for the drainage of the city had been docketed, objection by him to a member of the committee came too late. City of Valparaiso v. Parker, 148 Ind. 379.

188. Petition to circuit court—Remonstrance—Proceedings.—2. Whenever the petitioners shall file their petition with the clerk of the circuit court they shall fix and note thereon the date fixed for docketing thereof, and it shall be made to appear to the court that notice has been given by publication for twenty days of the proposed motion, to docket said petition, therein giving the names of the owners of said lands, to be affected thereby, and the day set for docketing said petition, thereupon the court shall order said petition docketed as an action pending therein. Every person owning lands to be affected by said proposed drain, including the trustee of any township in which is a highway that may be affected thereby, shall have three days after docketing said petition to file any motion, demurrer, remonstrance or objection he may have to the form and sufficiency of said petition. After the expiration of said three days the court shall consider said motion, demurrer, remonstrance or objection, and if the court find said petition defective and not amendable, it shall dismiss said proceedings at the costs of the petitioners. But if the petition is amendable, without material injury to parties objecting, the court shall give the petitioners a reasonable time in which to amend the same, upon such terms and in such manner as the court may order. If the court shall find said petition sufficient, it shall deny said motion and overrule said demurrer, remonstrance or objection. That either party may except to the ruling of the court as in other civil cases. All objections to said petition not taken within said three days shall be deemed waived: *Providing, further,* That if any person interested in any benefits or damage shall within said three days remonstrate against the assessments of benefits and damages, as set forth in said petition, said person or persons shall file in said court his or their remonstrance, showing one or more of the following facts, to wit:

First. That said assessment is too high and disproportionate to other lands affected thereby, or are disproportionate to the benefits assessed against said city.

Second. By any person whose lands are assessed for benefits, that certain other specified tract or tracts of land are assessed too low, according to benefits secured.

Third. By any person or persons whose lands are assessed, that the same are not affected, nor will be benefited by said proposed drainage.

Fourth. By any person to whom damages are assessed, that the same are inadequate. Said remonstrance shall be signed by each and every person joining therein, and filed in said court. Thereupon it

shall be the duty of said court to order a re-appraisement of benefits and damages, according to the issue tendered by said remonstrance; and shall appoint three good and true men of judgment and discretion, and not in any way related to or affected by said proposed drainage and resident householders or freeholders of said county, who shall, under the order of said court, fixing the time and place of the meeting of said committee, proceed in accordance with said order, to view the line of said proposed ditch, and the lands to be affected thereby, and shall fix, determine and assess any or all of the benefits or damages to the owner or owners of said lands, and the benefits against said city, which assessment shall be made on actual view of said lands, and shall, under the order of said court, report the same in writing, duly verified and sworn to, as being in the opinion of said committee just, fair and equitable, between the parties interested in said proceedings. R. S. 1894, § 3599.

189. Report, correction of—Hearing—Order of court.—3. Any party aggrieved by said report, may, within ten days after filing of said report, or at such other time, not less than ten days, as the court may fix, move the court to have any error apparent on the report corrected by said committee; and, if necessary, the court shall re-refer said report to said committee, with instructions to review and correct their said report, and when corrected and refiled, it shall be conclusive of the rights of the parties, unless one or more of the parties affected by said report shall, within a time to be fixed by the court, appeal from such report to the court, and which appeal shall be by the court noted on its docket, and set down for trial by the court. The trial of said cause shall be conducted as other civil cases, without a jury; and if the court find in favor of the remonstrants, the court shall modify the assessments or affirm them, as justice and equity may require; and shall assess costs for or against each and every party as in the opinion of said court may be just: *Provided*, That if the commissioner's report of assessments of benefits and damages shall substantially agree with the original estimates as set forth in said petition, and said remonstrants shall not further appeal from the report of said commissioners, the court shall, in such case, assess the costs of said review to said remonstrants. If the finding of the court on the trial shall be against the remonstrants, the court shall make an order declaring the proposed work established, and shall approve the assessments as finally determined, and shall order the construction of said drain. The court shall refer the said drains to the drainage commissioner of said county and require him to construct said drain according to the plans and specifications as set forth in said petition and in accordance with the findings and final order of said court. If the findings of the court shall be for or against either party in part, the court shall apportion the cost as justice and equity may require: *Provided further*, That no part of the cost made by said city in its survey, plat or assessments shall be assessed as costs, in the construction of said drain, but shall be paid by said city. R. S. 1894, §3600.

190. Construction—Assessments—Collection.—4. The commissioners charged with the construction of said inlet or outlet, shall proceed to construct the same, as hereinbefore provided and ordered. He shall make all necessary assessments and collect the same from time to time as may be required; he shall pay all costs not otherwise adjudged against parties; shall pay all expenses incident to the construction of said inlet or outlet and such expenses as the court shall deem a proper charge upon the funds in the hands of said commissioner. His assessments made from time to time shall be upon the lands benefited and the assessments against said city, ratably upon the amount of benefits as adjudged by the court, such sums of money as may be necessary therefor, not exceeding the whole benefits so adjudged upon any one tract or against said city, and require the same to be paid in installments not exceeding twenty per cent. per month, at such times as he shall fix, after thirty days' notice thereof to be given by personal notice to the owner of said lands, or by one publication in a newspaper published in such city. He may divide the work into such parts as he may deem best, and let the same to the best advantage, in such parts or altogether as he may determine and contract for the construction thereof. He shall collect the assessments so made by him and apply the same as herein provided; and for the purpose of making such collections, if not paid as above required, he shall have all the power to distrain and sell personal property which is, by law, conferred upon the county treasurer for the collection of taxes, and for so doing, shall be allowed the same fees and costs. He may, if he so determine, bring suit in the name of the state of Indiana, for his use as commissioner of drainage, in any court of competent jurisdiction to enforce a lien upon any tract or tracts of land for the amounts so assessed by him, and also to bring suit against said city, in the court making the order for the construction of said inlet or outlet, and which court shall have power to enforce its orders against said city by attachment as for contempt against mayor and common council of said city or against any other officer of said city, who being required to pay or provide for the payment of said assessments, shall neglect or refuse to obey the order of said court. All judgments and orders obtained may include reasonable attorneys' fees for services in prosecuting the same, and shall be without relief from valuation or appraisement laws, or he may make his certificate, showing the amount of such assessments against any tract of land and that default in its payments as required, has been made and file the same with the auditor of the county where such lands are situated, and thereupon the auditor shall place the same upon the succeeding tax duplicate, and the same shall be collected as state and county taxes are collected: *Providing further*, That default made by such city shall be prosecuted in the court where said petition was filed, and which court shall have all like remedies for enforcing its judgments known to the courts of law and equity of the state. R. S. 1894, § 3601.

191. Notice of proceedings—Liens—Recording.—5. The filing of the petition and docketing the same as provided in section 1 of this

act shall be deemed notice of the pendency of proceedings to all persons whose lands are named in the petition, and to said city, and the final order of the court, fixing the amount of assessments, shall be deemed notice of said liens, and a charge against said city. The commissioner charged with the construction of the work shall, as soon as may be after he has been directed to construct said work, make out a notice wherein he shall state that the work has been established by the court, also the several assessments to the tracts of land as the same have been finally confirmed by the court, and cause the same to be recorded in the office of the recorder of the county in which said lands are located. R. S. 1894, § 3602.

192. Act liberally construed—Informalities—Release.—6. This act shall be liberally construed to promote the drainage of cities, the reclamation of wet lands and the improvement of the public health. Collection and assessments shall not be defeated by reason of any defect in the proceedings, accruing prior to the judgment of the court; but said judgment shall be conclusive that all prior proceedings were regular and according to law; nor shall any person, at any stage of the proceedings herein, be permitted to take any advantage of an error, default or informality, unless the person complaining is directly affected thereby. If the court shall deem it just to release any person or modify any assessment or liability, such release or modification shall in no manner affect the rights or liabilities of any other person. R. S. 1894, § 3603.

193. Repairs.—7. Repairs shall be governed by the law in force in relation to repairs of ditches, as in other cases, by law may be provided: *Provided*, That in cases of emergency, said city shall have the right to open up or clean out said inlet or outlet, for which the proper officer having the keeping of said inlet or outlet in repair shall assess benefits or damages for or against such city, or for or against the landowners or the highway, if any are affected thereby, and shall fully pay said city therefor, less its benefits. R. S. 1894, § 3604.

194. Report of commissioner.—8. On the completion of said inlet or outlet, the commissioner having the construction thereof shall make and file in said court a report, therein showing the amount of moneys by him received and from whom and at what time he received the same. He shall also show when, to whom and for what said moneys were paid, with proper vouchers therefor, excepting for incidental expenses. He shall also show the number of days, giving day and date of time by him devoted to the construction thereof, and which report shall be duly verified by the oath of said commissioner, signed and acknowledged according to law. R. S. 1894, § 3605.

195. Agreement as to damages—Recording—Collection.—9. After making said survey, plat and assessments, as hereinbefore required to be made, said city by its common council, or a committee by it duly appointed, may submit said survey, plat, and estimates of benefits and damages (or copies thereof), to the owners of lands affected thereby, and to the proper officer having charge of highways affected by said proposed inlet or outlet, and will accept said estimates of benefits and

damages as therein assessed or agreed upon with said city; then and in such case said city shall cause said survey, plat and assessments as agreed upon, together with the agreement of said parties duly acknowledged, to be recorded in the office of the recorder of said county, and when so recorded shall conclude the rights of the parties thereto, and become a lien upon the lands affected thereby for assessments made against said lands not exceeding the amount of said original assessments or as modified by the agreement of said parties. The recording of said survey, plat, estimates and agreements shall be deemed as an establishment of said inlet or outlet and shall entitle said city to proceed and construct, and maintain said inlet or outlet as a part of the city drainage; and shall entitle said city by its duly qualified officers to assess and collect assessments by it made in the construction of said inlet or outlet as if made by the commissioner of drainage as herein provided: *Providing further*, That under this provision said city shall keep said inlet or outlet in repair at its own expense, with a right of action against any person for damages who wantonly or carelessly fills or blocks the flow of water in said inlet or outlet, and judgments rendered herein in any court shall be without relief and include reasonable attorney's fees for the complaining party. R. S. 1894, § 3606.

[Acts 1889, p. 13. In force February 14, 1889.]

196. Levees—Construction by city—Procedure.—1. That whenever the common council of any city is of the opinion that the construction, repair or maintenance of any levee or levees for the protection of the city or property within the corporate limits thereof is of sufficient public interest to justify construction, repair or maintenance thereof by the city, the common council may by resolution cause surveys and location and estimates of the costs thereof to be made, or if for improvement or repairs only, may cause surveys and estimates of the costs thereof to be made; and both kinds of surveys and estimates may be made when expedient, and may provide by ordinance, on return of surveys and estimates, for doing the work, and appropriate money from the general funds of the city not otherwise appropriated for that purpose, and provide by ordinance the means required by a levee tax of not exceeding four per cent. on the valuation of property, and by assessment of benefits on the property benefited, as in case of opening or change of streets, except that when the benefits are to be assessed the city shall cause a roll to be made from the tax duplicate and assessment rolls perfecting any imperfect descriptions of lands and lots and from the surveys outside the corporate limits, which latter shall be separate from the former, and the roll shall be of convenient form to allow the benefits assessed to be set opposite the several parcels described in a designated column, and shall append thereto a resolution of the common council requiring the city commissioners to meet on a day named in the resolution and enter upon the duty of assessing the benefits to the lands and lots described on the roll. A

copy of which resolution shall be served on the commissioners and they shall meet at the council hall on the day named and receive the roll, and enter upon their duties, and shall proceed with reasonable expedition, and when their duties are performed, shall return the roll into the clerk's office of the city, duly executed, and so certify over their signatures. And the roll may be amended at any time as to omitted or imperfectly described lands, or lots, and ownership thereof, and the benefits thereto assessed by the commissioners. On such roll being returned the clerk shall cause notice thereof to be given for two weeks, by publication in a newspaper of the city, or if none is published therein, by posting notices at five public places therein for two weeks, stating that the assessment of benefits roll has been returned, and that on a day fixed, not earlier than the expiration of the notice, the city commissioners will meet at the council hall as a board of equalization of benefits, and will hear and determine all complaints of property owners assessed, and they shall be attended by the city clerk as clerk of the board, and shall meet from day to day until the business is completed and then perfect the roll as then determined upon and make final return thereof; and said roll shall be final and conclusive as to all property owners not appearing, and those appearing may appeal to the common council at the next regular session, if aggrieved. And at such meeting of the common council action may be taken thereon, both as to appeals and final action, approving or rejecting the same, and if approved the same shall stand as the roll of benefits, and the tax duplicate, provided for in this act, shall be made therefrom as to the benefits. And any one aggrieved by the action of the common council, may appeal therefrom to the circuit court of the county wherein such city is situated, within twenty days, upon filing with the clerk of such city, a sufficient bond conditioned for the payment of all costs and damages occasioned by such appeal, and the trial of such appeal shall be conducted as other trials of civil causes are conducted in said court. The city clerk shall, upon the filing of said bond, forthwith make out and certify, under his hand and official seal, a true and complete copy of all papers connected in any way with said matter, beginning with the order of the council directing the work to be done and contracted for, and including all notices, precepts, orders of council, bonds and other papers filed in said matter, which transcript shall be in the nature of a complaint, and to which the appellant shall answer upon rule, and the same shall thereupon be tried in all respects as other civil cases are tried, and the result thereof certified by the clerk of the circuit court to the city clerk. And no other notices or greater formality shall be required in the assessment of benefits, which benefits shall be collected and collection thereof be enforced as taxes are collected, and otherwise such benefits shall be assessed as provided by law for opening and changing of streets: *Provided*, That the taxes and benefits assessed may be divided into not exceeding six equal parts in each individual case, or in case of joint, or tenant in common ownership, each such ownership shall

be as an individual case; and the whole taxes and benefits so divided shall be placed on the tax duplicate as taxes are placed, either before, at the time, or after the duplicate is otherwise made up, and may be placed on a separate book if most convenient, which shall be a part of the tax duplicate, and be a lien on the real estate and property taxed or benefited from the time assessed, and be collected and paid, one installment each year, as other taxes are collected; such taxes and benefits may be levied and assessed at any time, and such benefits assessed and taxes assessed may be anticipated by the city in making the contracts for doing the work, not exceeding the fund so provided, and as otherwise provided. The tax and benefits provided for shall continue and be paid each year in installments, during the period provided, and both funds shall be sacred to the levee and shall not be applied to any use until such work is completed and paid for. The whole tax and benefits may be anticipated in contracting for the work, and, to the extent anticipated, shall thereby be irrevocably appropriated to such payment until complete. R. S. 1894, § 3607.

197. Contract—Bids—Payment.—2. The contract for the work shall be let to the lowest responsible bidder, on such notice and sealed bids and bond as may be provided for in the ordinance, the work to be paid for from the general funds appropriated for that purpose and from the tax and benefits assessed so that no indebtedness of the city under the contract will exist in excess of the funds on hand appropriated to the payment thereof, until the current funds applicable are in the treasury, to cancel the same. But the execution of the contract for the work shall subrogate the contractor, on performance by him as stipulated, to the lien of the city for the taxes and benefits assessed, as in this act provided, to the extent required to pay for the work, without affecting the right and duty of the city through its proper officers to collect the taxes and enforce the collection thereof as authorized by law, and the expense of such work and the maintenance thereof shall be deemed of the current expense of the city having the special benefit separately of the provisions of this act. And said funds may also be anticipated otherwise, in any manner authorized by law for other taxes, and when the taxes and benefits are so assessed and the lien thereof fixed as herein provided, orders may be drawn on the city treasurer, payable out of the funds as the common council may direct, in denominations from $100 to $10,000, showing that they are secured by the tax and benefit liens amounting to the sum of such taxes existing and in the installments thereof payable as fixed, and that they will be received by the treasurer in payment of the taxes and benefits of the year named, and no more shall be drawn against the fund for any year than four-fifths of the amount collectible in that year. Such orders shall be drawn, payable to bearer, and be good to any bona fide holder, and as many series of such orders may be issued as the annual payment of taxes and benefits provided for; and each series shall stand secured by the tax and benefit lien of that year, and be payable therefrom and may be applied on the work as it progresses, as may be provided for in the contract, or contracts, for

the work, or the orders may be negotiated under the direction of the common council, and the contract made, paid in cash from the proceeds of the said orders, and when so applied or negotiated, shall stand performed as against the contractor under the contract, and shall stand secured and shall have the full force and virtue herein provided for the contract first herein authorized, and all such orders when taken up by the treasurer shall not be again negotiated, but shall be canceled. R. S. 1894, § 3608.

198. Jurisdiction of city—Condemnation.—3. For the purposes herein provided, the jurisdiction of the city is extended four miles beyond the corporate limits, and the lands to be protected may all be assessed with the benefits. And authority is given to the city to enter upon the lands and make surveys, doing no unnecessary damages, and to purchase, receive conveyances of and hold the necessary lands for right of way and construction and maintenance. In case such lands can not be so obtained by contract, they may be condemned and taken by the city as railroad corporations are authorized by law to condemn and take real estate for right of way and other railroad purposes, except that the surveys, location and plan of the levee, or a copy thereof, shall be filed in the recorder's office of the county, and in the city clerk's office, and no other map or profile shall be required; which survey and plan shall be certified by the city clerk, under seal, as the survey and plan adopted by the common council, or a true copy thereof. R. S. 1894, § 3609.

199. Collection of assessment—Official duties.—4. The city clerk shall copy from the duplicate the lands and benefits assessed outside of the corporate limits of the city, and certify the same under the seal of the city, and deposit the same with the county treasurer in his office, and it shall be his duty to collect the same annually as required by ordinance under this act, and pay the money to the city treasurer when requested by him, deducting the fees allowed by law for collecting other taxes. And the duplicate required by this act, and said transcript filed in the county treasurer's offices shall be due notice of the lien of the taxes and benefits assessed. The county treasurer shall report to, and make settlement with, the common council as to such benefits the same as he is required by law to do with the board of county commissioners, and will [shall] advertise, and with the county auditor sell the lands of delinquents as required by law for other delinquent taxes, and make certificate of purchase and conveyances as required by law, with like force and effect. R. S. 1894, § 3610.

200. Duplicates—Description—Engineer.—5. The duplicates required shall describe the lands assessed with benefits competently, and the city civil engineer is required to make all necessary surveys and plans to furnish such description. R. S. 1894, § 3611.

[Acts 1873, p. 58. In force March 6, 1873.]

201. Aid to roads, bridges, etc.—60. Any incorporated city, under this act, shall have power to borrow money, to subscribe to the stock of any plank road, macadamized road, or railroad running into

or through such city; or to any bridge company organized under the laws of this or any other state, to construct a bridge across any river or water-course within or bordering on this state, where such bridge has its termini, or either terminus, within such city; or to public improvements or public works,—to make donations in money or bonds of such city to aid in construction of such roads or bridges or public improvements or public works, only on petition of a majority of the resident freeholders thereof: *Provided*, That said donations shall not be payable either in money or bonds until the roads or bridges or public improvements or public works, in aid of which it is given, shall be so far completed as to admit the running of trains from the point of commencement to such point or points as are designated in the petition, in case of a railroad or railroad bridges; or the passage of wagons in the case of other roads or bridges; and, in case of public improvements or public works, upon the completion thereof. And when so far completed, it shall be obligatory on the common council of said city to contract and do whatever may be necessary to carry into effect the substantial meaning of such petition; and the obligation herein enjoined may be enforced in the courts of this state having competent jurisdiction, on the application of any signer of such petition or president of any road or bridge company in behalf of which such donation may have been made, at any time after said petition or petitions have been presented to such common council. And for any debt created in pursuance of the provisions of this section, in carrying out the intentions of the petitioners aforesaid, the common council shall add to the duplicate of each year thereafter a levy sufficient to pay the annual interest on such debt or loan, with an addition of not less than five cents on the one hundred dollars, to create a sinking fund for the liquidation of the principal thereof; which fund, with all the increase thereof, shall be applied to the payment of such debt, and to no other purpose. R. S. 1894, § 3612.

See *ante*, § 146, and *post*, §§ 202, 203, 214 and notes; refunding bonds and sinking fund, see *post*, § 1001, *et seq.*

Aid to private corporations.—States can not by taxation take private property for any but a public use. Cities can not be authorized to donate bonds to private corporations. Cole v. LaGrange, 113 U. S. 1; Citizens', etc., Assn. v. Topeka, 87 U. S. 20; Wall. 655; Chicago, etc., Co. v. Chicago, 166 U. S. 226; 2 Elliott Railroads, § 814 and note; Hainer Munic. Securities, §§ 185, 188.

Aid to railroads—Credit—Bonds.—Legislatures of states unless restricted by some special provisions of their constitutions, may confer upon municipal corporations the power to take stock in corporations created to build railroads, and to lend their credit to such corporations, or to issue bonds to aid railroad companies, and to levy taxes to pay the debts thus incurred. Taxation in such case is for a public purpose. Loan Association v. Topeka, 87 U. S. 655; Chicago, etc., R. Co. v. Chicago, 166 U. S. 226; John v. Cincinnati, etc., R. Co., 35 Ind. 539; Brocaw v. Board, etc., 73 Ind. 543; 2 Elliott Railroads, §§ 812, 814; Hainer Munic. Securities, § 138.

A municipal corporation has no power to issue bonds in aid of a railroad, except by legislative permission. The legislature in granting such permission can impose such conditions as it may choose. The authority to aid a railroad and incur a debt in extending such aid, under federal decisions, does not include the power to execute nego-

tiable bonds except subject to the restrictions and directions of the enabling act; but that such bonds are commercial paper, see decisions of our state in subsequent note. Young v. Clarendon Tp., 132 U. S. 340; Wells v. Supervisors, 102 U. S. 625; Kelley v. Milan, 127 U. S. 139; 2 Elliott Railroads, §§ 827, 875, 876 and cases; Hainer Munic. Securities, § 139; 2 Beach Conts., § 1175, *et seq.*

Continuing power.—The power conferred upon a municipality to aid railroads, etc., is a continuing one, and is not exhausted by being once exercised. Brocaw v. Board, etc., 73 Ind. 543, 548; 2 Elliott Railroads, § 828.

Power strictly pursued.—The power to issue public aid bonds, or to subscribe for stock or make donations, is not one of the inherent or incidental corporate powers, and must be strictly pursued. Hainer Munic. Securities, § 141 and cases.

This section is not in conflict with the next following section and is not inconsistent therewith. City of Madison v. Smith, 83 Ind. 502.

This section is constitutional. Thompson v. City of Peru, 29 Ind. 305; City of Aurora v. West, 9 Ind. 74.

Express authority—Subscription for stock.—Express authority is conferred by this section upon cities to subscribe for stock in railroad companies running into or through the city, and to borrow money by the issue of bonds to pay such subscriptions; also, to make donations of bonds of the city to the railroad company to aid in the construction of the road through or into the corporate limits. Thompson v. City of Peru, 29 Ind. 305; Wilkinson v. City of Peru, 61 Ind. 1; Indiana, etc., R. Co. v. City of Attica, 56 Ind. 476.

The proviso in this section relates to donations by cities to railroads, and not to subscriptions of stock; a petition of a majority of the resident freeholders is necessary to authorize a donation, but is not necessary to authorize a subscription to stock. Thompson v. City of Peru, 29 Ind. 305.

Statutes of this character authorizing cities to subscribe for stock in corporations organized for the purpose of constructing works of public benefit, and to issue bonds for such stock, are constitutional and valid, but are to be strictly construed. A municipal corporation can not, without statutory authorization, subscribe for stock and issue bonds in payment therefor in a railroad corporation. City of Aurora v. West, 9 Ind. 74; Council v. City of Peru, 29 Ind. 305; City of Mt. Vernon v. Hovey, 52 Ind. 563; Mayor, etc., v. State, 57 Ind. 152; Indiana, etc., R. Co. v. City of Attica, 56 Ind. 476; Brocaw v. Board, etc., 73 Ind. 543; Pittsburgh, etc., R. Co. v. Harden, 137 Ind. 486; City of Aurora v. West, 22 Ind. 88; City of Lafayette v. Cox, 5 Ind. 38; Demaree v. Johnson, 150 Ind. 419; 2 Elliott Railroads, §§ 831, 836; Hainer Munic. Securities, § 141 and cases.

Petition—Remonstrance—Action of city thereon.—In ascertaining the number of resident freeholders so as to determine numerically whether a petition for a city to make a donation in city bonds to aid in the construction of a railroad is signed by a majority of resident freeholders, as required by this section, all persons resident within the city and owning a freehold interest in the land must be counted. State v. Mayor, etc., 108 Ind. 74.

Where a petition for such donation is presented to the common council and referred to a committee of the council, persons who sign the petition may, by a remonstrance, withdraw their names from the petition while the same is in the hands of the committee; and if, after such withdrawal, there is not a sufficient number of petitioners asking the donation, the council can not make the same. Noble v. City of Vincennes, 42 Ind. 125.

Estoppel—Legality of petition.—The action of the common council, in adopting a resolution declaring a donation petitioned for should be made, does not estop the city, in an action for a mandate to issue bonds, from denying that such petition had been

signed by a majority of the resident freeholders. Mayor, etc., v. State, 57 Ind. 152; City of Madison v. Smith, 83 Ind. 502.

Decision of the council.—Where a city council has authority to decide upon the sufficiency of such petition, and its decision is final, it is so whether for or against the petition. The decision of the council, that such petition has or has not the requisite number of signatures, is not conclusive, but the question is open to inquiry, either upon mandamus to compel, or injunction to prevent, action by the council. The rule is different where there is the right of appeal or the tribunal is strictly a judicial one. City of Madison v. Smith, 83 Ind. 502.

The decision of the city council that the requisite number of freeholders had petitioned for the subscription is conclusive unless it may be set aside in some direct proceeding for that purpose. Evansville, etc., R. Co. v. City of Evansville, 15 Ind. 395.

The two cases last cited seem to be in conflict upon the point of the conclusiveness of the decision of the common council upon the sufficiency of the petition, but the case of Evansville, etc., R. Co. v. City of Evansville, *supra*, has been cited with approval and followed in many subsequent cases: McEneney v. Town of Sullivan, 125 Ind. 407, 412; Tucker v. Sellers, 130 Ind. 514, 517; Cason v. Harrison, 135 Ind. 330, 335; McCollum v. Uhl, 128 Ind. 304, 308.

The common council must decide upon petitions to aid railroads before bonds can rightfully be issued. City of Madison v. Smith, 83 Ind. 503.

Until a proper and sufficient petition is presented, the council has no power to issue the bonds; and, when such a petition is presented, the council has no right to refuse to issue them on the completion of the road to the designated point; a fact, also, to be ascertained by the council. Mayor, etc., v. State, 57 Ind. 152, 162.

Under the former charter of Evansville, the common council had no power to subscribe, in the absence of the petition required by the charter, but when power to subscribe was conferred by petition, the mode in which it was to be exercised was necessarily left, in a measure, to the discretion and judgment of the common council. Evansville, etc., R. Co. v. City of Evansville, 15 Ind. 395.

Under the said Evansville charter, the city was expressly authorized to borrow money to pay for stock subscribed, and power to determine time of payment, and to issue bonds, and other evidences of debt, was manifestly implied; and the power to borrow money carried with it the right to borrow wherever the money could be procured on the best terms, and if the railroad company saw proper to receive bonds, as cash, in payment of subscriptions, the transaction was proper, and not beyond the corporate powers of either city or company. Evansville, etc., R. Co. v. City of Evansville, 15 Ind. 395.

Councilman—Interest as stockholder—Effect.—The fact, that at the time the petition is presented to and acted upon by the council, a councilman is a stockholder, director and officer of the railroad company, does not disqualify him to act upon the petition, or the common council to pass an ordinance making the donation. Under the statute, donation bonds are not issued or withheld upon the judgment of the council. Mayor v. State, 57 Ind. 152, 162; City of Madison v. Smith, 83 Ind. 502, 511.

Bonds—Commercial papers—Donation.—Bonds issued for the aid of railroads under this section, in the hands of a bona fide holder, for a valuable consideration, without notice, must be regarded as public securities, and are placed on a footing with bills of exchange. City of Mount Vernon v. Hovey, 52 Ind. 564; Gardner v. Haney, 86 Ind. 17; City of Aurora v. West, 22 Ind. 88; New Albany, etc., Co. v. Smith, 23 Ind. 353; City of Bloomington v. Smith, 123 Ind. 41; Wilkinson v. City of Peru, 61 Ind. 1, 11; 2 Elliott Railroads, § 882; Hainer Munic. Securities, §§ 251, 258.

Donation defined—Conditions, etc.—The term "donation," used in this and the next succeeding section, means an absolute gift or grant, made without condition or consideration. Indiana, etc., R. Co. v. City of Attica, 56 Ind. 476; Wilkinson v. City of Peru, 61 Ind. 1; Goddard v. Stockman, 74 Ind. 405; Irwin v. Lowe, 89 Ind. 540, 550.

If the petition and donation are made upon conditions, or in consideration of an

agreement upon the part of the railroad company to do certain things not required by the statute, the petition and ordinance founded thereon are unauthorized by law and void. The conditions and agreements can not be regarded as surplusage. Indiana, etc., R. Co. v. City of Attica, 56 Ind. 476; Wilkinson v. City of Peru, 61 Ind. 1. See cases to preceding note.

Townships in appropriating aid to railroads may prescribe reasonable conditions, and make their subscriptions payable thereon. Bittinger v. Bell, 65 Ind. 445; Brocaw v. Board, etc., 73 Ind. 543; Goddard v. Stockman, 74 Ind. 400.

Interest.—The common council has no power to fix the rate of interest upon the bonds donated if the petition does not name the rate of interest. Where the petition does not name the rate of interest, it will be construed as a petition for the donation of the sum named in the petition without interest. Mayor, etc., v. State, 57 Ind. 152.

Under the former Evansville charter, in the absence of any provision in the charter of the city, as to the interest she may pay on borrowed money, her contracts would be governed, in this respect, by the general law of the state. Evansville, etc., R. Co. v. City of Evansville, 15 Ind. 395.

Mandate—Injunction.—Mandate will lie to compel the issue of the bonds in a proper case; and injunction will lie to prohibit the issue of the same when they ought not to be issued. Mayor, etc., v. State, 57 Ind. 152; City of Madison v. Smith, 83 Ind. 502; State v. Mayor, etc., 108 Ind. 74; Wilkinson v. City of Peru, 61 Ind. 1; City of Mount Vernon v. Hovey, 52 Ind. 563; 2 Elliott Railroads, §§ 850, 863, 874, 917.

Where a municipal corporation has a discretionary power, mandate will not lie; but where the duty is imperative it is otherwise. City of Madison v. Smith, 83 Ind. 502; 2 Elliott Railroads, § 917.

Upon a proper petition, it becomes the absolute duty of the council to issue the bonds. Where the performance of such an act becomes the absolute duty of a corporation, mandate is the proper, indeed the only remedy. Mayor v. State, 57 Ind. 152, 160; Wilkinson v. City of Peru, 61 Ind. 1.

Where a petition is filed for the issue of bonds for aid to a certain railroad company, and an order of donation is thereupon made to said company, but before the issue of said bonds said company is consolidated with another, injunction will not lie, after the issue of said bonds without new petition and order to the consolidated company, at a suit of a tax-payer to restrain the collection of taxes assessed against him to pay interest on the bonds and to create a sinking fund for the payment of the bonds. City of Mt. Vernon v. Hovey, 52 Ind. 563.

Where such donation of bonds has been made pursuant to a petition, and a tax has been levied to pay the interest on such bonds, and also to create a sinking fund to pay the principal, the collection of such tax can be enjoined by a tax-payer, not on grounds sufficient merely to enjoin the making of such donation, but only on grounds constituting a valid legal defense to the payment of the bonds in the hands of the present holders. Wilkinson v. City of Peru, 61 Ind. 1.

Bonds, issuing of—Injunction.—A citizen and tax-payer of a city by injunction may prevent an illegal appropriation of the funds of the city, or the creation of a debt which the authorities have no power to incur, or the issue of negotiable bonds which bona fide holders might enforce, and where they have been issued, but remain in the hands of one who received them with notice, may maintain a suit to restrain their transfer and to cancel them. City of Madison v. Smith, 83 Ind. 502, 509.

Sinking fund to pay bonds—Interest.—The common council may levy, and enforce the collection of, a special tax to pay the whole of the interest accrued, whether overdue or not, on the public railroad debt of the city, and may in addition to such levy to pay interest, add to such levy not less than five cents on the one hundred dollars of the assessed value, to create a sinking fund to liquidate the principal of such debt. And, where a levy for such purpose is made, it is not rendered illegal or void by the fact that

it does not specify the proportion to be applied to the liquidation of each, and such fact is not ground to enjoin a collection of the tax. City of Aurora v. Lamar, 59 Ind. 400.

Evansville charter—Railroads.—For questions arising upon the former Evansville charter, and act for the incorporation of railroads, with respect to city subscribing for stock, making donations, etc., in aid of railroads, see Evansville, etc., R. Co. v. City of Evansville, 15 Ind. 395.

City of Aurora—Charter construed.—Where the charter of the city authorized a subscription of stock in a railroad corporation, on condition precedent that the railroad should run to such city, a railroad running through the city was, within the meaning of the condition in the charter, a railroad running to it. City of Aurora v. West, 9 Ind. 74.

Under said charter, where special authority was given to the city to subscribe stock to a railroad running to it, and it was not made a point in charter of such road, it could only have been made so by subsequent action of the directors of the railroad corporation, and, until such action had been had, no absolute subscription of stock in such corporation could be made by such city. City of Aurora v. West, 9 Ind. 74.

City of Lafayette—Charter construed.—The charter of the city of Lafayette did not authorize the corporate authorities to issue bonds to aid in the construction of railroads. City of Lafayette v. Cox, 5 Ind. 38.

[Acts 1869 S., p. 97. In force May 4, 1869.]

202. Aid to railroads, hydraulic companies, etc.—1. Any city incorporated under the general laws of this state, upon petition of a majority of the resident freeholders of such city, may hereafter subscribe to the stock of any railroad, hydraulic company, or water-power running into or through such city, or near the corporate limits of said city, or to make, on petition of the majority of the resident freeholders of such city, donations in money or the bonds of such city, to aid in the construction of any such railroad, hydraulic company, or water-power, subject, however, to the limitations, direction and restriction named in the provisos to the sixtieth section of the act entitled "An act to repeal all general laws now in force for the incorporation of cities, prescribing their powers and rights, and the manner in which they shall exercise the same, and to regulate such other matters as properly pertain thereto," approved March 14, 1867 [§ 3612]. R. S. 1894, § 3613.

See preceding section and note.

This section is not in conflict with or repealed by the next preceding section. City of Madison v. Smith, 83 Ind. 502.

City, donation by—Liability as stockholder.—A city having subscribed to the stock of a railroad company, under the act of May 4th, 1869, authorizing cities to aid in the construction of railroads, is bound to the same liability that under § 5198, R. S. 1894, attaches to an ordinary stockholder in such company for labor done in the construction of the railroad. Shipley v. City of Terre Haute, 74 Ind. 297, 299.

In ascertaining the number of resident freeholders, so as to determine numerically whether a petition for a city to make a donation in city bonds, to aid in the construction of a railroad, is signed by a majority, as required by the statute, all persons resident within the city, and owning a freehold interest in land, must be counted. State v. City of Kokomo, 108 Ind. 74.

Mandamus—Injunction.—The decision of the city council that such petition has or has not the requisite number of signatures is not conclusive, but the question is open to

inquiry, either upon mandamus to compel, or injunction to prevent, action by the council. The rule is different where there is a right of appeal or the tribunal is strictly a judicial one. City of Madison v. Smith, 83 Ind. 502, 514.

Estoppel.—The records of a city council, denying a petition for aid to a railroad, must be presumed to have come to the knowledge of the railroad company, and it can not successfully aver, by way of estoppel to a suit of a tax-payer to cancel bonds issued without authority afterward as such aid, that it has, on faith in their validity, issued stock to the city and entered into contracts for the construction of its road. City of Madison v. Smith, 83 Ind. 502, 519.

Petition—Discretion and action of council.—Where a city council, upon petition, refuses to subscribe for the stock of a railroad company, under this section it has no power, after the lapse of two years, to again consider the same petition and grant its prayer. City of Madison v. Smith, 83 Ind. 502, 511.

Where a city council has authority to decide upon the sufficiency of such a petition, and its decision is final, it is so, whether for or against the petition. City of Madison v. Smith, 83 Ind. 502, 512.

Where the action of the common council in voting aid to a railroad company depends upon discretion, councilmen who are stockholders in the railroad company are not competent to act, and a grant of aid carried by their votes will not be valid. Under this statute, upon the filing of a sufficient petition, the council have no discretion to refuse to grant petition, and may be mandated to do so, and, therefore, the interest of a councilman does not disqualify him to act upon the petition. City of Madison v. Smith, 83 Ind. 502, 513; Mayor v. State, 57 Ind. 152, 162.

[Acts 1872 S., p. 49. In force December 14, 1872.]

203. Aid to roads in other states, by border counties, cities and townships.—1. Any county in this state bordering on the state line or rivers forming state boundaries, and any township therein, may, upon a vote of the majority of the legal voters thereof, and any city in such county may, upon petition of a majority of the resident freeholders thereof to the city council, subscribe to the capital stock of any railroad company, to aid in the construction of its road opposite such county in any other state or to form connection with other railroads in such counties. R. S. 1894, § 5377.

204. Bonds by border city.—2. Any city incorporated under the general laws of this state, and situate in any county bordering on the state line, or river forming the state boundary, may issue the bonds of such city, running for a period of time not exceeding twenty years, and bearing an annual interest not exceeding eight per cent., in liquidation of all subscriptions to the capital stock of any railroad made under the provisions of this act. R. S. 1894, § 5378.

See *ante*, §§ 146 and 201, *et seq.*, and notes.

205. Petition to city.—12. Whenever a petition shall be presented to the city council of any city incorporated under the general laws of this state, and situate in any county bordering on the state line, or any river forming the state boundary, signed by a majority of the resident freeholders of such city, asking said council to make an appropriation of money (stating the amount), to aid a railroad company

therein named, and coming under the provisions of the first section of this act [R. S. 1894, § 5377], by subscribing to the capital stock of such company, to aid in constructing a railroad from an adjoining state to such city, or to the state line, or to a river forming the state boundary bordering the county in which such city is situated, or to connect with any other railroad in said city or near the corporate limits of such city, it shall be the duty of such council, after being satisfied that such petition has been properly signed by the requisite number of resident free-holders of such city, to cause the same to be entered at full length upon its records. R. S. 1894, § 5388.

206. Duty of council.—13. Such city council shall take said petition under advisement, and, thereupon, make an order directing the mayor of such city to subscribe to the capital stock of such railroad company, in the proper corporate name of such city, the amount specified in such petition for the purposes aforesaid; which subscription shall be made upon and subject to such provisions and conditions as a majority of such city council and mayor may deem necessary to protect the best interests of such city. R. S. 1894, § 5389.

207. Bonds.—14. It shall be the duty of such city council to issue the bonds of such city as provided for in section 5 of this act (R.S. 1894, § 5381), to an amount sufficient to liquidate said subscription to the capital stock of such railroad company aforesaid, and to pay the same, or the proceeds thereof, in such liquidation, from time to time, as the work upon such railroad progresses or the conditions of such subscription to the capital stock thereof require. R. S. 1894, §5390.

208. Interest—Sinking fund.—15. Such city council shall provide for the payment of the annual interest of such bonds, and also provide a sinking fund for the payment of the principal thereof at maturity, by levying a special tax therefor upon the real and personal property in such city subject to taxation for state, county and municipal purposes; which tax shall be placed upon the tax duplicate of such city, and collected as other taxes are collected for city purposes. R. S. 1894, § 5391.

See *ante*, § 146, and § 214, *post*.

209. Payment of aid.—16. After the money authorized by this act to be subscribed and appropriated shall have been levied and collected, or city bonds issued as aforesaid, the railroad company for whose aid the same shall have been levied and collected, or city bonds so issued, having fully done, performed and complied with all the provisions and conditions upon which such subscriptions were made and connected therewith in good faith, shall be entitled to demand and have a full compliance with the terms of such subscriptions upon the part of such counties, townships or cities, as the case may be, to the full intent and meaning of this act; and such railroad company, or any one of said petitioners, or any tax-payer of such county, township or city, as the case may be, may compel the same to be done by mandate against such county, township or city. R. S. 1894, § 5392.

[Acts 1867, p. 33. In force March 14, 1867.]

210. Jurisdiction beyond limits.—54. For removal and abatement of nuisances; to carry out and enforce sanitary regulations; for the apprehension of disorderly persons, vagrants, common prostitutes, and their associates; to exact license money from all persons licensed to retail intoxicating liquors by county or state authority; and to regulate all places where intoxicating liquors are sold to be used on the premises,—the common council shall have jurisdiction two miles beyond the city limits. R. S. 1894, § 3615.

See *ante*, § 124.

Jurisdiction.—The legislature has power to designate the limits over which the jurisdiction of municipal corporations shall extend, and its judgment on this question is conclusive. Lutz v. City of Crawfordsville, 109 Ind. 466; Emerich v. City of Indianapolis, 118 Ind. 279.

Cemeteries.—Under this clause, the authorities of a city have no power to prohibit the establishment of cemeteries or burying grounds outside of the city limits, nor have they any control over them when established. Begein v. City of Anderson, 28 Ind. 79. See subsequent legislation, *ante*, § 124, clause 5, and *post*, §§ 1096–1104.

Houses of ill fame.—No power is conferred on the common council of a city to impose a penalty upon any person for visiting or residing within a house of ill fame outside the corporate limits of the city. Robb v. City of Indianapolis, 38 Ind. 49.

For the provisions of the criminal law upon this subject, see R. S. 1894, §§ 2079, 2080, 2089.

Sanitary regulations.—The questions of public health and safety are proper subjects of municipal legislation, and cities may by ordinance carry out and enforce sanitary regulations. Skaggs v. City of Martinsville, 140 Ind. 476.

Under the power to enforce sanitary regulations a city by ordinance may provide penalties against owners or occupants of lots for permitting water from any flowing well or spring to flow upon any of the streets or alleys in the city, and the enforcement of such an ordinance does not constitute the taking of property, but is simply a requirement that the property-owners shall so control their property as not to impair the usefulness of the public streets and jeopardize the public health. Skaggs v. City of Martinsville, 140 Ind. 476.

Sale of intoxicating liquors—Regulation.—An incorporated city has power, within its corporate limits and for two miles beyond, to regulate all places where intoxicating liquors are kept for sale to be used on the premises, and to require a license from all keepers of such places, as well from those who have a license from the state or county as those who have not. Lutz v. City of Crawfordsville, 109 Ind. 467; Emerich v. City of Indianapolis, 118 Ind. 279. See *ante*, § 124, clause 13.

Nuisance—Abatement of.—The legislature has power to invest municipal corporations with authority to abate public nuisances without resorting to judicial proceedings. Baumgartner v. Hasty, 100 Ind. 575.

A municipal corporation has no power to forfeit the property of a citizen, but the abatement of a public nuisance by the tearing down of a wooden building, which constitutes a nuisance, is not a forfeiture of property. Baumgartner v. Hasty, 100 Ind. 575.

A wooden building is not in itself a nuisance, but it may become so when it endangers surrounding buildings, and a municipal corporation may enact an ordinance providing for the summary removal of such building. Baumgartner v. Hasty, 100 Ind. 575.

The common council can not declare that to be a nuisance which in fact is not. City of Evansville v. Miller, 146 Ind. 613; Bank v. Sarlls, 129 Ind. 201; Baumgartner v. Hasty, 100 Ind. 575.

Concurrent remedies.—The power of municipal corporations to declare what shall constitute a nuisance and abate the same and the power to resort to the courts for that purpose are concurrent remedies, and the choice and interrupted prosecution of one excludes the exercise of the other. American etc., Co. v. Town of Batesville, 139 Ind. 77.

Action to remove—Proceeding in rem.—The power to declare what shall constitute a nuisance, and prevent, abate and remove the same is a proceeding *in rem*, not *in personam*, and must be exercised by and through ordinances of a general character affecting alike all the property or all the business of all the citizens under like conditions. American, etc., Co. v. Town of Batesville, 139 Ind. 77.

Where a summary method given a town for abatement of a nuisance confers no right not possessed at common law, it does not preclude a resort to the courts. American, etc., Co. v. Town of Batesville, 139 Ind. 77.

211. By-laws—Penalties.—56. The common council shall have power to make other by-laws and ordinances not inconsistent with the laws of this state, and necessary to carry out the objects of the corporation, and to enforce the observance of all by-laws and ordinances, by enacting penalties for their violation not exceeding one hundred dollars for any offense; which may be recovered in an action at law, with costs, as they may deem right and proper. R. S. 1894, § 3616.

See *ante*, § 118, and *post*, § 1383 and notes.

Powers conferred.—The general power conferred on common councils by this section authorizes the enactment of such by-laws and ordinances only as are necessary to the complete exercise of the corporate powers expressly or impliedly granted to cities. Bessonies v. City of Indianapolis, 71 Ind. 189.

The common council of a city, incorporated under the general law of this state for the incorporation of cities, is not authorized to pass ordinances which contravene the express provisions, and the clear implications of the statute under which the city is incorporated. Benjamin v. Webster, 100 Ind. 15.

This clause does not authorize common councils of cities to enact ordinances to license and regulate the establishment of private hospitals erected within the city limits. Bessonies v. City of Indianapolis, 71 Ind. 189.

The common council under this clause had no power to create a fire board, as the same was unauthorized and impliedly forbidden by the statute, the ordinance assuming to invest such fire board with powers and duties which the statute imposed upon the common council, or upon the chief engineer of the fire department, and which could not be delegated. Benjamin v. Webster, 100 Ind. 15.

Pawnbrokers.—This clause did not authorize the common council to enact an ordinance making it unlawful for any person to carry on business of a pawnbroker without having first procured a license, and to regulate the business and place of business of pawnbrokers. Shuman v. City of Ft. Wayne, 127 Ind. 109. See subsequent legislation, *post*, § 1148.

Fire protection.—The rule has always been that a municipal corporation has the inherent power to enact ordinances for the protection of the property of its citizens from fire. The exercise of such a power * * * is the exercise of a power long possessed by municipal corporations and closely connected with the purposes for which such corporations are organized. Corporation of Bluffton v. Studabaker, 106 Ind. 129; Baumgartner v. Hasty, 100 Ind. 575, 580; Kaufman v. Stein, 138 Ind. 49; Miller v. City of Valparaiso, 10 App. 23.

Cities may regulate or prohibit the keeping of within the corporate limits, articles lia-

ble to be dangerous on account of fire. Clark v. City of South Bend, 85 Ind. 276, 278; City of Richmond v. Dudley, 129 Ind. 112, 114.

A city ordinance placing restrictions upon the keeping and storing of inflammable or explosive oils is invalid which fails to specify the rules and conditions to be observed in such business, and which does not admit of the exercise of the privilege by all citizens alike, who will comply with such rules and conditions; but which does admit of the exercise of an arbitrary discrimination by the municipal authorities, between citizens who will so comply. City of Richmond v. Dudley, 129 Ind. 112, 116.

Obstruction of streets.—The wrongful obstruction of a public street or sidewalk of a city is a misdemeanor, punishable under the criminal law of the state, and a city can not enact an ordinance prescribing a penalty for any one who obstructs such street. City of Indianapolis v. Higgins, 141 Ind. 1, 4.

Validity of ordinance—When not in question.—An action to recover the penalty prescribed for the violation of an ordinance does not necessarily call in question the validity of the ordinance. Griffee v. Town of Summitville, 10 App. 332.

Misdemeanor—Invalidity of ordinance.—Where an act is made a misdemeanor punishable under the criminal law of the state, a city or town can not enact an ordinance prescribing a penalty for the same offense. City of Indianapolis v. Higgins, 141 Ind. 1; City of Indianapolis v. Huegele, 115 Ind. 581; Jett v. City of Richmond, 78 Ind. 316.

By the provisions of § 10 of the metropolitan police act of 1883 (R. S. 1894, § 3726), the interfering with or interrupting a member of the police force, when making an arrest, is made a criminal offense, and a city ordinance covering the same ground is ineffective and void. City of Indianapolis v. Huegele, 115 Ind. 581.

The statute prohibiting towns and cities from making acts punishable by ordinance which are made public offenses punishable by the state does not apply to an ordinance providing a punishment for selling intoxicating liquors without first procuring a license from the town or city, that not being an offense under the statutes of the state. City of Frankfort v. Aughe, 114 Ind. 77; Clevenger v. Town of Rushville, 90 Ind. 258; Zeller v. City of Crawfordsville, 90 Ind. 262.

Prior to the enactment of said statute cities and towns could be authorized to provide by ordinance for the punishment of an act already punishable by the criminal law of the state. Williams v. City of Warsaw, 60 Ind. 457; Ambrose v. State, 6 Ind. 351; Sloan v. State, 8 Blackf. 361; Waldo v. Wallace, 12 Ind. 569.

ARTICLE 3.—TAXATION.

SEC.
212. General and specific taxes.
213. Equalization—Fixing rate—Refunding.
214. Sinking fund tax.
215. Temporary loans.
216. Cities governed by this act—Payment of taxes—Assessment and equalization.
217. Time to pay taxes—Delinquency—Penalty.

[Acts 1873, p. 57. In force March 7, 1873.]

212. General and specific taxes.—58. The common council shall have power to levy, and cause to be assessed and collected, in each year, an ad valorem tax of not more than one per centum for general purposes, on all property subject to state and county taxation within such city, and also upon the stocks of all free banks, insurance companies, and other joint stock companies doing business within such city; the said tax to be assessed and levied upon the stock of each individual shareholder of said companies and banks, whether

such shareholder reside within such city or elsewhere. The cities and incorporated towns through or into which a railroad may pass may assess any railroad building, fixtures, and machinery connected therewith, within the city or town limits, on the same basis and the same manner that the like property of natural persons is assessed, and collect the taxes thereon as other taxes are collected; but the rolling machinery used in operating the road shall be deemed to be embodied in the taxes by the mile. And also a specific tax on omnibuses, or any carriages and other vehicles used and run for passengers for hire, unless the same be licensed; and on each dog owned by any resident of such city of not more than two dollars, and on any bitch owned by any resident of such city of not more than five dollars; and also a poll-tax not exceeding one dollar on every male inhabitant, sane and not a pauper, of the age of twenty-one years and not exceeding fifty years, residing therein: *Provided*, That any incorporated city having a population exceeding twenty thousand shall have power to levy, and cause to be assessed and collected, in each year, an ad valorem tax of not more than one and one-half per centum for general purposes on all property within such city returned for taxation by the city assessor, and upon stocks of incorporations as before provided. There may also be levied and collected, annually, an additional tax to pay the whole interest of the public debt due from said city. [As amended Acts 1899, p. 512. In force March 6, 1899.] R. S. 1894, § 3617.

See Taxation, R. S. 1894, ch. 108 (§ 8408, *et seq.*), and Burns' Supp. 1897, ch. 108 (§ 8411, *et seq.*); Acts 1899, pp. 422, 430, 497, 516.

General laws.—Some of the provisions of the statutes compiled under this title, and decisions cited thereunder, may not now be applicable. The general laws of the state upon the subject of taxation control municipal taxation so far as applicable. See *post*, § 216.

Constitutional law—Municipal taxation.—Section 1, article 10, of the state constitution (R. S. 1894, § 193), providing that the "general assembly shall provide by law for a uniform and equal rate of assessment and taxation," etc., has no reference to municipal taxation; but see subsequent notes. Hamilton v. City of Ft. Wayne, 40 Ind. 491; City of Richmond v. Scott, 48 Ind. 568; Bank, etc., v. City of New Albany, 11 Ind. 139; Anderson v. Kerns Draining Co., 14 Ind. 199; Thomasson v. State, 15 Ind. 449.

Said provision of the constitution does not mean that the rate of assessment shall be uniform and equal for all purposes throughout the state, but does require a uniform rate throughout the locality in which the particular tax is levied; if for state purposes, then in all parts of the state alike; if for county purposes, in the entire county; and so in township, town or city, for the local purposes of each. Loftin, etc., v. Citizens' Nat. Bank, 85 Ind. 341, 346; Robinson, etc., v. Schenck, 102 Ind. 307; Bright v. McCullough, 27 Ind. 223.

The taxing power of the state can not be made the means of levying municipal taxes upon a fraction of a class, and of bestowing the taxes so levied upon a small fraction of the citizens. Henderson, etc., v. London, etc., Co., 135 Ind. 23.

It is only the taking of specific pieces of property of an individual, by virtue of the right of eminent domain, that is prohibited by the constitution. The prohibition does not extend to the taxing power. City of Aurora v. West, 9 Ind. 74; City of Logansport v. Seybold, 59 Ind. 225, 228; Board, etc., v. State, 147 Ind. 476.

Statute construed—Executors—Administrators, etc.—This section must be construed according to its spirit and reason, rather than its exact words, so that choses in

action held by resident executors, administrators and guardians of non-residents, shall be exempt from taxation by all cities. McDougal v. City of Brazil, 83 Ind. 211.

Assessment—Extending time of.—Under a former incorporating act, the council had discretionary power to extend the time for assessment when the circumstances required it. Tousey v. Bell, 23 Ind. 423.

Exemptions—Construction of statute.—The general policy of the state is to subject all private property to the burden of taxation, and hence, statutes exempting property from taxation must be strictly construed. City of Indianapolis v. Grandmaster, 25 Ind. 518; Trustees, etc., v. Ellis, 38 Ind. 3; Read v. Yeager, etc., 104 Ind. 195; Conklin v. Town of Cambridge City, 58 Ind. 130; City of South Bend v. University, etc., 69 Ind. 344; State v. City of Indianapolis, 69 Ind. 375; Common Council, etc., v. McLean, 8 Ind. 328.

Same—Constitutional law—Exemption favor of widows.—A clause of the statute of 1872, which exempts "the property to the amount of five hundred dollars, of a widow or unmarried female," etc., is unconstitutional and void; such exemption is not for "charitable purposes," within the meaning of § 1 of article 10 of the state constitution (R. S. 1894, § 193). State v. City of Indianapolis, 69 Ind. 375; Warner v. Curran, 75 Ind. 309.

Assessments for public improvements—Municipal property.—A municipal corporation is liable for its proportion of the cost of local improvements assessed against it, even though the statute exempts public property from taxation. Warner v. City of New Orleans, 87 Fed. Rep. 829.

Tax levy—Lien.—Municipal corporations in levying taxes are instrumentalities of government, and taxes levied by them are, in legal effect, levied by the state, so that the lien for such taxes is of equal rank and priority to that of taxes levied for state or county purposes. Justice v. City of Logansport, 101 Ind. 326, 327; Robinson v. Schenck, 102 Ind. 307, 312; Jones v. Foley, 121 Ind. 180, 183; City of Logansport v. McConnell, 121 Ind. 416, 419.

Double assessment—Tender.—Relief from a double assessment can not be had until a tender of the taxes legally assessed has been made. City of Logansport v. McConnell, 121 Ind. 416.

Property subject to tax levy.—Cities may levy a tax on all property within the corporate limits subject to state and county taxes. Toledo, etc., R. Co. v. City of Lafayette, 22 Ind. 262; City of Logansport v. Seybold, 59 Ind. 225; Stilz v. City of Indianapolis, 81 Ind. 582; Seward v. City of Rising Sun, 79 Ind. 351, 353; Hilgenberg v. Wilson, 55 Ind. 210.

Personal property—Situs.—Personal property, which exists in a substantial and corporal form, must have an actual situs, and is taxable wherever that situs is; but personal property of an intangible character, which exists in rights of action, such as debts, bank stocks, etc., has no situs, other than the domicile of the owner, and is therefore taxable only at the place of his residence. Powell v. City of Madison, 21 Ind. 335; Eversole v. Cook, 92 Ind. 222; City of New Albany v. Meekin, 3 Ind. 481; City of Evansville v. Hall, 14 Ind. 27; Rieman v. Shephard, 27 Ind. 288; Standard Oil Co. v. Bachelor, 89 Ind. 1; Standard Oil Co. v. Combs, 96 Ind. 179.

Personal property, in general, is assessed where its owner resides; but the situs of such property, for the purpose of taxation, does not always or necessarily follow the domicile of the owner. Buck v. Miller, 147 Ind. 586; Eversole v. Cook, 92 Ind. 222.

The test as to where the right to tax property exists is the place of its location and use; the place where, if a security or obligation, it is a credit, not where it is a debit. Buck v. Miller, 147 Ind. 586.

Where notes or other choses in action are in the state temporarily, or in the hands of an attorney for collection, and the credits thereof are owned and held in another state by a non-resident of this state, the notes or bonds so owned and held can not be

taxed here, although secured by lien on property in this state. Buck v. Miller, 147 Ind. 586.

Ships at sea are regarded as incapable of acquiring an actual or permanent situs. This is true of all other water-craft. Such property is to be listed for taxation at the place of the owner's residence, without regard to its actual situation. Cook v. Town of Port Fulton, 106 Ind. 170. *Contra,* Eversole, etc., v. Cook, 92 Ind. 222; City of New Albany v. Meekin, 3 Ind. 481

Funds of non-residents in hands of a receiver.—The funds of an insolvent mutual benefit assessment society in the hands of a receiver in this state are subject to taxation in the county where they are kept on deposit by such receiver, although the funds had been collected in other states in which the company also did business, and turned over to the Indiana receiver by orders of their respective courts, and were to be distributed to claimants, many of whom were non-residents. Schmidt v. Failey, 147 Ind. 150.

Name wrong does not vitiate.—The fact that real estate is assessed for taxation in the name of a person other than the owner does not invalidate the assessment. Stilz v. City of Indianapolis, 81 Ind. 582; Peckham v. Millikan, 99 Ind. 352; Schrodt v. Deputy, 88 Ind. 90.

Bonds of United States.—The bonds of the United States, issued and sold by the government of the United States, are not subject to taxation under the laws of the state. Whitney v. City of Madison, 23 Ind. 331; Wright v. Stilz, 27 Ind. 338; City of Madison v. Whitney, 21 Ind. 261.

United States property not subject to taxation.—A state has no power to tax the property of the United States within its limits. Wisconsin R. Co. v. Price County, 133 U. S. 496.

Life insurance policies.—Life insurance policies under the present statute are not subject to taxation. State Board Tax Comm'rs v. Holliday, 150 Ind. 216.

Notes—Mortgages, etc.—It is the credit, not the debt, to which value attaches, and which is taxable, and it makes no difference, for the purposes of taxation, where the debtor lives or where the debt was contracted, provided only that the note or other evidence of the amount due the creditor is itself within the jurisdiction of the state.

Where a business of buying and selling property, making loans and investments, and collecting and reloaning the money is conducted, and the notes and mortgages so used are retained in this state they will be subject to taxation in this state, although the owner thereof may have his residence in another state, whether such business be conducted by him in person or by an agent. Buck v. Miller, 147 Ind. 586.

Hackneymen—License—Ordinance—Validity.—An ordinance of a municipal corporation regulating the running of hacks, by requiring a license, is a proper and reasonable exercise of municipal power, and is fully implied and authorized by this section of the statute as well as others. Scudder v. Hinshaw, 134 Ind. 56.

Lands annexed.—When the territorial boundary of a municipal corporation is extended so as to include new and additional property, such property is thereby subjected to taxation in like manner and to the same extent as the property previously included within the corporation, and this is so even though such taxation be for the purpose of paying pre-existing debts of the corporation. Lake Shore, etc., R. Co. v. Smith, 131 Ind. 513; Stilz v. City of Indianapolis, 55 Ind. 515; City of Logansport v. Seybold, 59 Ind. 225; Town of Cicero v. Sanders, 62 Ind. 208; Stilz v. City of Indianapolis, 81 Ind. 582.

Alleged annexation—Recovery of taxes.—Where the plat and annexation are void, taxes assessed and collected by the city are illegal, and may, there being no estoppel, be recovered back, unless barred by the six years' statute of limitations, which begins to run with each payment. City of Indianapolis v. Patterson, 112 Ind. 344; City of Peru v. Bearss, 55 Ind. 576.

Bank and other corporation stock.—There are, under our constitution and laws,

two recognized modes of taxing the capital stock of corporations. One is by an assessment against the corporation itself by name for the whole amount of its capital stock, which assessment the corporation pays and charges up to stockholders, etc. The other is where the stockholders are separately and severally listed by the assessor for the amount of their capital stock. The latter is the mode to be adopted, in all cases, where the statute does not otherwise provide. Whitney v. City of Madison, 23 Ind 331; Seward v. City of Rising Sun, 79 Ind. 351; City of Evansville v. Hall, 14 Ind. 27; Conwell v. Town of Connersville, 15 Ind. 150; City of Richmond v. Scott, 48 Ind. 568; City of Madison v. Whitney, 21 Ind. 261; Small v. City of Lawrenceburg, 128 Ind. 231. See general tax law 1891, R. S. 1894, §§ 8408-8677.

Bank of State of Indiana—Capital stock—Exemption.—The provision of the charter of the Bank of the State of Indiana that "the capital stock of said bank or branches shall not be taxed for municipal purposes" was constitutional, and money, notes and real estate of the bank and its branches were exempt from municipal taxation. Bank of State, etc., v. City of New Albany, 11 Ind. 139; State Bank v. Brackenridge, 7 Blackf. 395; State Bank, etc., v. City of Madison, 3 Ind. 43; President, etc., v. Bank of State, etc., 16 Ind. 105; King v. City of Madison, 17 Ind. 48; Craft, etc., v. Tuttle, 27 Ind. 332.

Under the act of March 11, 1861, cities were authorized to collect taxes on the shares of stock in the free banks located in a city, whether the owners of the stock resided therein or not. DePauw v. City of New Albany, 22 Ind. 204. See City of Madison v. Whitney, etc., 21 Ind. 261.

The act of 1867, exempting bank stocks from municipal taxation, applied to cities organized under special charters as well as those under the general law for the incorporation of cities. City of Evansville v. Bayard, 39 Ind. 450.

Under the act of March 4, 1873, cities could levy taxes on shares of bank stock at the same rate as on real and personal property within the city, though there were still in existence branches of the Bank of State of Indiana, the shares of stock of which are not subject to municipal taxation. City of Richmond v. Scott, 48 Ind. 568.

Under the charter of the city of Madison bank stocks should be assessed, for municipal taxation, in the names of the individual stockholders, and not in the name of the bank. City of Madison v. Whitney, etc., 21 Ind. 261.

If bank stock is assessed in the name of the corporation instead of being assessed to the owners of the stock, the lien for taxes will not be thereby affected. Small v. City of Lawrenceburgh, 128 Ind. 231.

Foreign corporation.—A city has the right to tax its citizens for stock owned by them in a foreign railroad company, although a tax has been paid thereon in the state where the corporation is located. Seward v. City of Rising Sun, 79 Ind. 351.

Persons moving into city.—Persons moving into a city at any time before assessments are made for any year, are liable to be assessed for such year. Hilgenberg v. Wilson, 55 Ind. 210.

Public debt—Interest—Tax.—The common council may levy and enforce the collection of a special tax to pay the whole of the interest accrued, whether overdue or not, on the public debt of the city. City of Aurora v. Lamar, 59 Ind. 400; Stilz v. City of Indianapolis, 81 Ind. 582.

Railroad aid—Taxation.—For the purpose of a township tax in aid of a railroad, an incorporated city within the limits of a civil township is a part of such township, the qualified voters for the city are voters of the township, and the taxable property within the city is also taxable property within the township, and is subject to taxation for township purposes. Scott v. Hansheer, 94 Ind. 1.

Tax to build and repair gravel roads—County a taxing district.—The whole county, under the laws for the building and keeping in repair of free gravel roads and turnpikes, is a taxing district, and the property within a municipal corporation, and situ-

ated within such taxing district, is subject to taxation for the building and repair of gravel roads and turnpikes, although such roads are wholly without the limits of the corporation. Byram v. Board, etc., 145 Ind. 240.

Farm lands.—For cases construing various statutes from time to time in force, but repealed, exempting farm lands from taxation by cities, see Blaine v. Bailey, 25 Ind. 165; Hamilton v. City of Ft. Wayne, 40 Ind. 491; Stilz v. City of Indianapolis, 55 Ind. 515; City of South Bend v. University, etc., 69 Ind. 344; Stilz v. City of Indianapolis, 81 Ind. 582; Kalbrier v. Leonard, 34 Ind. 497; Leeper v. City of South Bend, 106 Ind. 375; Taber v. Grafmiller, 109 Ind. 206; Dickerson v. Franklin, 112 Ind. 178; City of South Bend v. Cushing, 123 Ind. 290; Thomas v. Town of Butler, 139 Ind. 245; Conklin v. Town of Cambridge City, 58 Ind. 130.

Upon the right to recover taxes illegally assessed under statutes exempting farm lands from city taxation, see Fleming v. City of Indianapolis, 6 App. 80; Leonard v. City of Indianapolis, 9 App. 262.

Illegal taxes—Injunction.—If illegal taxes are assessed and threatened to be collected, the appropriate remedy to restrain their collection is by injunction. Toledo, etc., R. Co. v. City of Lafayette, 22 Ind. 262; Greencastle, etc., v. Black, 5 Ind. 557; City of Lafayette v. Jenners, 10 Ind. 70; City of Peru v. Bearss, 55 Ind. 576; City of Delphi v. Startzman, 104 Ind. 343; City of Delphi v. Bowen, 61 Ind. 29.

Irregularities—Injunction.—Irregularities, or the neglect of mere forms in the assessment of taxes, where there is authority to levy the tax, will not be sufficient cause to enjoin the collection thereof. Jones v. Summer, 27 Ind. 510; Ricketts v. Spraker, 77 Ind. 371; Reynolds v. Bowen, 138 Ind. 434; Florer v. McAffee, 135 Ind. 540; City of Delphi v. Bowen, 61 Ind. 29.

Part valid and unpaid—Tender.—An injunction will not be granted against the collection of taxes, if any part thereof be valid and unpaid, and the complaint shows no offer or tender to pay them. Stiltz v. City of Indianapolis, 81 Ind. 582; City of Logansport v. Case, 124 Ind. 254; City of South Bend v. University, etc., 69 Ind. 344; Florer v. McAffee, 135 Ind. 540; Buck v. Miller, 147 Ind. 586.

An injunction will not lie to prevent the execution of a deed on an invalid sale for taxes, unless there has been a tender and offer to pay the taxes legally due. The tender must be kept good by bringing the amount into court for the benefit of the purchaser. City of Logansport v. Case, 124 Ind. 254.

Complaint—When insufficient.—A complaint to enjoin the collection of taxes, which fails to aver that such taxes have been placed upon the duplicate, and that it is in the hands of the proper officer for collection, is bad. Worley v. Harris, 82 Ind. 493.

Complaint—When sufficient.—A complaint to enjoin the sale of lands for taxes, which shows that the taxes have been paid, and also that the former owner against whom the taxes were assessed had and has abundant personal property subject to distress and sale for taxes, shows two good reasons for the injunction. City of Logansport v. Carroll, 95 Ind. 156.

Same.—A complaint against an incorporated town and the marshal thereof to stop the sale of the plaintiff's property for taxes, alleging the payment of all taxes assessed against him, including the year 1879; that in January, 1880, after such payment, the trustees of the town placed an additional tax on the duplicate against him eight years preceding; that he had paid all taxes lawfully assessed against him, and that the additional assessment was consequently illegal and void, was good on demurrer. Scott v. Town of Knightstown, 84 Ind. 108.

Curative act.—When an illegal assessment of taxes has been rendered legal by a curative statute, the collection of such taxes can not subsequently be enjoined. Johnson v. Board, etc., 107 Ind. 15.

Railroads—State board of equalization.—Under the general tax law of 1891, the state board of equalization has exclusive authority to value and assess the railroad

property denominated "railroad track" and "rolling stock." City authorities must take the valuation of the right of way from the state board of equalization. Pfaff, etc., v. Terre Haute, etc., R. Co., 108 Ind. 144; Cleveland, etc., R. Co. v. Backus, 133 Ind. 513; Pittsburgh, etc., R. Co. v. Backus, 133 Ind. 625.

Respecting the powers of the state board of equalization relating to the valuation and assessment of the property of railroad, telegraph and express companies, under the general tax law of 1891, see Pfaff, etc., v. Terre Haute, etc., R. Co., 108 Ind. 144; Cleveland, etc., R. Co. v. Backus, 133 Ind. 513; Pittsburgh, etc., R. Co. v. Backus, 133 Ind. 625; Western U. Tel. Co. v. Taggart, 141 Ind. 281; Western U. Tel. Co. v. Henderson, 68 Fed. Rep. 589; Western U. Tel. Co. v. Atty.-General, 125 U. S. 530; Pullman, etc., Co. v. Hayward, 141 U. S. 36; Pittsburgh, etc., R. Co. v. Backus, 154 U. S. 421; Cleveland, etc., R. Co. v. Backus, 154 U. S. 439; State v. Adams Express Co. 144 Ind. 549; Evansville, etc., R. Co. v. West, 139 Ind. 254.

213. Equalization—Fixing rate—Refunding.—59. The common council, together with the clerk and assessor, shall constitute the board of equalization of such city, and shall within one month after the assessment-roll has been returned, at a stated meeting thereof (of which at least two weeks' notice shall be given), hear and decide all complaints in relation thereto, and shall equalize the same as right and justice may require, and shall have the power to equalize the valuations made by such assessor, either by adding to or deducting from any valuation made as aforesaid, such sum as to them, or a majority of them, may appear just and equitable. The common council shall have power to refer the assessment lists and all complaints in regard to any assessment to a committee of said council, which committee shall sit from day to day and examine such lists and hear and determine such complaints, and shall make reports thereon to the common council within ten days after the meeting of the board of equalization before mentioned, which report shall be accompanied by a statement of the total amount of the taxables returned by the assessor. The common council shall then proceed to fix the amount and rate of tax to be levied on property and polls within such city, and the clerk shall have power, at any time, to correct erroneous assessments that shall be proven and made apparent to him, and the common council may, at any time, order the amount erroneously assessed against and collected from any tax-payer to be refunded to him. R. S. 1894, § 3618.

By § 254 of act of March, 1891 (R. S. 1894, § 8672), city boards of equalization are abolished. See *post*, § 216.

The act of 1885 (R. S. 1894, § 3744, *et seq.*), did not repeal this section. Leonard v. City of Indianapolis, 9 App. 262.

The provisions of this section respecting the refunding of taxes erroneously assessed do not apply to towns. Simonson v. Town of West Harrison, 5 App. 459.

Appraisement—Equalization.—While § 26 of the general act for the incorporation of cities of 1867 was in force it was held that, under said section, cities were given two modes of ascertaining the value of real estate within their limits for the purpose of taxation: first, by adopting the appraisement made under the law for general taxation, and, second, by causing it to be appraised; and that, when a city council had adopted the appraisement which had been made by the township assessor, that appraisement became the basis of the assessment of city taxes, and such council had no authority to

add to the appraisement thus adopted by way of equalizing the same or otherwise. Jones v. City of Columbus, 62 Ind. 421.

Illegal annexation—Taxes—Injunction.—Where a city has assessed for taxation property illegally annexed to such city, collection of taxes so assessed may be enjoined. City of Peru v. Bearss, 55 Ind. 576; Windman v. City of Vincennes, 58 Ind. 480; Stultz v. State, 65 Ind. 492, 503. See Mullikin v. City of Bloomington, 72 Ind. 161.

Lands illegally annexed to city.—If taxes be assessed and collected by a city on lands illegally annexed to the city, they may be recovered. City of Indianapolis v. McAvoy, 86 Ind. 587, 589; Strosser v. City of Ft. Wayne, 100 Ind. 443, 444; City of Indianapolis v. Patterson, 112 Ind. 344, 350.

Taxes illegally collected—Remedy.—An ordinary action may be maintained to recover taxes illegally assessed and collected. City of Indianapolis v. McAvoy, 86 Ind. 587; Newsom v. Board, etc., 103 Ind. 526; City of Indianapolis v. Patterson, 112 Ind. 344; City of Indianapolis v. Vajen, 111 Ind. 240; Leonard v. City of Indianapolis, 9 App. 262.

Duty to refund mandatory.—The provision of this section as to refunding taxes erroneously assessed is mandatory. City of Indianapolis v. McAvoy, 86 Ind. 587; City of Indianapolis v. Vajen, 111 Ind. 240, 247; DePauw, etc., Co. v. City of Alexandria, Ind. Sup. Ct., Jan. 11, 1899.

Deduction of indebtedness.—If a tax-payer is erroneously refused permission to deduct his indebtedness from his credits, and he pays the taxes illegally assessed under protest, he may recover from the city such illegal tax. City of Indianapolis v. Vajen, 111 Ind. 240.

Estoppel.—A land-owner may be estopped by his own conduct from contesting the validity of a tax imposed upon land illegally annexed. Where a land-owner in such case, for three years, permitted the city to proceed to make costly improvements and assume heavy obligations, openly and in full view without objection from the land-owner, and could not have been unaware that the common council was induced thereto in part by its belief that the land so illegally annexed would bear its ratable proportion of the burden; and the land-owner also accepted the protection of the municipal government, and for said period acquiesced in a state of things that reasonably led the city to rely upon the land as taxable for city purposes and accepted benefits at the expense of the city, such land-owner will not be permitted to invoke the invalidity of the act of annexation to escape taxation. DePauw, etc., Co. v. City of Alexandria, Ind. Sup. Ct., Jan. 11, 1899.

Voluntary payment—Mistake of law.—Without a statute authorizing it, no recovery can be had for taxes voluntarily paid, although paid under protest. A mistake as to the law will avail nothing in such a case. Board, etc., v. Armstrong, 91 Ind. 528, 534; Hines v. Board, etc., 93 Ind. 266, 268; Durham v. Board, etc., 95 Ind. 182, 183; Board, etc., v. Graham, 98 Ind. 279, 280; Worley v. Town of Cicero, 110 Ind. 208, 209; Churchman v. City of Indianapolis, 110 Ind. 259, 267; City of Indianapolis v. Vajen, 111 Ind. 240, 246; McWhinney v. City of Logansport, 132 Ind. 9, 12; Donch v. Board, etc., 4 App. 374, 378; Simonson v. Town of West Harrison, 5 App. 459.

Demand not essential.—A demand is not essential to create a cause of action for taxes illegally collected. Newsom v. Board, etc., 103 Ind. 526, 530.

City taxes, land sold for.—As a general rule, a city is not liable to refund to a purchaser, who fails by his purchase to acquire title to or a lien upon land sold for city taxes, the amount of money paid by him upon such purchase. In order to render it liable to refund the money, it must be shown that the land was not liable to taxation, or that the taxes had been paid before sale. City of Logansport v. Humphrey, 84 Ind. 467, 469; McWhinney v. City of Indianapolis, 98 Ind. 182, 183; McWhinney v. City of Indianapolis, 101 Ind. 150, 152; City v. Langsdale, 29 Ind. 486; Worley v. Town of Cicero, 110 Ind. 208.

Lands illegally annexed, sale of.—The common council of a city by resolution annexed certain real estate to the city, and assessed the same for taxes for the years 1878 and 1879, and such taxes remaining unpaid, said real estate was, on February 15, 1881, sold to M., and a certificate was issued to him. Before a deed was executed, the city annulled the annexation, because the land was not contiguous. M. had no knowledge at the time of his purchase that the land was not properly annexed and legally assessed, and before he discovered said facts he paid taxes thereon in addition to the purchase-money. M. could recover from the city, under §§ 217 and 218 of the act of March 29, 1881 (Acts 1881, p. 681), the amount of the purchase-money and subsequent taxes paid. McWhinney v. City of Indianapolis, 101 Ind. 150, 153.

City tax sale.—A city or town can not purchase property sold for delinquent taxes due the city or town, nor can a city or town make a valid agreement to warrant the title to property sold at tax sale. City of Logansport v. Humphrey, 84 Ind. 467.

Invalid sales by city—Remedy.—Under the general tax law of 1881,§§ 227 and 228 of the act of December 21, 1872, providing a remedy for purchasers of real estate at invalid tax sales, and which were applicable to sales of real estate made by cities, were re-enacted and continued in force as §§ 217 and 218 of the act of March 29, 1881, which were likewise applicable to cities, and such remedy has been continuously in force since the date of the first act, notwithstanding its repeal and re-adoption. (See §§ 212 and 213 of the tax law of 1891. (R. S. 1894, §§ 8630, 8631.) McWhinney v. City of Indianapolis, 101 Ind. 150; Millikan v. City of Lafayette, 118 Ind. 323.

When sale void.—A sale is void where the land is not liable for taxation, where the taxes were paid before sale, or where the description is insufficient. State v. Casteel, 110 Ind. 174; St. Clair v. McClure, 111 Ind. 467; Morrison v. Jacoby, 114 Ind. 84; McWhinney v. City of Indianapolis, 98 Ind. 182; City of Logansport v. Case, 124 Ind. 254.

Sale—Municipal power.—A power given to a municipality to sell property for delinquent taxes, like other powers, can be exercised only in the mode prescribed by the statute, if there be such mode. City of Logansport v. Humphrey, 84 Ind. 467.

Private sale—Transfer of lien.—A private sale of land for taxes, after notice as required by statute, if insufficient to convey title, will transfer the lien of the state to the purchaser. Peckham v. Millikan, 99 Ind. 353; McWhinney v. City of Indianapolis, 98 Ind. 182; Morrison v. Jacoby, 114 Ind. 84.

Purchaser's lien—Void sale.—A tax sale, although made in violation of mandatory provisions of the statute, vests in the purchaser the lien of the state upon the land upon which the taxes were leviable, in all cases except where the sale was void because the land was not liable to taxation, or where the taxes had been paid, or the description of the land was so imperfect as to fail to identify the land, or where the sale was made without authority of law. City of Logansport v. Case, 124 Ind. 254.

Sale ineffectual to convey title, but carrying lien—Redemption.—Where a tax sale is ineffectual to convey title, but carries to the purchaser the lien of the state, the delinquent tax-payer can redeem from such sale only upon the conditions prescribed by the statute. City of Logansport v. Case, 124 Ind. 255.

County sale for taxes—City taxes.—A purchaser at a tax sale made by the county officers takes the land subject to the lien for city taxes thereon, if the land is of sufficient value to pay all taxes, but if the land is not sufficient to pay all taxes, then the sale first rightfully made will divest the lien for the other taxes. Justice v. City of Logansport, 101 Ind. 326; Millikan v. Hamm, 104 Ind. 498.

Tax sale—Caveat emptor.—The purchaser at a city tax sale assumes all risk, and, if the sale proves invalid, has no remedy against the municipality. The city can not warrant the title. City of Logansport v. Humphrey, 84 Ind. 467; Churchman v. City of Indianapolis, 110 Ind. 259.

Invalid tax sale—Refunding money by city.—As a general rule, a city is not liable

to refund to a purchaser, who fails by his purchase to acquire title to or lien upon land sold for city taxes, the amount of money paid by him upon such purchase. In order to render the city liable to refund the money, in such case, it must be shown that the land was not liable to taxation, or that the taxes had been paid before sale. McWhinney v. City of Indianapolis, 98 Ind. 182; City of Indianapolis v. Patterson, 112 Ind. 344; Millikan v. City of Lafayette, 118 Ind. 323.

Same—Judgment as to lien—When conclusive as to city.—When an action is brought by the owner of the land against the city treasurer and the purchaser, and defended by the city, wherein it is decreed that the purchaser acquired no lien, and his certificate is canceled and the plaintiffs' title quieted, the city is concluded by the judgment, and the purchaser is then entitled to be re-imbursed, under § 218 of the general tax law of 1881. Millikan v. City of Lafayette, 118 Ind. 323.

But where the city is not in any manner a party to the action, the judgment of the court refusing to enforce the purchaser's lien against the land-owner does not conclude the city, and, therefore, the mere rendition of the judgment does not render the city liable to refund the purchase-money. McWhinney v. City of Indianapolis, 98 Ind. 182.

Tax sale certificate—Void sales.—The act of March 11, 1875, made the tax law of December, 1872, applicable to cities and towns, and purchasers at tax sales who did not get titles were entitled to 25 per cent. interest; and a tax sale certificate only entitled the holder to possession of land when the sale was valid. Barton v. McWhinney, 85 Ind. 481.

Invalid sale—Reimbursement of purchaser.—A proceeding, brought after the tax law of 1881 went into force, by a purchaser at a city tax sale made under the law of 1872, wherein the plaintiff seeks to be reimbursed from the city treasury for the taxes paid by him, was governed by the law of 1881. Millikan v. City of Lafayette, 118 Ind. 323.

Under the tax law of 1881, the right of a purchaser to be reimbursed from the public treasury for taxes paid by him, on account of the uncertainty of the description of the land sold, only exists where the description is so indefinite as to fail to carry a lien. Millikan v. City of Lafayette, 118 Ind. 323.

Under the tax law of 1881, where one has purchased real estate at a tax sale for non-payment of county and state taxes, and afterwards pays the city tax on such property, he may, in a suit to quiet title, have the same allowed and decreed a lien on the real estate as part of the original claim for the purchase price. Millikan v. Hamm, 104 Ind. 498; Schissel v. Dickson, 129 Ind. 139.

Under the general tax law of 1872, the sales of lands by city treasurers for delinquent taxes, together with penalties, etc., were governed by the general tax law. Schissel v. Dickson, 129 Ind. 139, 149; Barton v. McWhinney, 85 Ind. 481.

214. Sinking fund tax.—82. For the purpose of creating a sinking fund for the gradual extinguishment of the bonds and funded debt of any city coming under this act of incorporation, the common council thereof shall, annually, levy and collect, in addition to other taxes herein provided, not less than half a mill on the dollar upon the taxable property in such city; which shall be paid into the treasury and applied, by direction of the common council, to the extinguishment of the bonds and debts aforesaid, and to no other purpose whatever. R. S. 1894, § 3619.

See *ante*, §§ 146, 201, 203, *et seq.*, and *post*, § 1001, *et seq.*

Sinking fund tax.—Under § 60 of the general act of 1867 for the incorporation of cities, while said section was in force, the common council could, in addition to a levy to

pay interest upon public railroad debt, add to such levy not less than five cents on the one hundred dollars of the assessed value, to create a sinking fund to liquidate the principal of such debt. And, where a levy for such purpose was made, it was not rendered illegal or void by the fact that it did not specify the portion to be applied to the liquidation of each, and such fact was not ground to enjoin the collection of the tax. City of Aurora v. Lamar, 59 Ind. 401.

215. Temporary loans.—83. Loans may be made by a vote of two-thirds of the common council, in anticipation of the revenue of the current and following year, and payable within that period; but the aggregate amount of such loan in any fiscal year shall not exceed the levy and tax authorized by this act for municipal expenses for the same year. R. S. 1894, § 3620.

The purchase of real estate on credit is not a loan within the meaning of this section. City of Richmond v. McGirr, 78 Ind. 192.

[Acts 1891, p. 199. In force March 6, 1891.]

216. Cities governed by this act—Payment of taxes—Assessment and equalization.—254. Cities shall be governed by the provisions of this law, in regard to the matters embraced therein, so far as the same are applicable, and the duties required by the terms of this act to be done by the county officers, shall be performed by the corresponding officers of each city in regard to the assessment and collection of taxes, and all matters pertaining thereto: *Provided*, That all city taxes shall be paid on or before the third Monday in April of each year, unless the common council shall, by ordinance or resolution, determine otherwise, as provided by law: *And, provided further*, That the office of city assessor and the city board of equalization are hereby abolished and the assessment of real and personal property, as made and returned by the township assessor, shall serve as the assessment for city purposes, and the proper city officers shall have access to the assessor's books and to the tax duplicates in the county auditor's office, for the purpose of transcribing therefrom a list of the property assessed, as the same shall have been equalized by the board of review and the state board of tax commissioners. R. S. 1894, § 8672.

See R. S. 1894, Taxation, ch. 108 (§ 8408, *et seq.*), Burns' Supp. 1897, Taxation, ch. 108 (§ 8411, *et seq.*), and Acts 1899, pp. 422, 430, 431, 491, 516. Also, see *post*, § 1057.

General law—Omitted property—City clerk.—The general law of the state, in regard to the matters embraced therein, so far as the same is applicable, upon the subject of taxation, governs cities. The city clerk is the proper city officer to assess omitted property, and to give the notice to the owner required to be given in such case. City of Delphi v. Bowen, etc., 138 Ind. 235.

[Acts 1883, p. 30. In force Feb. 27, 1883.]

217. Time to pay taxes—Delinquency—Penalty.—1. That any city in this state by a provision contained in the ordinance or resolution fixing the tax levy for any year, may allow the taxes so levied for general city purposes to be paid in equal semi-annual installments, the first half to be paid on or before the third Monday in April, and

the second half on or before the first Monday in November: *Provided*, That in all cases where the first installment shall not be paid on or before the third Monday in April, the whole amount unpaid shall become due and be returned delinquent and collected as provided by law; and there shall be a penalty added of 10 per cent. upon the amount of any installment not paid when due, which the persons or property assessed shall pay, together with the cost of collection, and if such taxes remain delinquent at the succeeding first Monday in November, there shall be a penalty of 6 per centum added to all such taxes that became delinquent at the preceding April and November settlements, and a penalty of ten per centum only shall be added to the current delinquency occurring on the first Monday in November. All poll or special taxes shall be paid at the same time, on or before the third Monday in April. In all cities which do not adopt and accept the provisions hereof taxes shall be paid and collected as now provided by law. R. S. 1894, § 3622.

See Burns' Supp. 1897, § 8570.

By amendment to the general tax law of 1891, if this provision is applicable to cities, any person may pay the full amount of his taxes on or before the first Monday in May, or may pay the first installment on or before such first Monday, and the remaining installment on or before the first Monday in November following. Burns' Supp., 1897, § 8570.

Penalty and interest—Delinquent taxes—Law of 1891 construed.—Under the tax law of March 6, 1891, non-payment of the April installment carries into delinquency the whole tax, to which is added a penalty of 10 per centum; if such taxes are not paid, but are delinquent in November, an additional burden of 6 per centum thereon is imposed; if the April installment is paid, and only the November installment is delinquent, but 10 per centum can be added; and to these penalties no additions can be made in the way of either penalties or interest, however long the delinquency continues. Evansville, etc., R. Co. v. West, 139 Ind. 254.

For construction of prior statute as to tax delinquency, penalty, etc., see Abbott v. Edgerton, 53 Ind. 196.

Liability for publication of delinquent list.—A city is liable, on a common count for work and labor, to one who, on request of her authorized agent, publishes her delinquent list of tax-payers in a newspaper. City of Evansville v. Thayer, 59 Ind. 324.

ARTICLE 4.—IMPROVEMENT OF STREETS.

SEC.
218. Power over streets.
219. Petition for street improvements.
220. Cost, how apportioned.
221. Apportionment of cost of improvement.
222. Payment—Lien—Order without petition.
223. Payment, how enforced.

[Acts 1867, p. 33. In force March 14, 1867.]

218. Power over streets.—61. The common council shall have exclusive power over the streets, highways, alleys and bridges within such city, and may prescribe the height and manner and construction of all such bridges, and to lay out, survey, extend and open new streets and alleys, and straighten, widen and otherwise alter those already laid out, and to make repairs thereto, to construct and establish sidewalks and crossings; they may cause buildings, structures or

other things in the way of any street or other public improvement to be taken down, removed and appropriated, upon the payment of damages as now provided by law; they may enter upon, seize, appropriate, and condemn the right of way, or other lands of any railroad company, person or corporation passing through such city for street or alley purposes, whether such lands be occupied and used or not, upon payment of damages as provided under and pursuant to the provisions of an act entitled "An act in relation to the laying out, opening, widening, altering and vacation of streets, alleys and highways, and for the straightening or altering of water-courses by cities of the state, and providing for the appointment of commissioners to assess benefits and damages, prescribing their duties and the method of procedure, and providing for the collection of benefits and payment of damages, and prescribing the duties of city officers in relation thereto, and providing remedies in such matters," approved March 17, 1875, and the amendments thereto, and not [no] person residing in said city shall be required or compelled to work on any road without the city; nor shall any property lying or being within the city be taxed for the purpose of working, opening, improving or repairing any road or bridge without the limits of said city; and the common council may exercise all powers of township trustees, and the street commissioners, under the direction of the common council, may perform all the duties and exercise all the powers of township trustees and road supervisors in reference to a road labor tax of two days by each person liable to work on roads in townships, and shall be governed by the same rules and regulations in reference to the collection and enforcement of the same; or any person so liable to work may be discharged therefrom on the payment of one dollar and fifty cents per diem: *Provided*, That the common council may, by general ordinance, prescribe the time within which such labor shall be performed. [As amended, Acts 1891, p. 122. In force March 6, 1891.] R. S. 1894, § 3623.

See Towns, *post*, § 1258.

Statutes construed.—The above and succeeding sections should be construed with § 224, *post, et seq.* City of Terre Haute v. Evansville, etc., R. Co., 149 Ind. 174.

Constitutional law.—For constitutional provisions applicable, see *ante*, §§ 4 and 11, and notes.

Dedication—Plats—Prescription—Streets.

What is necessary to constitute.—To constitute a valid dedication, there must be a clear intention on the part of the owner, clearly indicated by unequivocal acts or conduct, to dedicate the land to the public, and there must be an acceptance by the public of the land dedicated. Ross v. Thompson, 78 Ind. 90, 95; Faust v. City of Huntington, 91 Ind. 493, 494; Tucker v. Conrad, 103 Ind. 349, 354; Shellhouse v. State, 110 Ind. 509, 513; Mansur v. State, 60 Ind. 357; Mansur v. Haughey, 60 Ind. 364; Steinaur v. City of Tell City, 146 Ind. 490; Elliott Roads and Streets, pp. 85, 120; 2 Beach Pub. Corp., § 1450.

Express—Implied.—The dedication may be either express or implied. An express dedication of property to a public use is made by a direct appropriation of it to such use. Dedication may be implied from the acts of the owner. Williams v. Wiley, 16 Ind. 362; Gwynn v. Homan, 15 Ind. 201; City of Indianapolis v. Kingsbury, 101 Ind. 200, 219;

Town of Marion v. Skillman, 127 Ind. 130; Cromer v. State, 21 App. 502; Pittsburgh, etc., R. Co. v. Town of Crown Point, 150 Ind. 536; Elliott Roads and Streets, p. 91. Streets, p. 91.

Statutory and common law dedication.—A dedication may be statutory or by common law. One operates by grant, the other by estoppel *in pais*. 1 Dillon Munic. Corp., § 628; Elliott Roads and Streets, pp. 85, 87.

All that is necessary to constitute a dedication of land to a public use is the assent of the owner of the soil to the use by the public, and the actual enjoyment by the public of the use for such length of time that public accommodation and private rights would be materially affected by a denial or interruption of the enjoyment. Town of Marion v. Skillman, 127 Ind. 130, 136.

The indication of an owner of lands on a recorded plat of an intention at some future time to dedicate a portion of the lands for a street, will not amount to a dedication. City of New Albany v. Williams, 126 Ind. 1.

Evidence that a street has been used by the public and that a town has repaired it, is sufficient to show an acceptance of a dedication. Acceptance upon the part of the public may be express or implied. Town of Fowler v. Linquist, 138 Ind. 566; Boyer v. State, 16 Ind. 451; Elliott Roads and Streets, p. 115.

The fact that a part of a street has been for several years appropriated by a private citizen to his own use, is not conclusive evidence that the dedication has not been accepted, or has been abandoned by the public. Boyer v. State, 16 Ind. 451.

Ipso facto dedication—Suit for damages for appropriation of land.—Where a fair construction of a complaint is that plaintiff's land therein described was appropriated for permanent use as a street, a recovery of damages thereon works a dedication of the land to the city for street purposes; and in such case it is not necessary for plaintiff to aver a willingness to convey the land described before he could recover its value. City of Huntington v. Kenower, 12 App. 456.

Dedication by plat.—Marking a street upon the plat of a town or city, or an addition thereto, and selling lots with reference to such marked street, constitutes a dedication of the ground so marked to the use of the public as a street. Faust v. City of Huntington, 91 Ind. 493, 495; City of Indianapolis v. Kingsbury, 101 Ind. 200, 210; Fossion v. Landry, 123 Ind. 136, 143; Miller v. City of Indianapolis, 123 Ind. 196, 206; Wolfe v. Town of Sullivan, 133 Ind. 331, 333; City of Logansport v. Dunn, 8 Ind. 378; Gwynn v. Homan, 15 Ind. 201; City of Evansville v. Evans, 37 Ind. 229; Cox v. Louisville, etc., R. Co., 48 Ind. 178; Shanklin v. City of Evansville, 55 Ind. 240; Boyer v. State, 16 Ind. 451; Conner v. New Albany, 1 Blackf. 43; Rhodes v. Town of Brightwood, 145 Ind. 21; Town of Woodruff v. Raschig, 147 Ind. 517; Common Council, etc., v. Croas, 7 Ind. 9; Vaughn v. Stuzaker, 16 Ind. 338; West v. Blake, 4 Blackf. 234.

Dedication—Plat—Presumption.—A mere showing that some one, not proved to be the owner, has placed on record a map or plat in which a street or highway is laid off, will raise no presumption against a party in possession, who has proved title in himself, coupled with possession for more than twenty years. Such plat, taken by itself, and without evidence of ownership by the donor, is of no value as tending to establish a dedication. City of Lawrenceburgh v. Wesler, 10 App. 153, 159. See Town of Fowler v. Linquist, 138 Ind. 566.

When the shape, lines and dimensions of a space marked on a recorded plat indicate that it is a street, there is a valid dedication of the space so indicated, although there be no formal words of dedication, and although the space be not in express terms designated as a street. City of Indianapolis v. Kingsbury, 101 Ind. 200, 209.

Plat—How construed after recording.—Where ways are shown on recorded plats, and they appear as streets, they will be so regarded, unless there is in the plats an express provision to the contrary, and no acts or conduct of the owner can change the effect of the dedication evidenced by the plat. City of Indianapolis v. Kingsbury, 101 Ind. 200, 209.

The filing and recording of a plat of an addition to a town shows, prima facie, that the dedicator was the owner of the land and intended to dedicate the streets marked on the plat. Town of Fowler v. Linquist, 138 Ind. 566. See City of Lawrenceburg v. Wesler, 10 App. 153.

To the public, not the city.—A grant or dedication of a street is a grant or dedication to the public, and not to the city. Miller v. City of Indianapolis, 123 Ind. 196, 198.

When implied from conduct.—The assent of the owner to the public use need not be expressly declared, nor be manifested in any particular manner, but may be implied from the conduct of the owner of the land. City of Indianapolis v. Kingsbury, 101 Ind. 200, 219; Town of Marion v. Skillman, 127 Ind. 130, 136; Faust v. City of Huntington, 91 Ind. 493.

An implied dedication arises by operation of law from the acts of the owner of the land. Town of Marion v. Skillman, 127 Ind. 130.

Dedication—Proof.—A street may be shown to exist in a town or city, whether incorporated or not, by a public plat, together with user by the public, or a sale of adjoining lots by the proprietor; or, by proof of a parol dedication to the public, accompanied by user by the public; or, by proof of acts of the owner evidencing a dedication, as by selling lots on opposite side of a strip suitable for a street, and standing by and seeing it used by the public; or, by proof of a taking by lawful authority for public use. Gwynn v. Homan, 15 Ind. 201; Williams v. Wiley, 16 Ind. 362; City of Logansport v. Dunn, 8 Ind. 378; Elliott Roads and Streets, pp. 86, 89.

Intention to dedicate—Evidence.—As to whether a person intends to make a dedication of ground to the public for a street or other purpose, must be determined from his acts and declarations explanatory thereof, in connection with all the circumstances that surround and throw light upon the subject, and not from what he may subsequently testify in relation to his real intentions. Fossion v. Landry, 123 Ind. 136; City of Columbus v. Dahn, 36 Ind. 330; City of Indianapolis v. Kingsbury, 101 Ind. 200.

Dedication of land to public use—Intention of party.—Where the declarations, acts, and conduct of a land-owner are such as fairly and naturally lead to the conclusion that he intended to dedicate land to public use, and others have in good faith acted upon such acts and declarations, the fact that the land-owner may have entertained a different intention from that manifested by his acts and declarations can not prevail against the force of his conduct and acts upon which the public or those dealing with him have relied. Pittsburgh, etc., R. Co. v. Noftsger, 148 Ind. 101.

An implied dedication of a public highway is made by acts or a course of conduct from which the law will infer an intent to dedicate. It will exist without any express grant, and is founded in the doctrine of equitable estoppel. The public, as well as individuals, have a right to rely upon the conduct of the owner as indicative of his intent, and if his acts are such as would fairly and reasonably lead an ordinarily prudent man to infer an intent to dedicate, and his acts are so received and relied upon by the public, the dedication is complete. The intent to dedicate will be inferred from the acts. Lake Erie, etc., R. Co. v. Town of Boswell, 137 Ind. 336.

Intent to dedicate necessary.—It is necessary, to constitute a valid dedication, that there should be a clear intent to dedicate the land to a public use, but the intent which the law regards is that which the open acts of the owner indicate and not a secret intent. Bidinger v. Bishop, 76 Ind. 244, 254; City of Indianapolis v. Kingsbury, 101 Ind. 200, 213; Town of Marion v. Skillman, 127 Ind. 130, 136; Elliott Roads and Streets, p. 92.

Intent inferred from conduct.—Where the acts and conduct of the land-owner are such as fairly and naturally lead to the conclusion that he intended to dedicate the land to the public use, and others have in good faith acted upon his open acts and conduct, he will not be permitted to aver that there was no dedication, but the law will conclusively infer that he intended what his acts and conduct indicated. City of

Indianapolis v. Kingsbury, 101 Ind. 200, 215; Pittsburg, etc., R. Co. v. Town of Crown Point, 150 Ind. 536; Cromer v. State, 21 App. 502; Elliott Roads and Streets, p. 92. Streets, p. 92.

Where a railroad company for eighteen years permitted the public to use a street across its right of way as a public crossing, allowed it to make improvements thereon, parted its trains to permit persons and vehicles to pass through, and recognized its existence as a duly laid out public street in a map required by the statute to be filed as a public record, an intent to dedicate it to the use of the public in common with itself will be presumed. Lake Erie, etc., R. Co. v. Town of Boswell, 137 Ind. 336.

Dedication by railroad may be inferred from use by the public as a highway for thirty years, the public having accepted the use for a definite width, the town having improved and cared for the same as other streets, and residence and business property having been erected and maintained with their only entrance over the land, all without objection from the railroad company. Pittsburgh, etc., R. Co. v. Town of Crown Point, 150 Ind. 536.

Evidentiary facts of intention.—Evidentiary facts, tending to prove an intended dedication, or from which it might possibly be presumed, are not themselves such an intended dedication. Tucker v. Conrad, 103 Ind. 349, 354; Shellhouse v. State, 110 Ind. 509, 513; Steinaur v. City of Tell City, 146 Ind. 490, 499.

When intention may be rebutted.—An intention to dedicate may be rebutted when there is an implied dedication, but not when there is an express dedication. City of Indianapolis v. Kingsbury, 101 Ind. 200, 215; Miller v. City of Indianapolis, 123 Ind. 196.

A single declaration, made by the owner of land, that he intends to dedicate any portion of it to public use, unconnected with some act in furtherance of that intention, will not amount to a dedication; much less will such declaration amount to a dedication when accompanied or immediately followed, by an act wholly inconsistent therewith. City of Logansport v. Dunn, 8 Ind. 378.

Manner of rebutting intention.—One of the usual methods of rebutting the presumption of dedication is by evidence that a gate was swung across the way, but this will not rebut an intent to dedicate in case of an express dedication, nor will it do so in cases of implied dedication where the other evidence in the case shows that there was an intent to dedicate and that rights were acquired upon the faith that such an intent did in fact exist. City of Indianapolis v. Kingsbury, 101 Ind. 200, 215.

Oral evidence to deny inadmissible.—An implied dedication may be rebutted by parol testimony, but where the dedication is express, evidenced by a recorded plat, the intent as expressed in such plat can not be contradicted by parol. Miller v. City of Indianapolis, 123 Ind. 196, 207.

Partition, dedication.—The commissioners in a partition proceeding were ordered by the court to lay off the land in controversy into lots, blocks, streets and alleys, which was done, there being left undivided a strip sixty feet wide extending east and west through the entire width of the land so set off. The commissioners reported to the court that they had divided the land intended for partition into lots, etc., and had assigned to each of the persons in said land his share in severalty. All the property abutting on the street had passed into the hands of third parties by conveyance or by mortgage. Oral evidence was inadmissible to prove that it was not the intention of the commissioners to dedicate this strip to the public as a street. Miller v. City of Indianapolis, 123 Ind. 196, 207.

Presumption of dedication by user.—User by the public, with the consent of the owner, for such length of time that public accommodation and private rights might be materially affected by an interruption of the enjoyment, is sufficient to raise a presumption that the owner intended a dedication to the public. Bidinger v. Bishop, 76 Ind. 244, 254; City of Indianapolis v. Kingsbury, 101 Ind. 200, 216; Zimmerman v. State, 4

App. 583, 589; City of Evansville v. Page, 23 Ind. 525; Faust v. City of Huntington, 91 Ind. 493; State v. Hill, 10 Ind. 219; Fisher v. Hobbs, 42 Ind. 276; Summers v. State, 51 Ind. 201; Mauck v. State, 66 Ind. 177.

Use of land with owner's consent.—One who devotes a portion of his land for use as a way of travel for his own convenience and accommodation will not be deemed to have dedicated it to the public simply because the public also use the way with the landowner's permission. Pennsylvania Co. v. Plotz, 125 Ind. 26, 32; Shellhouse v. State, 110 Ind. 509.

Prescription—Twenty years' use without intent.—Twenty years' use by the public under a claim of right, evidenced by the use, gives a right to the road or street of which the owner of the fee can not divest the public, whatever his intention may have been, not because an intent to dedicate is conclusively presumed, but because the statute of limitations has divested the owner of a right by destroying the remedy. Waltman v. Rund, 109 Ind. 366, 367; Town of Marion v. Skillman, 127 Ind. 130, 137; Shellhouse v. State, 110 Ind. 509; Board, etc., v. Huff, 91 Ind. 333, 340; Elliott Roads and Streets, p. 123.

Section 6762, R. S. 1894, which provides that a way used for twenty years as a highway shall be deemed a public highway, has no application to the public streets of a town or city; but dedication may be presumed from circumstances continuing for a much shorter period. Pittsburgh, etc., R. Co. v. Town of Crown Point, 150 Ind. 536; Tucker v. Conrad, 103 Ind. 349; Shellhouse v. State, 110 Ind. 509; Elliott Roads and Streets, p. 138.

Where the city took within its corporate limits a highway, and the public continued to use the highway as it existed and had been used before, and such use had continued for more than twenty years, a highway in which the public had a right to travel became established, and it became the duty of the city to keep it in a reasonably safe condition for travel. City of Frankfort v. Coleman, 19 App. 368.

Before a highway can be established by prescription, it must appear that the general public, under a claim of right, and not by mere permission of the owner, used some defined way, without interruption, or substantial change, for a period of twenty years or more. Shellhouse v. State, 110 Ind. 509; Talbott v. Grace, 30 Ind. 389.

Interruption of use by public.—When the use of a way is interrupted, prescription is annihilated, and must begin again, and any unambiguous act by the owner, such as closing the way at night, or erecting gates or bars which evinces his intention to exclude the public from its uninterrupted use, destroys the prescriptive right. Shellhouse v. State, 110 Ind. 509.

Street across public square—Dedication—Prescription.—Although land be set aside for a public square, the public may acquire a highway across such land by dedication, or by user for twenty years. The county commissioners may make such dedication. Board, etc., v. Hough, 91 Ind. 333.

One public use may be lost by user or dedication to another. Pittsburgh, etc., R. Co. v. Town of Crown Point, 150 Ind. 536; Blumenthal v. State, 21 App. 665.

United States lands—User.—No presumption of dedication of uncultivated land of the United States for a highway can be raised from the use of such land as a highway by the public. Phipps v. State, 7 Blackf. 512.

State—Municipal corporations.—States, counties, towns, cities and townships may dedicate land for public use for streets, public squares, parks, etc. Elliott Roads and Streets, pp. 107, 108 and cases; 2 Beach Pub. Corp., § 1455.

Irrevocable—Estoppel in pais.—A dedication once made is irrevocable; it is considered as in the nature of an estoppel *in pais*. Town of Marion v. Skillman, 127 Ind. 130, 136; City of Noblesville v. Lake Erie, etc., R. Co., 130 Ind. 1, 3; Shanklin v. City of Evansville, 55 Ind. 240; Haynes v. Thomas, 7 Ind. 38; Common Council, etc., v. Croas, 7 Ind. 9; Rhodes v. Town of Brightwood, 145 Ind. 21.

Revocation before acceptance.—Prior to the acceptance by the public the owner may revoke such dedication. Steinhaur v. City of Tell City, 146 Ind. 490.

Revocation—Private rights.—A dedication to the public becomes irrevocable after private rights have been acquired by reason thereof, as by sale of lots by reference to a map filed in the recorder's office upon which land is designated as a "park." Rhodes v. Town of Brightwood, 145 Ind. 21.

Corrected plat—Revocation.—Where a triangular tract at the intersection of two streets, as shown upon a town plat, was not separated from the streets by lines, and two years afterwards a corrected plat was filed which expressly reserved said triangular tract, there being no evidence that said tract had been intended to be dedicated to the public, and no evidence of acceptance thereof by the public, the making and recording of said first plat did not constitute a dedication of said triangular tract. Steinhaur v. City of Tell City, 146 Ind. 490.

Invalid condition annexed.—A donor can not attach to his dedication any condition that will destroy its chief characteristic or take it from the control of the public authorities; and if such a condition be attached it is void and the dedication is valid. City of Noblesville v. Lake Erie, etc., R. Co., 130 Ind. 1, 5; Elliott Roads and Streets, p. 109.

Twenty years user—Highway—Annexation.—Section 6762, R. S. 1894, which provides that "all public highways, which have been or may hereafter be used as such for twenty years or more, shall be deemed public highways," etc., does not apply to cities; but where there has been twenty years' use of the way, prior to its annexation to the city, such use constitutes a public one prior to the annexation. Upon annexation of the territory through which it extends to the city, such public highway becomes one of the streets of the city. Such street may be improved as any other street and the cost thereof collected as in other cases. Brown v. Hines, 16 App. 1; Tucker v. Conrad, 103 Ind. 349.

Passive acquiescence with knowledge.—Mere passive acquiescence, with knowledge, by the owner, of an uninclosed and unimproved lot in a town or city, in its use by the public for street or highway purposes, until such time as he may be able and willing to improve the same, does not constitute a dedication. Tucker v. Conrad, 103 Ind. 349, 353.

Express dedication a question of law.—As to whether a plat contains an express dedication of a strip of ground to the public as a street, is a matter of law for the court. Miller v. City of Indianapolis, 123 Ind. 196, 206; Wolfe v. Town of Sullivan, 133 Ind. 331, 334.

Implied dedication a question of fact.—In absence of an express dedication, whether land was or was not dedicated to the public is not a conclusion of law, but is a question of fact to be decided upon the evidence. City of Indianapolis v. Kingsbury, 101 Ind. 200, 222.

Construction of maps and plats.—Where there is doubt as to whether the owner intended by the plat or map to dedicate land to public use, the general rule, within reasonable limits, is to resolve the doubt in favor of the public. Elliott Roads and Streets, p. 111.

Where reservations of any kind are marked on a plat, the intention of the proprietor of such plat in regard to the meaning of the marks on such reservations is in general a question of fact, and not of law. Pidgeon v. McCarthy, 82 Ind. 321.

Dedication, what is not—Injunction.—Where a railroad company desired to have a to portion of an alley vacated in order to build a passenger depot, and presented a petition the common council offering to donate to the city a certain strip of ground to be used as a street or alley in consideration of the vacation of the said alley, and the city, through its proper officers, rejected the proposition of exchange by failing to act thereon, but assessed the benefits to the company growing out of the vacation of the said alley at a

certain sum, which sum was paid by the company into the city treasury, and afterward the company, for the purpose of making a convenient and necessary way of approach to, and egress from, its passenger depot, curbed and paved the strip of ground which it had proposed to donate to the city and constructed convenient and necessary gates, all of which was done at its own expense, the said strip of ground did not become a public street of the city, subject to a right of all the citizens to use it as a public thoroughfare. An abutting property-owner could not enjoin the company from erecting a fence along the boundary of said strip of ground. Pennsylvania Co. v. Plotz, 125 Ind. 26, 29.

Proposition not acted upon—Effect.—No right accrued to the public on account of the proposition contained in the petition of the railroad to the common council. Inasmuch as only the matter of vacating the alley was acted upon and referred to the city commissioners, everything relating to the opening of a new street must be deemed to have been abandoned. A mere proposition, or offer, on the one hand, not acted on or accepted, is not a contract. Pennsylvania Co. v. Plotz, 125 Ind. 26, 31.

Husband and wife—Donation by husband bars wife's interest.—A donation or grant of land by a husband, to a municipal corporation for use as a street, bars the inchoate interest of his wife in such land. Duncan v. City of Terre Haute, 85 Ind. 104; City of Indianapolis v. Kinsbury, 101 Ind. 200, 220; Robinson v. Thrailkill, 110 Ind. 117; Indiana, etc., R. Co. v. Allen, 113 Ind. 581, 585; Elliott Roads and Streets, p. 108.

Marriage—Effect of pending partition.—Where proceedings in partition are pending, and one of the parties marries, the validity of the dedication made by the commissioners will not be affected by such marriage. City of Indianapolis v. Kingsbury, 101 Ind. 200, 217.

When presumed against married women.—A dedication may, in some cases, be presumed against a married woman, although there be no formal deed executed by herself and husband. City of Indianapolis v. Kingsbury, 101 Ind. 200, 219.

By guardian of an infant.—A guardian of an infant has authority, when so ordered by a court of competent jurisdiction, to subdivide the lands of his ward, and to dedicate streets and highways to the public. City of Indianapolis v. Kingsbury, 101 Ind. 200, 208.

As to whether infants may be estopped by matters *in pais* to deny dedication, see Elliott Roads and Streets, p. 104 and cases.

By commissioners in partition.—It is competent for commissioners in partition proceedings, acting under the order of a court of competent jurisdiction, to make a subdivision of the land into lots, and to dedicate streets and alleys to the public on the plats made by them. City of Indianapolis v. Kingsbury, 101 Ind. 200, 207; Miller v. City of Indianapolis, 123 Ind. 196.

Continuing way on second plat.—Where a land-owner, having made and recorded a plat with lines marking a way, afterward makes and records a second plat on which the way is continued of the same width as on first plat, and is marked "Highland street," and lots are sold with reference to such plats, it will be conclusively presumed that the way throughout its entire length is a public one. City of Indianapolis v. Kingsbury, 101 Ind. 200, 211.

Dedication by town plat—Fee-simple.—By the making and recording of a town plat, under the statutes of this state on that subject, the designation of streets, lanes, and alleys on the plat gives to the public only an easement therein for such use as the public have a right to make of them; but the fee-simple remains in the proprietor. Cox v. Louisville, etc., R. Co., 48 Ind. 179. Board, etc., v. Indianapolis, etc., Co., 134 Ind. 209, 213; Lostutter v. City of Aurora, 126 Ind. 436; Haslett v. New Albany, etc., R. Co., 7 App. 603; Terre Haute, etc., R. Co. v. Rodel, 89 Ind. 128.

Effect of conveyance of lands or lots abutting on streets.—A conveyance of land on a highway carries with it the fee to the center of the road, as part or parcel of the ground, unless such inference be excluded; and this rule is applicable when the land

conveyed is a lot or part of a lot in a town or city and designated on the plat by its number, or ascertained by its appropriate description, and abutting on a street, lane or alley. Cox v. Louisville, etc., R. Co., 48 Ind. 178; City of Indianapolis v. Kingsbury, 101 Ind. 200, 211; Indianapolis, etc., R. Co. v. McCaffery, 72 Ind. 294.

Change of private to public way.—A private way, no matter how long or how much used by the public, can not be transferred into a public way without the consent of the owner, but when the owner does consent, and the public accepts, the change may be made. City of Indianapolis v. Kingsbury, 101 Ind. 200, 217.

Use as street—Injunction.—In a suit to enjoin a city from using a strip of ground as a street, the complaint must not only show that there has been no grant or condemnation of the land for a street, but, also, that there has been no implied dedication. Faust v. City of Huntington, 91 Ind. 493.

Eminent Domain—Streets.

Appropriation of land for streets.—The legislature may authorize the taking of private property for use as streets and other public highways. McCormick v. President, etc., 1 Ind. 48; Snyder v. President, etc., 6 Ind. 237; Rassier v. Grimmer, 130 Ind. 219; Ray v. City of Jeffersonville, 90 Ind. 567; Palmer v. Stumph, 29 Ind. 329; Elliott Roads and Streets, pp. 141, 146.

Where a city desires to appropriate land for the purposes of a street, it must first comply with the provisions of the law, as to the assessment and tendering of damages to the owner. City of Lafayette v. Bush, 19 Ind. 326; McKernan v. City of Indianapolis, 38 Ind. 223; City of New Albany v. Endres, 143 Ind. 192; Dantzer v. Indianapolis Union R. Co., 141 Ind. 604; City of New Albany v. White, 100 Ind. 206.

Land can not be appropriated for the purposes of a street unless compensation is first assessed and paid or tendered. Faust v. City of Huntington, 91 Ind. 493; Holder v. City of Crawfordsville, 143 Ind. 558; City of Terre Haute v. Blake, 9 App. 403; City of New Albany v. Endres, 143 Ind. 192; Elliott Roads and Streets, pp. 178, 179.

Eminent domain—Appropriating land taken for one public use to another.—Lands once taken for public use can not, under general laws, without an express act of the legislature for that purpose, be appropriated by proceedings *in invitum* to a different public use. A legislative intent to subject lands devoted to a public use, already in exercise, to one which may thereafter arise, will not be implied from a grant of power, made in general terms, without special reference to an existing necessity for the subsequent use, when it appears that both uses can not stand together, and the latter, if exercised, will greatly endanger the exercise of the former. City of Terre Haute v. Evansville, etc., R. Co., 149 Ind. 174; Baltimore, etc., R. Co. v. North, 103 Ind. 486; City of Ft. Wayne v. Lake Shore, etc., R. Co., 132 Ind. 558; City of Seymour v. Jeffersonville, etc., R. Co., 126 Ind. 466; Lake Shore, etc., R. Co. v. Cincinnati, etc., R. Co., 116 Ind. 578; Baltimore, etc., R. Co. v. North, 103 Ind. 486; McDonald v. Payne, 114 Ind. 359; Steele v. Empson, 142 Ind. 397; Cincinnati, etc., R. Co. v. City of Anderson, 139 Ind. 490; Elliott Roads and Streets, p. 167; 3 Elliott Railroads, § 1104; 1 Beach Pub. Corp., § 660; Gold v. Pittsburg, etc., R. Co., Ind. Sup. Ct., March 28, 1899.

Same—Right of way and other property of railroad companies—Condemnation of by city for street—Statute.—Under the law as it existed prior to the amendment of this section in 1891, no city had power to condemn real estate belonging to a railroad company, in actual use for right of way and for depot purposes, and to appropriate the same to the use of the public as a street, as the statute authorizing cities to condemn and take lands for public use as a street did not, either in terms, or by necessary implication, authorize the taking of property already dedicated to a public use, and land held by a railroad corporation for right of way and for the purposes of depots is so dedicated. City of Terre Haute v. Evansville, etc., R. Co., 149 Ind. 174;

Cincinnati, etc., R. Co. v. City of Anderson, 139 Ind. 490; Steel v. Empson, 142 Ind. 397; City of Valparaiso v. Chicago, etc., R. Co., 123 Ind. 467.

Same—Railroad yards, engine-house, coal-box, etc.—The use of the ground by a railroad company for the purposes above mentioned is a public use, and where the use of the ground for railroad purposes and for street purposes may coexist without impairment of the first use, it may be appropriated to the use of both; but where such uses can not coexist, or where the first use is materially impaired or destroyed, the second public use will be denied. Cincinnati, etc., R. Co. v. City of Anderson, 139 Ind. 490; Lake Erie, etc., R. Co. v. Town of Boswell, 137 Ind. 336; City of Ft. Wayne v. Lake Shore, etc., R. Co., 132 Ind. 558; City of Seymour v. Jeffersonville, etc., R. Co., 126 Ind. 466; City of Valparaiso v. City of Chicago, etc., R. Co., 123 Ind. 467; Steel v. Empson, 142 Ind. 397.

Same—Crossing railroad right of way transversely—Implied power.—Under the general law permitting cities to establish streets, there is implied power to extend streets transversely across the right of way of a railroad when, in doing so, the uses for which such right of way is employed are not materially injured or destroyed. Steel v. Empson, 142 Ind. 397; Cincinnati, etc., R. Co. v. City of Anderson, 139 Ind. 490; Lake Erie, etc., R. Co. v. City of Kokomo, 130 Ind. 224; 3 Elliott Railroads, §§ 1099, 1104, and notes; 1 Beach Pub. Corp., § 661.

Railroad—Right of way—Crossing—Taking longitudinally for highway.—Railroad companies acquire the right to construct their tracks subject to the dominant right of the state to cross such tracks when the public necessity demands that new roads and streets shall be opened, but the right to take longitudinally is quite a different thing from the right to cross, and is governed by different rules. A municipal corporation, in the absence of legislation expressly or by necessary implication authorizing it, can not take a part of the right of way of a railroad company by constructing a public highway longitudinally to the right of way. City of Ft. Wayne v. Lake Shore R. Co., 132 Ind. 558.

Same—Right of highway to cross—Limitation of.—The rule that allows the construction of streets and other public highways across railroad tracks has its limitations. They can not be so constructed when by so doing the railroad company would be unable to use its track at the point of crossing for the purposes for which it was constructed. City of Ft. Wayne v. Lake Shore R. Co., 132 Ind. 558.

Railroad right of way—Injunction.—Where the municipal authorities have instituted proceedings to appropriate a strip of ground for a street occupied by a railroad track, which strip is part of a continuous railroad, an injunction proceeding will lie to prevent the appropriation. City of Seymour v. Jeffersonville, etc., R. Co., 126 Ind. 466.

Same.—When the city officers have jurisdiction to open or extend a street, injunction will not lie; but when the city has no authority to open or extend a street an injunction is an appropriate remedy. City of Terre Haute v. Evansville, etc., R. Co., 149 Ind. 174; City of Seymour v. Jeffersonville, etc., R. Co., 126 Ind. 466; Tucker v. Sellers, 130 Ind. 514; Bass v. City of Ft. Wayne, 121 Ind. 389; Smith v. Goodknight, 121 Ind. 315.

Same—Act of 1891 authorizes the taking for second use.—Under this section, as amended by the act of 1891, cities have the power to extend streets and alleys across property devoted to public use by railroads, and are authorized by said amended section to appropriate same to a second public use, although the same will be inconsistent with the first. City of Terre Haute v. Evansville, etc., R. Co., 149 Ind. 174; Powell v. City of Greensburg, 150 Ind. 148.

Same—Constitutional—Does not violate contract.—The special charter of a railroad company is a contract with the state, but is subject to the right of eminent domain which remains in the state. The exercise of this power by the state, or by a municipal corporation under authority of the state, in the taking of the railroad right of way or

property in the opening or extending of a street, is not an interference with the inviolability of the contract. City of Terre Haute v. Evansville, etc., R. Co., 149 Ind. 174.

Diverting street to another use.—A street can not be diverted from the use to which it was dedicated, and an additional burden can not be laid upon the property abutting on the street without lawful authority, and compensation paid or tendered. Lostutter v. City of Aurora, 126 Ind. 436; Elliott Roads and Streets, pp. 159–161.

Use of streets—Easement—Expansive.—The easement in a street is not limited to the particular methods of use in vogue when the easement was acquired, but includes all new and improved methods, the utility and general convenience of which may afterwards be discovered and developed in aid of the general purpose for which highways are designed. It is not material that these new and improved methods of use were not contemplated by the owners of the land when the easement was acquired, and are more onerous to him than those then in use. Magee v. Overshiner, 150 Ind. 127; Elliott Roads and Streets, p. 529.

Power Over Streets, Alleys and Bridges—Duties—Liabilities—Obstructions—Negligence—Actions—Damages.

Streets—Definition—A generic word.—A public street is a public highway, and a sidewalk is a part of the street, and public highways belong, from side to side and from end to end, to the public. The word "street" is a generic one, embracing sidewalks, and under an authority to improve streets a municipal corporation may improve sidewalks. State v. Berdetta, 73 Ind. 185, 188; Bybee v. State, 94 Ind. 443, 446; City of Kokomo v. Mahan, 100 Ind. 242, 243; Taber v. Grafmiller, 109 Ind. 206, 209; Dooley v. Town of Sullivan, 112 Ind. 451, 453; Wiles v. Hoss, 114 Ind. 371, 378; Town of Rosedale v. Ferguson, 3 App. 596, 598; City of Indianapolis v. Higgins, 141 Ind. 1; Common Council, etc., v. Croas, 7 Ind. 9; Sims v. City of Frankfort, 79 Ind. 446; State v. Moriarity, 74 Ind. 103, 104; White v. Chicago, etc., R. Co., 122 Ind. 317, 326; State v. Mathis, 21 Ind. 277; West v. Blake, 4 Blackf. 234; Conner v. President, etc., 1 Blackf. 43; Elliott Roads and Streets, p. 17.

Every street is a highway, but every highway is not a street. Common Council, etc., v. Croas, 7 Ind. 9; City of Indianapolis v. Higgins, 141 Ind. 1.

Sidewalks.—A sidewalk is a part of a street, and a city's authority over a street extends over the sidewalk, as a part of the street. City of Frankfort v. Coleman, 19 App. 368; Taber v. Grafmiller, 109 Ind. 206; City of Kokomo v. Mahan, 100 Ind. 242; State v. Berdetta, 73 Ind. 185.

Power over streets, alleys, sidewalks and bridges.—The common councils of cities have exclusive power over streets, sidewalks, alleys and bridges, and to regulate the use thereof. Kistner v. City of Indianapolis, 100 Ind. 210; Terre Haute, etc., R. Co. v. Bissell, 108 Ind. 113; Lowrey v. City of Delphi, 55 Ind. 250; City of Wabash v. Carver, 129 Ind. 552; Spicer v. Board, etc., 126 Ind. 369; Wood v. Mears, 12 Ind. 515; City of Indianapolis v. Consumers', etc., Co., 140 Ind. 107; Grove v. City of Ft. Wayne, 45 Ind. 429; Indianapolis, etc., R. Co. v. State, 37 Ind. 489.

Limit of power to regulate streets.—The exclusive power of a city to regulate and control the use of its streets is not restricted to that of transit alone, but also extends to the laying of gas and water pipes, and to the promotion of the public health and convenience. City of Indianapolis v. Consumers', etc., Co., 140 Ind. 107; Cummins v. City of Seymour, 79 Ind. 491; Elliott Roads and Streets, pp. 305, 360.

Same—Contract rights.—The power of a city to regulate and control the use of its streets does not give such city the additional right to prohibit, annul, or destroy rights arising out of a valid contract. City of Indianapolis v. Consumers', etc., Co., 140 Ind. 107.

The grant of a right by a city to a gas company to lay and repair mains in the street

can not be subsequently taken away from such company on the ground that new and other methods of improving streets had been introduced and adopted by the city after such grant had been made, and especially is this true where the original grant bound such company to speedily repair such portions of the street as it opened for the purpose of laying and repairing such mains. Nor can such city, by a subsequent ordinance, require such company to first obtain permission of it to lay a main in or upon a street or to repair its mains, when it had that right, without first obtaining such permission, under its original grant or franchise. City of Indianapolis v. Consumers', etc., Co., 140 Ind. 107.

Cleaning street—Garbage.—A city has exclusive power over streets within the corporate limits, and the cleaning of its streets when duly exercised can not be controlled by the courts. In such work if unavoidable injury results, no liability ensues, because the doing of what the law authorizes can not be a nuisance so as to give a right of action. But collecting garbage and filth from the streets and depositing the same in a mass upon some other street may create a nuisance, and if it does the city must be responsible in damages. City of New Albany v. Slider, App. Ct., Jan. 10, 1899.

The legislature in granting to cities and towns exclusive authority over the streets did not abridge its power to define and punish misdemeanors, nor did the legislature thereby repeal or modify the statutes then in force, making acts relating to streets in towns or cities crimes. The wrongful obstruction of a public street or sidewalk in a city or town is a misdemeanor under the criminal laws of the state, and a city or town can not enact an ordinance prescribing a penalty for any one who obstructs such street. City of Indianapolis v. Higgins, 141 Ind. 1.

Streets held in trust.—The streets of a city are held in trust by the municipal corporation for public purposes, and the city can not authorize a permanent obstruction thereof for private uses. Pettis v. Johnson, 56 Ind. 139; State v. Berdetta, 73 Ind. 185; Adams v. Ohio, etc., Co., 131 Ind. 375; Sims v. City of Frankfort, 79 Ind. 446; 3 Elliott Railroads, § 1089.

Presumption—Damages.—The presumption is that a street was legally laid out and opened, and that property owners damaged thereby claimed and received compensation. Sims v. City of Frankfort, 79 Ind. 446.

Statute construed—Gravel roads and turnpikes—Taxation for.—The above section, as amended, March 6, 1891, as to the provision that "property within the city shall not be taxed for the purpose of making, opening, improving or repairing any road or bridge without the limits of said city," has reference only to the exemption of city property from the ordinary road tax. Property within the limits of a city is subject to taxation for the building and repair of gravel roads and turnpikes. Byram v. Board, etc., 145 Ind. 240; Read v. Yeager, 104 Ind. 195.

Corporations occupying streets under municipal franchises—Duties to public—Mandamus—Injunction.—Telegraph, telephone, water, gas and other like companies that have received from public authorities franchises for occupying the streets, which also provide for the accommodation of the general public, owe a duty to serve all persons, who make proper application for such service and who comply with such reasonable rules as may be fixed, and pay such reasonable compensation as may be required. If such companies neglect and refuse to perform such duty, they may be compelled to do so by writ of mandamus; and when the maximum rate to be charged consumers is prescribed by the ordinance granting the franchise to use the streets, the companies may be enjoined from charging consumers more than the maximum rate. Coy v. Indianapolis, etc., Co., 146 Ind. 655; Portland, etc., Co. v. Keen, 135 Ind. 54; Central, etc., Co. v. Fehring, 146 Ind. 189; City of Rushville v. Rushville, etc., Co., 132 Ind. 575; Westfield, etc., Co. v. Mendenhall, 142 Ind. 538.

Actions upon contract or in tort.—Actions may be maintained upon contract or in tort against corporations occupying the street, and under duty to serve the public, for

breaches of such duty. In tort a wider range of inquiry as to damages is permissible than in an ordinary action for simple breach of contract. Coy v. Indianapolis, etc., Co., 146 Ind. 655; Lake Erie, etc., R. Co. v. Acres, 108 Ind. 548; Cincinnati, etc., R. Co. v. Eaton, 94 Ind. 474.

Where a gas company violates an order of a court of equity, enjoining it from charging the consumers more than a specified sum for gas, it is no defense for a prosecution for contempt that the officers of the company acted in good faith, and without any intention to violate an order of court. Thistlethwaite v. State, 149 Ind. 319.

Exclusive privileges.—A municipal corporation can not grant to a private corporation the exclusive privilege of using its streets for the purpose of supplying the corporation, or its citizens, with light, water, fuel or the like. Indianapolis, etc., R. Co. v. Citizens' R. Co., 127 Ind. 369, 388; Crowder v. Town of Sullivan, 128 Ind. 486, 489; City of Rushville v. Rushville, etc., Co., 132 Ind. 575, 578; Citizens', etc., Co. v. Town of Elwood, 114 Ind. 332; City of Vincennes v. Citizens', etc., Co., 132 Ind. 114; Elliott Roads and Streets, pp. 566, 569; 1 Beach Pub. Corp., § 596.

An ordinance which specifically and by name grants to a company (in this instance a natural gas company) the right to use its streets, etc., for the purpose of laying its pipes, etc., simply grants a license or permission to the particular company to use the streets for the purpose designated, and does not grant a special and exclusive franchise to the company to occupy and use the streets of the city for said purpose. City of Rushville v. Rushville, etc., Co., 132 Ind. 575, 578.

Streets—Exclusive grant to use.—Neither a void grant of an exclusive privilege to use the town streets to one company, nor a refusal to grant a special privilege to another company, authorizes the latter company to use the streets. Citizens', etc., Co. v. Town of Elwood, 114 Ind. 332, 333.

Use of streets, how regulated.—A special ordinance granting a permissive license to a designated corporation is effective. When a municipality attempts to regulate the mode of using its streets it must do so by a general ordinance; but when it simply grants a privilege to use the streets, and does not undertake to regulate the entire subject, a general ordinance is not indispensably necessary to authorize the licensee to use the streets. The rights acquired under a mere permissive license are subject to control under the delegated governmental power vested in the municipality. Crowder v. Town of Sullivan, 128 Ind. 486, 489.

Natural gas—Exclusive privileges.—A municipal corporation has no power to grant a natural gas company the exclusive privilege of using its streets, and a company obtaining such a grant is bound to take notice that it is void. Citizens', etc., Co. v. Town of Elwood, 114 Ind. 332, 333; Crowder v. Town of Sullivan, 128 Ind. 486, 489; City of Rushville v. Rushville, etc., Co., 132 Ind. 575, 578.

A town can not enjoin a natural gas company from using its streets upon the ground that it has conferred the exclusive right to their use upon another gas company, but it may do so on the ground that the defendant has not obtained a license so to do. Citizens', etc., Co. v. Town of Elwood, 114 Ind. 332, 334.

The act of 1887 relating to natural gas (R. S. 1894, § 4306), requires that a general ordinance shall be adopted by municipal corporations, giving, upon equal terms, substantially the same privileges to all companies. Citizens', etc., Co. v. Town of Elwood, 114 Ind. 332, 336.

Exclusive possession of street.—A city can not give an exclusive right to a street railway company to occupy all its streets, to the exclusion of all other companies and so prevent it afterward giving similar grants to other companies. But if it make such a grant and then make a similar grant to another company, that company which first occupies a street, or which first enters upon the construction of a particular line of street railroads, and has expended its money in the prosecution of the work, is entitled to the possession of such street, or to the streets over which such particular line passes,

although the effect is that such company thus acquires the exclusive possession of such street or streets for the purpose of a street railroad. Indianapolis, etc., R. Co. v. Citizens', etc., R. Co., 127 Ind. 369, 394.

Sale of street—Ultra vires.—The common council of a city have no authority to make contracts for the sale or letting of any public street, or any portion thereof. They may grant an easement in a street in a proper case. They can not grant to a railroad company the right to appropriate to its sole use a street. Such act would be *ultra vires*. Indianapolis, etc., R. Co. v. State, 37 Ind. 489; Tate v. Ohio, etc., R. Co., 7 Ind. 479.

Use of streets—Gas companies—Negligence.—Gas companies maintaining mains and pipes in the streets for the conduct and delivery of gas to patrons owe a duty to the citizens and property owners to use reasonable and ordinary care in so planting their pipes and mains, and the keeping of them in repair, as to prevent the escape of gas therefrom in such quantities as to become dangerous to life and property, and for failure to perform this duty they are liable to persons injured thereby, in the absence of concurring negligence. Richmond Gas Co. v. Baker, 146 Ind. 600; Mississinewa Mining Co. v. Patton, 129 Ind. 472; Lebanon, etc., Co. v. Leap, 139 Ind. 443; McGahan v. Indianapolis, etc., Co., 140 Ind. 335; Consumers', etc., Co. v. Perrego, 144 Ind. 350.

Electric light companies occupying streets—Duties and liabilities of company and city.—Where a corporation has been authorized by the city to erect and maintain poles, wires, lamps and cables in the streets for electric lights, it is the duty of such corporation to keep watch over these appliances, and the city is liable only in cases wherein, after actual or constructive notice of the existence of danger growing out of or caused by some defect in the poles, wires or other appliances, it fails to use diligence in obviating the danger thus created; the corporation occupying the streets for such purpose is not an insurer of the safety of the public against all dangers arising from the lawful placing in the streets of such appliances, but it is bound to know the dangers which may naturally be caused by such use of the streets, and to guard against the same by the exercise of all the foresight and caution which can be reasonably expected of prudent men under such circumstances. City of Denver v. Sherrett, 88 Fed. Rep. 226.

Notice of defect.—If an employe of an electric light company occupying the streets, whose duty it is to report defects to the company, while in the line of his employment discover defects, such discovery is notice to the company. City of Denver v. Sherret, 88 Fed. Rep. 226.

Prescription—Permissive possession.—Mere permissive possession of a part of a street for the statutory period of limitation will not confer title as against the city. There can be no permanent, rightful possession of a public street. Sims v. City of Frankfort, 79 Ind. 446, 451; Strosser v. City of Ft. Wayne, 100 Ind. 443, 450; Adams v. Ohio, etc., Co., 131 Ind. 375, 378; Brooks v. Riding, 46 Ind. 15.

Prescription—Injunction—Pleading.—In an action for an injunction by a lot-owner against a city, where the complaint alleged that the plaintiff's lot had been improved with reference to the recognized line of the street as laid out and used for more than twenty years, and while the municipal officers stood by and saw such improvement made without objection, and that the city was about to sever from the side of the lot a strip of ground claimed as a part of the street, without an assessment and tender of damages, an answer that an ordinance to improve that street was duly passed, notice given, proposals received and a contract made for grading and graveling the street, and that upon a survey by the proper officer, the strip of ground appeared to be a part of the street properly dedicated to the public use and platted in the original plat, was sufficient on demurrer. Sims v. City of Frankfort, 79 Ind. 446, 448.

Private occupation of street.—The statute of limitations operating alone can not deprive a city of the right to its streets as trustee for the public; nor is the occupancy by a private party of a portion of a street by temporary and inexpensive structures for whatever time, inconsistent with the right of the public. Cheek v. City of Aurora, 92 Ind. 107, 114.

Laches by officers.—Laches by a city or its officers can not deprive the public of its right to a street. Cheek v. City of Aurora, 92 Ind. 107, 114.

Street abandoned—License.—A municipal corporation can not surrender the public streets to a mere licensee, nor can it, by failing to improve a part of a street, abandon the right to that part not improved. Sims v. City of Frankfort, 79 Ind. 446, 454; Town of Freedom v. Norris, 128 Ind. 377, 382; City of Tell City v. Bielefeld, 20 App. 1.

Preventing obstructions.—A city has power to prevent improper obstructions of streets and sidewalks. City of Terre Haute v. Turner, 36 Ind. 522.

Removal of obstructions.—Though a city has the power by its own act to remove obstructions from its streets, it may nevertheless by suit prevent them or obtain their removal. Cheek v. City of Aurora, 92 Ind. 107, 112.

A city may remove obstructions from the streets. If done in a proper and careful manner the city will not be liable for damages. Scales in a street, placed there by permission of the city, may be removed by it. City of Tell City v. Bielefeld, 20 App. 1; 2 Beach Pub. Corp., §§ 1234 n., 1235.

House-moving—Control of.—The moving of a house along a public street of a city is an extraordinary use thereof for an unusual purpose, which may be controlled or denied; and the owner of such a house can not insist on so moving it if such moving will result in the destruction of the property of others. Williams v. Citizens' R. Co., 130 Ind. 71, 75.

The courts have the power to restrain the moving of a house across a street electric railroad when such moving will result in the stopping of the cars an unnecessary length of time, and the cutting or destruction of the wires, even though the common council of the city have failed or refused to take any steps to prevent such injury or destruction. Williams v. Citizens' R. Co., 130 Ind. 71, 76.

Construction of canal in public street—Abandonment of canal—Revival of original easement.—Where the state entered upon and constructed the Wabash and Erie Canal in and through a public street in the town, now city, of Logansport, the easement of the public and abutting lot owners in such street was not thereby destroyed, but remained in abeyance during the occupancy and use of the street for the purposes of such canal; and upon the subsequent abandonment of the canal, when the street was no longer occupied or used by or for such canal, the original easement of the public and the private rights of abutting lot owners at once revived and became effective in, on and over such street. City of Logansport v. Shirk, 88 Ind. 563.

Duties—Liabilities—Streets, sidewalks, crossings.—It is the duty of an incorporated city to keep all its streets, sidewalks and crossings in a reasonably safe condition for ordinary travel, and free from unnecessary and dangerous obstructions, so as not to endanger the persons of those lawfully using the same, and it is liable for negligently suffering them to become and remain unsafe to any one injured thereby without fault upon his part. City of Lafayette v. Larson, 73 Ind. 367, 369; City of Delphi v. Lowery, 74 Ind. 520, 523; City of Crawfordsville v. Smith, 79 Ind. 308, 310; Murphy v. City of Indianapolis, 83 Ind. 76, 77; Turner v. City of Indianapolis, 96 Ind. 51, 55; City of Aurora v. Bitner, 100 Ind. 396, 399; Glantz v. City of South Bend, 106 Ind. 305, 309; City of Ft. Wayne v. Patterson, 3 App. 34, 37; Park v. Board, etc., 3 App. 536, 539; Trout v. City of Elkhart, 12 App. 343; Gaston v. Bailey, 14 App. 581; Buscher v. City of Lafayette, 8 App. 590; Town of Salem v. Walker, 16 App. 687; City of Huntington v. Breen, 77 Ind. 29; City of Washington v. Small, 86 Ind. 463; City of Goshen v. England, 119 Ind. 368; City of Michigan City v. Boeckling, 122 Ind. 39; City of Logansport v. Dick, 70 Ind. 65; City of Columbus v. Strassner, 124 Ind. 482; Higert v. City of Greencastle, 43 Ind. 574; Lowery v. City of Delphi, 55 Ind. 250; City of Aurora v. Colshire, 55 Ind. 484.

Streets and turnpikes—When reasonably safe for travel—How determined.—Whether a street or turnpike is reasonably safe for travel is a question to be determined

by the surrounding circumstances, the nature and surface of the soil over which the road is made, the natural obstructions and obstacles to be overcome, its situation and locality, and the kind and amount of public travel which pass over it. Sale v. Aurora, etc., 147 Ind. 327; 2 Dillon Munic. Corp., §§ 1006, 1008, 1016, 1019.

Not an insurer of its streets.—A municipal corporation is not an insurer of the safety of its streets, but is bound to exercise reasonable care and diligence to keep them in a reasonably safe condition for use, which includes the duty to keep them free from dangerous obstructions; and liability attaches for negligence in regard thereto, after notice is imputed to it, whether such notice be actual or constructive. City of Richmond v. Mulholland, 116 Ind. 173, 174; Town of Monticello v. Kennard, 7 App. 135, 139; Gaston v. Bailey, 14 App. 581; City of Evansville v. Wilter, 86 Ind. 414.

Not an insurer against accident.—A city is not an insurer against accidents, and is not required to keep its streets and sidewalks free from irregularities and trifling defects. McQueen v. City of Elkhart, 14 App. 671; City of Indianapolis v. Cook, 99 Ind. 10.

A municipal corporation is not an insurer of the safety of its streets, and to charge it with liability for injuries resulting from defects in its streets it must be affirmatively shown that the municipality was guilty of negligence. City of Franklin v. Harter, 127 Ind. 446, 447; Gaston v. Bailey, 14 App. 581.

City and owner of fee—Liability.—Neither the city nor the owner of the fee in a street guarantees the absolute safety of the sidewalk; and negligence is essential to the liability of the owner for an injury received upon such walk. Gaston v. Bailey, 14 App. 581.

Liability for injury to child—Negligence of parents.—The liability of a city is the same where a child, rightfully in a street, sustains an injury from a defect created therein by the city, as where an adult, who is free from fault, is injured from like cause. Negligence can not be imputed to parents who permit a child of tender years to go to a place where it has a right to be, and at which there is no reason to suspect danger, and which is safe, unless another is guilty of a breach of duty. City of Indianapolis v. Emmelman, 108 Ind. 530; Penso v. McCormick, 125 Ind. 116, 121.

Excavations—Embankments, etc.—Guards.—Cities should properly guard, by railings or otherwise, excavations, embankments or other dangerous places, in or near streets, so as to prevent persons from falling into or over the same. City of Aurora v. Colshire, 55 Ind. 484; Town of Elkhart v. Ritter, 66 Ind. 136; City of Indianapolis v. Scott, 72 Ind. 196; City of Delphi v. Lowery, 74 Ind. 520; Dooley v. Town of Sullivan, 112 Ind. 451; City of Logansport v. Dick, 70 Ind. 65; Park v. Board, etc., 3 App. 536; Noblesville, etc., Co. v. Teter, 1 App. 322; City of Indianapolis v. Doherty, 71 Ind. 5; City of Indianapolis v. Emmelman, 108 Ind. 530; Senhenn v. City of Evansville, 140 Ind. 675; City of Ft. Wayne v. DeWitt, 47 Ind. 391; Stevens v. City of Logansport, 76 Ind. 498; Elliott Roads and Streets, p. 453.

Danger signals—Keeping watch.—Only ordinary care is required of a municipal corporation, its agents and contractors, and it is sufficient to show that proper signals or guards were placed about an excavation on quitting work, unless there are circumstances peculiar to the particular case making it necessary that a watch be kept; and if such signals or guards are removed during the night by a wrong-doer, there is no liability. Dooley v. Town of Sullivan, 112 Ind. 451.

Natural causes producing excavation.—The facts that during the making of a lawful excavation by a third person, the sidewalk had given away because of a thaw, on the day of the accident, are admissible under the general denial. Town of Elkhart v. Ritter, 66 Ind. 136.

When not liable.—The rule requiring cities to keep their streets in a reasonably safe condition for public travel does not extend to one who is not a traveler. One who sustains injuries by falling from private premises over a bank made by grading a street

can not recover damages from the city. Dorsett v. City of Greencastle, 141 Ind. 38; Mulvane v. City of S. Topeka, 45 Kan. 45; Goodin v. City of Des Moines, 55 Ia. 67; Young v. District of Columbia, 3 McArthur 137.

City—Active vigilance—Traveler—Ordinary care.—A city is bound to use active vigilance to discover and repair defects in its streets and sidewalks, while the traveler must use ordinary care to avoid injury. City of Washington v. Small, 86 Ind. 462; Town of Gosport v. Evans, 112 Ind. 133; City of Evansville v. Wilter, 86 Ind. 414; City of Logansport v. Justice, 74 Ind. 378.

A complaint against a city to recover for an injury in consequence of a defective sidewalk, averring that the sidewalk had been negligently left out of repair and dangerous for two months, of which the city had notice; that when walked upon it tipped, because its support had been washed away, in consequence of which the plaintiff, in passing, without fault, and being ignorant of danger, slipped and fell, etc., sufficiently shows care by the plaintiff and negligence by the defendant. City of Washington v. Small, 86 Ind. 462.

A municipal corporation is required to exercise vigilance in keeping its streets and sidewalks in a reasonably safe condition for travel by night as well as by day; but that a pavement has become uneven, or that bricks therein may be displaced by the action of the elements, does not necessarily involve such municipality in liability, if the defect can be readily discovered and easily avoided by persons exercising due care, or if the defect be of such a nature as not of itself to be dangerous to persons so using the walk. Town of Gosport v. Evans, 112 Ind. 133.

Diligence in making repairs.—A city is bound to exercise reasonable diligence to repair defects in its streets and bridges, or to prevent accidents therefrom after such defects are known, and when on failure, after notice, to repair such defects in due time, injury occurs therefrom, the city is liable. City of Logansport v. Justice, 74 Ind. 378, 385.

When a street within the limits of a city is in common use by the people, it is the duty of the city to keep it in a reasonably safe condition for ordinary travel, whether it be what is technically called an improved street or not. City of Lafayette v. Larson, 73 Ind. 367, 369.

The duty of a city to persons lawfully using a street therein in a reasonably prudent manner is not fully discharged by making the traveled part of the street safe, but such measures as ordinary prudence requires must be taken to prevent such persons from falling into dangerous places along the sides or in close proximity to the termination of the street. City of Delphi v. Lowery, 74 Ind. 520, 522.

Presumption as to condition of street—Obstruction.—Any person traveling a sidewalk of a city, which is in constant use by the public, has a right, when using the same with due diligence, to presume, and act upon the presumption, that it is reasonably safe for ordinary travel throughout its entire width from all dangers and annoying obstructions of a permanent character. City of Indianapolis v. Gaston, 58 Ind. 224; Town of Elkhart v. Ritter, 66 Ind. 136; Gaston v. Bailey, App. Ct., May 24, 1899; City of Bluffton v. McAfee, App. Ct., May 24, 1899.

Streets improved and unimproved.—A complaint against a city for personal injury resulting from a defective street, which, with the other necessary averments, alleged that the city had negligently permitted the street to become dangerous to use, and that the plaintiff was without fault, was good on demurrer, though it appeared that the street had never been improved or graded, that the defect was caused by the action of surface water, and that the plaintiff had knowledge of it. Murphy v. City of Indianapolis, 83 Ind. 76, 77.

Length of time—Dangerous alley—Notice.—In an action for damages for an injury resulting from dangerous defects in a public alley, one witness testified that the defect had existed for six weeks prior to the injury; other witnesses, in some measure, corroborated this testimony. The verdict of the jury indicated that the jury believed and

acted upon this testimony. From the length of time the defect had existed, and the other facts and circumstances of the case, the jury was warranted in inferring knowledge on the part of the city of the existence of such defect. City of Indianapolis v. Murphy, 91 Ind. 382, 383.

Notice of defect.—Actual notice on the part of a city of a defective street or sidewalk, is not necessary, if the defect has existed for such a time that with reasonable diligence the defect might have been known. City of Frankfort v. Coleman, 19 App. 368; Buscher v. City of Lafayette, 8 App. 590; City of Evansville v. Wilter, 86 Ind. 414; City of Logansport v. Justice, 74 Ind. 378.

Length of time.—Where an obstruction, of which the city has no notice, has been placed on a street by a third person, and is permitted to remain an hour and three-quarters, when it occasions an injury to a passer-by, the city is not guilty of negligence, and is not liable. City of Warsaw v. Dunlap, 112 Ind. 576, 582.

Where a dangerous obstruction has existed for months, notice of it will be presumed. City of Evansville v. Wilter, 86 Ind. 414.

Notice to councilman sufficient.—In this state, notice to a councilman of a city of the dangerous condition of a street or bridge within the city is notice to the city. City of Lafayette v. Larson, 73 Ind. 367, 370; City of Logansport v. Justice, 74 Ind. 378, 384; City of Columbus v. Strassner, 124 Ind. 482, 489; Jewell v. Town of Sullivan, 5 App. 188, 192.

Notice to street commissioner.—Notice to street commissioner of a defective street is notice to city. City of Lafayette v. Larsen, 73 Ind. 367; Turner v. City of Indianapolis, 96 Ind. 55; City of Huntingburg v. First, App. Ct., March 10, 1899.

Mayor.—Notice to city may be inferred from the fact that the accident occurred immediately in front of the residence of the mayor of the city, and over which he passed day after day. City of Michigan City v. Ballance, 123 Ind. 334.

Notice of defect in streets actual or constructive—When necessary.—"Where the duty to keep its streets in safe condition rests upon the corporation, it is liable for injuries caused by its neglect or omission to keep the streets in repair, as well as for those caused by defects occasioned by the wrongful acts of others, but, as the basis of the action is negligence, notice to the corporation of the defect which caused the injury, or of facts from which notice thereof may reasonably be inferred, or proof of circumstances from which it appears that the defect ought to have been known and remedied by it, is essential to liability." 2 Dillon Munic. Corp., § 1024; City of Madison v. Baker, 103 Ind. 41; City of Indianapolis v. Murphy, 91 Ind. 382; City of Logansport v. Justice, 74 Ind. 378; City of Aurora v. Bitner, 100 Ind. 396; City of Michigan City v. Ballance, 123 Ind. 334; City of Lafayette v. Larson, 73 Ind. 367; City of Indianapolis v. Scott, 72 Ind. 197; City of Ft. Wayne v. Patterson, 3 App. 34; Turner v. City of Indianapolis, 96 Ind. 51, 58; Dooley v. Town of Sullivan, 112 Ind. 451; City of Ft. Wayne v. De Witt, 47 Ind. 391; City of Evansville v. Wilter, 86 Ind. 414; City of Washington v. Small, 86 Ind. 462; Town of Spiceland v. Alier, 98 Ind. 467; City of Huntington v. Burke, 12 App. 133; City of Evansville v. Senhenn, 151 Ind. 42.

Defects—Notice when presumed.—Notice to a city of the defective condition of a street, sidewalk or alley may be inferred from evidence that the defect was open and notorious and had existed for so long a time as to raise the inference that the proper officers of the city, by the exercise of due diligence, might have known of its existence. City of Lafayette v. Larson, 73 Ind. 367, 370; City of Evansville v. Wilter, 86 Ind. 414, 420; City of Washington v. Small, 86 Ind. 462, 471; City of Indianapolis v. Murphy, 91 Ind. 382, 383; City of Ft. Wayne v. Patterson, 3 App. 34, 37; City of Logansport v. Justice, 74 Ind. 378; City of Indianapolis v. Scott, 72 Ind. 196; City of Aurora v. Bitner, 100 Ind. 396; City of Michigan City v. Ballance, 123 Ind. 334; City of Madison v. Baker, 103 Ind. 41; Town of Elkhart v. Ritter, 66 Ind. 136; City of Mt. Vernon v. Hohen, Ind. App. Ct., April 28, 1899.

In an action against a city for negligently permitting a street to be out of repair, whereby the plaintiff was injured, the complaint, when questioned for the first time in the supreme court, will be held good as to the matter of notice, when its averments plainly imply that the city had notice of the bad condition of the street when the plaintiff was injured; and after verdict it will be inferred that the notice was in time to have enabled the city to repair the street. City of Madison v. Baker, 103 Ind. 41, 43.

Notice—Arrest of judgment.—A complaint in an action for a personal injury, which describes the street, the obstruction and the injury, and states facts which show that the city, if diligent in the discharge of its duty, would have had notice of the obstruction, is good on motion in arrest of judgment. City of Evansville v. Wilter, 86 Ind. 414, 421.

Obstruction—Notice—Complaint.—In a complaint against a city for an injury caused by an obstruction in a street, it is not enough to allege that the city negligently suffered an obstruction to be and remain in the street, but it must also appear that it had notice of the obstruction, or that it ought to have had such notice. Turner v. City of Indianapolis, 96 Ind. 51, 57; Town of Spiceland v. Alier, 98 Ind. 467; City of Madison v. Baker, 103 Ind. 41; City of Ft. Wayne v. De Witt, 47 Ind. 391.

Notice, presumption, fact.—Notice to the corporation of the unsafe condition of a street may be inferred from the length of time it has existed, as well as from other facts and circumstances. What is such a length of time must, in a great measure, depend on the circumstances of the particular case, and must, in most cases, be a question of fact to be submitted to the jury. City of Aurora v. Bitner, 100 Ind. 396, 401; City of Ft. Wayne v. Patterson, 3 App. 34, 38.

Knowledge, pleading, time.—In an action against a city for injuries received from a defect in the street, the complaint averred that the excavation was in existence on the 10th day of November, 1890, and that the injury was sustained on the 14th day of the same month. Such allegations are sufficient to impute knowledge to the city. City of Ft. Wayne v. Duryee, 9 App. 620, 621.

Where a city builds and maintains streets and sidewalks, which are reasonably safe for use by persons exercising ordinary care, it has fulfilled its duty in that respect. And pedestrians may presume that the city has done its duty in constructing and maintaining the same. Actual notice on the part of the corporation of the defective condition of a street or sidewalk is not necessary where such unsafe condition has existed for such time that, with reasonable diligence, it might have been known. Buscher v. City of Lafayette, 8 App. 590, 595.

Act of corporation—Notice not necessary.—Where the defect in the street which caused the injury is attributable to the act of the municipal corporation itself, it is not necessary to prove notice. In making an improvement in the street the city is bound to take notice of such defects as ordinary skill and prudence will discover. City of Ft. Wayne v. Patterson, 3 App. 34, 38; Board, etc., v. Bacon, 96 Ind. 31; City of Ft. Wayne v. Coombs, 107 Ind. 75; City of Warsaw v. Dunlap, 112 Ind. 576; Board, etc., v. Pearson, 120 Ind. 426; Elliott Roads and Streets, pp. 462, 644; 2 Dillon Munic. Corp., § 1024.

Where the obstruction which causes the injury is not placed in the street by the city itself, there must be actual notice, or the obstruction must have remained in the street such a length of time as to make it the duty of the corporate authorities to take notice of its existence. City of Warsaw v. Dunlap, 112 Ind. 576; City of Lafayette v. Blood, 40 Ind. 62; City of Evansville v. Wilter, 86 Ind. 414; Corporation of Bluffton v. Mathews, 92 Ind. 213; City of Madison v. Baker, 103 Ind. 41; City of Franklin v. Harter, 127 Ind. 446; City of Evansville v. Senhenn, 151 Ind. 42.

Obstructions—Liability of city.—A city which permits an obstruction to remain an unreasonable length of time upon its streets or sidewalks, until the presumption arises that it had notice of such obstruction, is liable therefor to the same extent as if it had

itself placed the same there in the first instance. Senhenn v. City of Evansville, 140 Ind. 675.

Presumption concerning obstructions.—The presumption is that an obstruction placed in a street is wrongfully placed and permitted to remain there. Senhenn v. City of Evansville, 140 Ind. 675.

Obstructions and defects—Acts of third persons—Notice.—A city is not liable for an injury to a person caused by falling into an excavation in a sidewalk made by the owner of an adjoining lot, and not by the officers or agents of the city, left open, unguarded, without barriers or lights in the night-time, where no notice of the condition of such excavation was had by the city, and no facts existed from which notice to the city might reasonably be inferred. City of Ft. Wayne v. DeWitt, 47 Ind. 391; Turner v. City of Indianapolis, 96 Ind. 51.

Where an obstruction is placed in the street or sidewalk by a wrong-doer, on account of which a passer-by is injured, the city can not be held liable for such injury unless it has actual notice of the obstruction, or the same has remained on such street or sidewalk such a length of time as to make it the duty of the corporate authorities to take notice of its existence. City of Warsaw v. Dunlap, 112 Ind. 576; Turner v. City of Indianapolis, 96 Ind. 51; Town of Monticello v. Kennard, 7 App. 135; City of Evansville v. Senhenn, 151 Ind. 42; City of Ft. Wayne v. Patterson, 3 App. 34; City of Huntington v. Breen, 77 Ind 29; City of Ft. Wayne v. Dewitt, 47 Ind. 391.

Where a defective and unsafe condition of a street or sidewalk in a city is caused by the act or omission of a third person, and the city, after due notice of the defect, fails to have it remedied within a reasonable time, it is as much responsible for an injury caused thereby as if the defect had had its origin in the acts of the city itself, through its officers in charge of the streets or otherwise. City of Huntington v. Breen, 77 Ind. 29, 32; Higert v. City of Greencastle, 43 Ind. 574; Grove v. City of Ft. Wayne, 45 Ind. 429; Senhenn v. City of Evansville, 140 Ind. 675; Town of Elkhart v. Ritter, 66 Ind. 136; City of Logansport v. Dick, 70 Ind. 65; City of Aurora v. Bitner, 100 Ind. 396; City of Mt. Vernon v. Hohen, Ind. App. Ct., April 28, 1899.

The corporation is entitled to notice of the defect, and to a reasonable time in which to remove it, when it has been caused by some third person. Town of Monticello v. Kennard, 7 App. 135; Turner v. City of Indianapolis, 96 Ind. 51; City of Huntington v. Breen, 77 Ind. 29; Town of Spiceland v. Alier, 98 Ind. 467; City of Ft. Wayne v. Patterson, 3 App. 34.

The notice, however, may be either actual or constructive. Whenever the defect has existed such length of time as that, when its character and location and the other attendant circumstances are considered, the corporation, by the exercise of reasonable diligence, ought to have discovered and removed the defect, then it will be held liable for damages occasioned thereby to one himself without fault. Town of Monticello v. Kennard, 7 App. 139; City of Evansville v. Wilter, 86 Ind. 414; City of Indianapolis v. Murphy, 91 Ind. 382; City of Aurora v. Bitner, 100 Ind. 396.

Negligence of third person contributing to injury—Sufficiency of complaint.—Where one, in company with others, is injured while walking along a sidewalk, it is unnecessary, in an action for damages, to aver that those who were with plaintiff on the walk when the injury occurred were likewise free from contributory negligence; if the party himself is free from fault, the negligent defendant will be liable, although the negligence of some third person may have contributed to the injury, except where such third person was subject to the control and direction of the injured person, or was so identified with him in a common enterprise as to become responsible for his act. Town of Nappanee v. Ruckman, 7 App. 361.

Contributory negligence of third person.—Persons who are injured by reason of defects or obstructions in streets, and who are free of fault, may recover for such injuries, although the negligence of some third person may have contributed to the in-

jury. Town of Knightstown v. Musgrove, 116 Ind. 121; Louisville, etc., R. Co. v. Creek, 130 Ind. 139; City of Michigan City v. Boeckling, 122 Ind. 39; Town of Nappanee v. Ruckman, 7 App. 361; City of Mt. Vernon v. Hohen, Ind. App. Ct., April 28, 1899.

The concurring fault of the driver of the vehicle in which the plaintiff is riding will not defeat his action, when he is himself free from fault; in such case a husband's negligence is not imputed to the wife. Town of Knightstown v. Musgrove, 116 Ind. 121; City of Michigan City v. Boeckling, 122 Ind. 39; Louisville, etc., R. Co. v. Creek, 130 Ind. 139; Miller v. Louisville, etc., R. Co., 128 Ind. 97.

The contributory negligence of the driver and manager of a carriage will not defeat an action by one who was passively riding with him upon invitation for personal injuries caused by the negligence of town authorities in leaving a dangerous obstruction in the streets without proper safeguard, if the person injured be himself without fault. Town of Knightstown v. Musgrove, 116 Ind. 121.

When negligence of a third person is a defense.—Before the concurring negligence of a third person can be interposed to shield another, whose negligence has caused an injury to one who was without fault, it must appear that the injured person and the one whose negligence contributed to the injury sustained such a relation to each other in respect to the matter then in progress that, in contemplation of law, the negligent act of the third person was, upon the principles of agency, or co-operation in a common or joint enterprise, the act of the person injured. Town of Knightstown v. Musgrove, 116 Ind. 121; Town of Nappanee v. Ruckman, 7 App. 361.

Liability for acts of licensees—Notice.—A city is not liable for the acts of persons it licenses to use the streets, unless the thing authorized is intrinsically dangerous, or the municipal authorities have notice of the negligence of the licensees. City of Warsaw v. Dunlap, 112 Ind. 576; Ryan v. Curran, 64 Ind. 345; Dooley v. Town of Sullivan, 112 Ind. 451; Corporation of Bluffton v. Mathews, 92 Ind. 213; City of Evansville v. Wilter, 86 Ind. 414; City of Madison v. Baker, 103 Ind. 41; Wheeler v. City of Plymouth, 116 Ind. 158; City of Michigan City v. Boeckling, 122 Ind. 39; City of Franklin v. Harter, 127 Ind. 446; Shnur v. Board, etc., Ind. App. Ct., April 7, 1899.

Where a city authorizes a track to be laid in a plank-covered street for the use of a street railway company, the iron rails projecting four inches above the plank surface, and permits it to remain in that condition to the injury of persons using the street for travel, it is liable for its own negligence in failing to exercise the ordinary care and skill required of a municipal corporation in making and keeping its streets in a reasonbly safe condition for travel by persons employing ordinary care. City of Michigan City v. Boeckling, 122 Ind. 39.

Citizen, when liable.—A citizen of a municipality is not responsible for an injury resulting from an unsafe condition of a street, unless his act caused it to become unsafe, or he has been guilty of some breach of duty in the particular instance. City of Elkhart v. Wickwire, 87 Ind. 77, 81; Wickwire v. Town of Angola, 4 App. 253, 258.

If a person unlawfully places an obstruction in a street, or makes a dangerous excavation therein, he will be liable to another, who, without fault on his part, is injured or damaged by such obstruction. Wood v. Mears, 12 Ind. 5, 15; Turner v. Buchanan, 82 Ind. 147; Perry v. Barnett, 65 Ind. 522; Silvers v. Nerdlinger, 30 Ind. 53.

License to use streets, liability.—A license to use a public street does not exculpate the licensee from the consequences of his negligence. City of Elkhart v. Wickwire, 87 Ind. 77, 80; Terre Haute, etc., Co. v. Teel, 20 Ind. 131.

Where a private corporation, doing business in a city, in the conduct of its business, creates a nuisance which causes injury to the property of a private citizen, such corporation will be responsible therefor in an action, notwithstanding such city may have attempted to authorize the doing of the acts which caused the nuisance. Terre Haute etc., Co. v. Teel, 20 Ind. 131; Pettis v. Johnson, 56 Ind. 139.

Firing explosives.—A city is not liable for damages caused to the property of a citizen by the negligent manner in which other persons, acting under permission from the mayor, fire explosives within the city. Wheeler v. City of Plymouth, 116 Ind. 158, 159.

Complaint—Insufficiency—Notice.—In an action against a city for damages for injuries sustained by plaintiff stepping into a "hole or broken place" while passing on and along the sidewalk in said city, the complaint is insufficient which does not show that defendant knew of the "hole and broken place" a sufficient length of time prior to the accident to have repaired the same in the exercise of reasonable care; nor that the "hole or broken place" had existed for such a length of time prior to the accident that appellant, in the exercise of reasonable care, should have discovered and repaired it. City of Huntington v. Burke, 12 App. 133; Town of Monticello v. Kennard, 7 App. 135; Town of Spiceland v. Alier, 98 Ind. 467.

Complaint—Hole in street.—A complaint which alleges that there was a large hole or deep cut in the street near a ridge, that said ridge and cut had been allowed to remain for more than two months, and that the city had notice thereof and failed to improve or repair said defect; that plaintiff, while said street was in such condition, was driving thereon and over said ridge, and that the wheel of his wagon dropped from the top of said ridge into said cut or hole, and he was thereby thrown out and injured without any fault on his part, states a good cause of action against the city. City of Decatur v. Stoops, App. Ct., Jan. 10, 1899.

Defective street—Complaint.—Where it appears from the complaint taken as a whole that the place where appellee was injured was upon a public street of the city, that the city had notice of the defective condition of the street, that the injury occurred within the corporate limits of the city, and at a place which it was the duty of the city to keep in repair, and it had negligently failed to repair the same for sixty days, and the plaintiff was without fault, the complaint is sufficient. City of Frankfort v. Coleman, 19 App. 368.

Defective street—Insufficient complaint.—A complaint against a town for a personal injury, suffered by reason of a fall in the street, must show that the injury was caused by some specified act of negligence or omission of duty on the part of the town; and the charge that the town, while grading a street, caused the digging of a hole ten inches deep and twelve inches in diameter, which it negligently permitted to remain in the street for ten days, uncovered and unguarded, and that while walking along the street the plaintiff, without negligence on her part, stepped into the hole and was thrown down and injured, was insufficient. Town of Rushville v. Poe, 85 Ind. 83, 84.

Duty as to streets—Independent contractor—Notice—Liability.—The duty of maintaining streets in towns and cities in a safe condition for public use and travel rests primarily, as respects the public, upon the municipal corporation. This duty can not be evaded, superseded or cast upon others by a contract for the improvement of the streets. When having work done upon the streets or bridges, even by an independent contractor, it is the duty of the municipal corporation to see that such precautions are used while the work is in progress as are reasonably necessary to protect travel, and failure to do so will render it liable to persons injured without fault upon their part. In such case, notice to the municipality of absence of proper precautions or guards is not necessary. City of Logansport v. Dick, 70 Ind. 65; Park v. Board, etc., 3 App. 536.

If, at the time of the injuries complained of, the city had a contract with any person to furnish it with lumber, by the year, or otherwise, and to deliver the same to the city, and such person did in fact, under such contract, deliver said lumber, and pile the same in the street, the act of such person in delivering and piling the same was not the act of the city, and the city could not be liable for any negligence of such person in placing the same in the street, unless it had notice thereof, either express or implied. City of Evansville v. Senhenn, 151 Ind. 42.

Joint liability of city and contractor.—When one constructs a defective and dangerous step on the sidewalk under the direction and supervision of the city, the city and such person are jointly and primarily liable to one injured thereby without fault. Kane v. City of Indianapolis, 82 Fed. Rep. 770.

Joint liability.—If an incorporated city contract with a company for the construction of a water system, and the contractor dig a deep ditch across one of the streets and leaves it open and unguarded in the night-time, and a traveler, without fault, fall into the excavation and is injured, the city and contractor are jointly liable. City of Alexandria v. Young, 20 App. 672.

Negligence of contractor.—The general rule is that a municipal corporation is not responsible for the negligence of an independent contractor; but this general rule does not apply where the corporation secures the right of way through private property, and expressly contracts to pay all damages occasioned by the construction of the public work; in such a case the maxim *respondeat superior* applies. Leeds v. City of Richmond, 102 Ind. 372, 381; City of Evansville v. Senhenn, 151 Ind. 42.

Officers and contractors—Torts.—A municipal corporation is not responsible for the torts of its officers, nor for breach of contract, when the acts of the officers are beyond the general powers of the corporation; but it is responsible when the acts of the officers are within the general corporate powers, and the construction of a public sewer is an act within the scope of the general powers of a municipal corporation. Leeds v. City of Richmond, 102 Ind. 372, 381.

Servants—Liability for torts.—Where the servants of a municipal corporation, engaged in the service of the corporation, and in the construction of an authorized corporate work, commit a trespass, the municipality is liable. Platter v. City of Seymour, 86 Ind. 323, 325.

Co-servants—Negligence of.—The rule that a master is not liable to a servant for an injury resulting from the negligence of a fellow-servant is not applicable to a suit against a municipal corporation. Turner v. City of Indianapolis, 96 Ind. 51, 56.

Evidence—Notice.—In actions against a city for injuries on account of a defective street, it may be proven that other persons were injured on account of the same defect as tending to show notice to the city. City of Delphi v. Lowery, 74 Ind. 520; City of Goshen v. England, 119 Ind. 368; Toledo, etc., R. Co. v. Milligan, 2 App. 578; City of Ft. Wayne v. Coombs, 107 Ind. 75; Louisville, etc., R. Co. v. Wright, 115 Ind. 378, 393.

The safety of the streets can not be proven by showing that other persons passed over the same without injury, or that the street complained of was as good as the other streets of the city. Bauer v. City of Indianapolis, 99 Ind. 56; McCormick, etc., Co. v. Gray, 100 Ind. 285; Cleveland, etc., R. Co. v. Wynant, 114 Ind. 525.

Evidence of subsequent repairs.—Evidence of repairs subsequent to the date of injury is not admissible to show antecedent negligence. Board, etc., v. Pearson, 129 Ind. 456; Chicago, etc., R. Co. v. Lee, 17 App. 215; City of Jeffersonville v. McHenry, App. Ct., March 7, 1899; Terre Haute, etc., R. Co. v. Clem, 123 Ind. 15.

Evidence of such repairs subsequent to the date of the injury is sometimes admissible for the purpose of tending to show that the party charged had notice of the defect. Hopkins v. Boyd, 18 App. 63; City of Jeffersonville v. McHenry, Ind. App. Ct., March 7, 1899.

Evidence of subsequent repairs, when restricted by a proper instruction, is proper for the purpose of showing a city's recognition of a defective walk as one which the city was bound to repair. City of Lafayette v. Weaver, 92 Ind. 477; City of Jeffersonville v. McHenry, Ind. App. Ct., March 7, 1899.

Evidence.—The introduction of many matters of record of the proceedings of a city council in an action for personal injuries against the city and a contractor for the construction of a water system, said proceedings relating in some manner to the construction of the water-works plant in said city, and the introduction in evidence of the bond

given by the contracting company and assigned to the city, do not constitute reversible error and are harmless even though much of it may be immaterial. City of Alexandria v. Young, 20 App. 672.

Evidence—Fact and opinion.—Where there was a hole in a sidewalk extending from the pavement down through a wall of a mill on the abutting lot, which was private property, and some years after the injury the mill was rebuilt by a private individual, at which time the hole in the wall was filled with stone and mortar and the hole in the pavement was filled with clay by said party, the city having nothing to do with the work, evidence of witnesses, who had known of the condition of the pavement and mill-wall prior to and subsequent to the rebuilding of the mill and the injury, and who had examined the pavement and wall a few days prior to the trial, as to the condition in which they found the wall and stating where and how the work of filling the hole had been done, was not open to the objection that the evidence was matter of opinion, for it was a statement of facts. City of Jeffersonville v. McHenry, Ind. App. Ct., March 7, 1899.

Expressions of pain.—Witnesses may be permitted to testify to expressions of present pain by the party injured. The interval of time between the injury and expression of pain will go to the weight of the evidence, but not to its admissibility, and evidence of expressions of present pain seven years after the injury may be admitted. City of Huntington v. Burke, 21 App. 655.

Same—Evidence—Sufficiency of.—Evidence that plaintiff was injured by falling over a loose board in a sidewalk, which was tipped up by another person stepping thereon, and that she knew of the condition of the walk, and was looking for holes in the walk, is insufficient to support a verdict in her favor. City of Huntingburgh v. First, 15 App. 552.

Negligence—Question of fact for jury.—Whether an obstruction or defect in a street is such as it is negligence on the part of the municipality to suffer to exist is generally a question of fact for the jury. City of Michigan City v. Boeckling, 122 Ind. 39; City of Lafayette v. Weaver, 92 Ind. 477.

Evidence—Ordinance—Street commissioner.—In an action against a city for injuries caused by defects or obstructions in a street, evidence may be given of an ordinance of a city prescribing the duty of its commissioner of streets. City of Indianapolis v. Gaston, 58 Ind. 224.

Same—Guards—Lights.—Where there is such a defect in a gutter-crossing of a city as to be dangerous to persons passing at night, it is the duty of such city to guard the same in some way, and the absence of gaslight from street lamps, or other lights, in such vicinity, may be considered in determining the question of negligence. City of Indianapolis v. Scott, 72 Ind. 196.

Contributory negligence—Burden.—In an action against a municipal corporation for injuries sustained by the failure of the corporation to keep the streets in safe condition, the plaintiff must allege in his complaint and prove that the injury was incurred without his own negligence having contributed thereto. The burden is on him to show, not only the negligence of the corporation, but his own freedom from negligence contributing to the injury. Town of Salem v. Walker, 16 App. 687; City of Huntingburgh v. First, 15 App. 552.

But see Acts 1899, p. 58, which provides that in all actions for damages brought on account of the alleged negligence of any person, copartnership or corporation for causing personal injuries, or the death of any person, it shall not be necessary for the plaintiff to allege or prove the want of contributory negligence, but that contributory negligence shall be a matter of defense, and such defense may be proved under the answer of general denial, provided said act shall not affect pending litigation.

Same.—If the municipality has neglected to keep its streets in a reasonably safe condition, a traveler thereon is not excused from the exercise of ordinary care for his own

safety. Town of Gosport v. Evans, 112 Ind. 133; Riest v. City of Goshen, 42 Ind. 339; President, etc., v. Dusouchett, 2 Ind. 586; Bruker v. Town of Covington, 69 Ind. 33; Town of Salem v. Walker, 16 App. 687; City of Huntingburgh v. First, 15 App. 552.

Same.—If one has knowledge that a highway or sidewalk in a town or city is out of repair, or even dangerous, he is not for that reason bound to forego travel upon the same, but, in such case, the care to avoid injury must be in proportion to the danger the traveler may encounter by reason of the defect or obstruction. Town of Salem v. Walker, 16 App. 687; Town of Albion v. Hetrick 90 Ind. 545; Town of Gosport v. Evans, 112 Ind. 133; City of South Bend v. Hardy, 98 Ind. 577; City of Huntington v. Breen, 77 Ind. 29; City of Indianapolis v. Cook, 99 Ind. 10; Turnpike Co. v. Jackson, 86 Ind. 111; President, etc., v. Dusouchett, 2 Ind. 586; City of Huntingburgh v. First, 15 App. 552; Town of Fowler v. Linquist, 138 Ind. 566; City of Richmond v. Mulholland, 116 Ind. 173; City of Columbus v. Strassner, 124 Ind. 482; City of Bedford v. Woody, Ind. App. Ct., May 18, 1899; City of Huntingburg v. First, Ind. App. Ct., March 10, 1899.

Same.—It is negligence for one, unless under compulsion, to cast himself upon a known peril from which a prudent person might reasonably anticipate injury; and where there is danger, and the peril is known, whoever encounters it voluntarily and unnecessarily can not be regarded as exercising ordinary prudence, and, therefore, does so at his own risk. Morrison v. Board, etc., 116 Ind. 431; Railway Co. v. Pinchin, 112 Ind. 592; Town of Gosport v. Evans, 112 Ind. 133; Town of Salem v. Walker, 16 App. 687; Bruker v. Town of Covington, 69 Ind. 33; City of Indianapolis v. Cook, 99 Ind. 10; Rogers v. City of Bloomington, Ind. App. Ct., Dec. 16, 1898.

Same.—It is contributory negligence upon the part of a horseman, who, riding upon a street in a city or town, encounters an obstruction which frightens his horse, to thereafter, voluntarily and without necessity so to do, to again ride his horse in proximity to such obstruction. Town of Salem v. Walker, 16 App. 687.

Contributory negligence—Knowledge of defect—Inference.—Where one is injured by being thrown from the wagon he was driving across a street railroad track because of ruts in the street, the fact that he had knowledge of the existence of such ruts would not alone be conclusive that he had knowledge of the unsafe or dangerous condition of the street, or that he was guilty of contributory negligence in driving over the same. Citizens' Street R. Co. v. Sutton, 148 Ind. 169.

Knowledge of defect—Effect.—Mere knowledge by the plaintiff that a way is dangerous will not prevent a recovery for injury resulting from an attempt to use it, unless the danger was so great that a person of ordinary prudence would not voluntarily encounter it. Nave v. Flack, 90 Ind. 205; City of Richmond v. Mulholland, 116 Ind. 173; Town of Poseyville v. Lewis, 126 Ind. 80; City of Elkhart v. Witman, 122 Ind. 538; Citizens' St. R. Co. v. Sutton, 148 Ind. 169.

The fact that a person traveling upon a street or sidewalk has knowledge of the defect will not of itself deprive him of a right of action in case of injury, but such fact, with all the other facts bearing upon the question, is to be considered by the jury in determining whether such person was guilty of contributory negligence. City of Frankfort v. Coleman, 19 App. 368; City of Columbus v. Strassner, 124 Ind. 482.

Use of defective street.—Where a person knows of the dangerous condition of a street, and yet, in the night-time, when it is dark, proceeds to travel thereon when the exact location of the dangerous portion can not be ascertained, he does so at his own peril. City of Bloomington v. Rogers, 9 App. 230, 237; City of Indianapolis v. Cook, 99 Ind. 10; Town of Gosport v. Evans, 112 Ind. 133; Bruker v. Town of Covington, 69 Ind. 33. See City of Huntington v. Breen, 77 Ind. 29; Rogers v. City of Bloomington, App. Ct., Dec. 16, 1898.

Ditch near sidewalk—Contributory negligence.—Where the findings show that plaintiff knew of the ditch, its location and relation to the street and sidewalk; that the sidewalk was in the course of construction, by having placed on the space intended for it crushed stone and cinders preparatory to laying the brick; that the ditch was about two

feet from the sidewalk; that the ditch was six feet deep, with a precipitous stone wall and a solid stone bottom; that she knew it was a dangerous place; that it was a dark night; that she had just been looking into a house through a window where there was a light; that the only precaution she took to avoid falling into the ditch was to feel with her feet and search with her eyes while she was walking; that even though she searched with her eyes, she was unable to determine the exact location of the ditch, and that under the circumstances she undertook to pass along and over the space intended for a sidewalk, without any light, and in so doing fell into the ditch, such facts clearly establish contributory negligence on the part of the plaintiff. Rogers v. City of Bloomington, Ind. App. Ct., Dec. 16, 1898.

Excavation—Circumstances—Evidence.—In an action for damages sustained by falling into a ditch in a street, while plaintiff was on her way home in the night-time, evidence touching the surroundings and the means of ingress and egress to and from her residence is admissible, as bearing on the question of due care. City of Bloomington v. Rogers, 13 App. 121.

Sidewalks.—Cities are liable for damages caused by defective sidewalks, although such walks are constructed by the adjoining property owners. Higert v. City of Greencastle, 43 Ind. 574; City of Huntington v. Breen, 77 Ind. 29. The city may be liable though the sidewalk is beyond the line of the street. City of Huntington v. McClurg, Ind. App. Ct., April 26, 1899.

It is the duty of cities to prevent anything over-hanging a sidewalk that renders the use of such walk dangerous. Grove v. City of Ft. Wayne, 45 Ind. 429.

The power of a city over its streets and the right of the public to them extends upward indefinitely for the purpose of their preservation, safe-guard and enjoyment; and the duty of a city in this respect is commensurate with its power. Grove v. City of Ft. Wayne, 45 Ind. 429.

Defective sidewalk—Loose board.—A city is liable for injuries sustained by one who is tripped up by a loose board in a sidewalk where the city had not exercised ordinary care to maintain the sidewalk in a reasonably safe condition for the use of pedestrians, and the defective condition of the sidewalk causing the injury would not have existed but for the want of such care upon the part of the city, and the pedestrian was injured while exercising ordinary care. City of Columbia City v. Langohr, 20 App. 395.

A city is not liable for damages to a person who receives an injury by slipping upon a loose brick which turns under the foot, where the brick is a part of an old sidewalk, and is on a level with and completely surrounded by other bricks composing the sidewalk, there being no apparent defect, and the walk being even and in fair condition, excepting natural wear from long usage. Bucher v. City of South Bend, 20 App. 177.

Sidewalk—Snow and ice—Personal injury—Liability.—The mere fact that snow falls on a sidewalk, melts, and subsequently freezes, making it slippery, does not render the city liable for an injury caused by slipping and falling thereon. McQueen v. City of Elkhart, 14 App. 671.

Grade of sidewalk—Negligence—Burden of proof.—A city is not liable for an injury received upon one of its sidewalks merely because its officials adopt one grade in preference to another, or because sidewalks of a given standard are better, or more perfect than that adopted. Plaintiff in an action for personal injuries on account of defective grading of a sidewalk, or of the defective construction of a sidewalk, has the burden of proving that the walk was improperly graded or constructed. McQueen v. City of Elkhart, 14 App. 671.

Coal vault—Negligence—Notice.—It is not negligent or wrongful for a city to silently allow the owner of property abutting on a street to properly construct a coal vault under the sidewalk; and the city is not chargeable with negligence where the occupant of

the premises using such vault leaves the opening of said vault in the sidewalk uncovered for a short time while engaged in putting coal into the vault, and where the city officials have not notice that it is uncovered. City of Lafayette v. Blood, 40 Ind. 62; City of Ft. Wayne v. DeWitt, 47 Ind. 391.

Where plaintiff passed over a sidewalk, that was out of repair, three or four times a week for several weeks prior to his injury, had actual knowledge that the sidewalk was old, the boards loose and walk dangerous, was walking over it in the dark with his hands in his pockets and could have gone home by some other route, and there was no evidence that he was actually trying to avoid anticipated danger, he is not free from contributory negligence and can not recover damages because of being tripped up by a loose board in the sidewalk. Town of Boswell v. Wakley, 149 Ind. 64.

Where a traveler knows of the general condition of a sidewalk and that some boards are loose and dangerous, but does not know that the particular board over which he afterward trips was loose, he is held to know of the defect. Town of Boswell v. Wakley, 149 Ind. 64.

Sidewalk—Pleading—Notice—Evidence—Negligence.—If a city permit a sidewalk to become out of repair so that a pedestrian, without knowledge or the means of ascertaining its condition, be injured while using the same without fault on his part, it is liable therefor. Town of Salem v. Goller, 76 Ind. 291, 292; City of Washington v. Small, 86 Ind. 462, 465; City of New Albany v. McCulloch, 127 Ind. 500, 502; Buscher v. City of Lafayette, 8 App. 590, 595; City of Huntington v. McClurg, App. Ct., April 26, 1899.

In a suit against a city for an injury caused by a defective sidewalk, it is not necessary that the plaintiff aver his ignorance of the defect, and, if averred, it need not be proved. City of Lafayette v. Weaver, 92 Ind. 477, 478.

In a suit against a city for personal injury caused by a defective sidewalk, the complaint alleged that the defendant did, willfully and knowingly, permit its sidewalk, describing it, to become and remain rotten, decayed, defective and out of repair. It was sufficiently shown that the street was one which the city was bound to keep reasonably safe for ordinary travel. City of Lafayette v. Larson, 73 Ind. 367, 369; City of Columbus v. Strassner, 124 Ind. 482, 484.

In an action against a city for damages for injuries caused by a defective sidewalk, an allegation that the city had exclusive authority and jurisdiction over its streets, alleys and sidewalks, and negligently permitted one of its sidewalks—the one on the west side of Washington street—to get out of repair, is sufficient to show that the sidewalk where the injury is alleged to have occurred was within the city and under its jurisdiction. City of Columbus v. Strassner, 124 Ind. 482, 484.

Notice of obstruction—Evidence.—Where there is no evidence that the town had notice of the alleged obstruction of the sidewalk, or that facts existed from which notice thereof may have been reasonably inferred, or that there were circumstances from which the alleged obstruction ought to have been known and remedied, a judgment for plaintiff will be reversed. Town of Rosedale v. Ferguson, 3 App. 596, 599.

Condition, question of fact.—In a suit against a city for an injury caused by a defective sidewalk, the question whether the walk was dangerous is one of fact for the jury, and if there be conflict in the evidence, the verdict will not be disturbed by the supreme court. City of Lafayette v. Weaver, 92 Ind. 477, 478.

An answer to a complaint, pleaded with the general denial, which alleges that the plaintiff knew the defective condition of the sidewalk, but that, notwithstanding such knowledge, he voluntarily, and of his own free will, ventured to travel on the same, and assumed the risk of his journey thereon, may properly be stricken out, since it alleges only such matters as are admissible under the general denial. City of New Albany v. McCulloch, 127 Ind. 500, 503.

Sidewalk—Lot-owner's liability.—A citizen can not be held liable for an injury re-

sulting from a defective sidewalk upon the ground that he is the owner of the adjoining lot and makes more use than others of a thing causing the injury, constructed and kept for public convenience, to which all have a common right, and over which no one citizen has specific control. City of Elkhart v. Wickwire, 87 Ind. 77, 82.

Personal injury—Damages.—In a suit against a city to recover for personal injury received in consequence of an obstruction upon a sidewalk, the sum of $1,000 was not excessive damages where such injury confined the plaintiff to his room for sixteen weeks, requiring him to use crutches three months more, caused him great pain for a longer period, rendered entire recovery doubtful, and entailed considerable expense for medical aid and nursing. City of Evansville v. Wilter, 86 Ind. 414, 421. See City of Bluffton v. McAfee, App. Ct., May 24, 1899.

Obstruction of street, injury.—In an action against a municipal corporation, for personal injuries sustained by tripping upon a guy wire which had been erected by an electric light company, licensed to use the street, extending from the top of a pole, across the street, and attached to a tree, the complaint is sufficient, on demurrer, which proceeds upon the theory that the defendant had notice, when the wire was stretched across the street, that it was fastened to a decayed and unsafe tree outside and beyond the street (such tree having been blown down, and such wire suspended but a few inches above the sidewalk about an hour before the accident complained of), and that, by the exercise of reasonable diligence, appellant might have known of the continuance (about nine months) of such unsafe attachment up to the time of the accident, and alleging want of contributory negligence. City of Lafayette v. Ashby, 8 App. 214, 217.

Complaint to abate—Bad answer.—Complaint by an incorporated town to recover the amount of a judgment which it had been compelled to pay, alleging an unlawful excavation, wrongfully and without permission made by the defendant in a sidewalk, into which one H. fell and was injured; that H. sued the town and recovered the judgment; that the defendant was notified of the suit and defended it. Answer, that the excavation was made for a stairway to the basement of a building of the defendant, such as was customarily made by others, with the knowledge of the town; that due care was used to avoid injury; that an unexpected caving of the earth occurred, of which the town had notice, but failed to inform the defendant, and the injury was the result of such caving, and could have been avoided by a trifling expense. The answer was insufficient, because it did not aver permission from the town to make the excavation, but only averred evidence tending to show permission. McNaughton v. City of Elkhart, 85 Ind. 384, 387.

Res judicata—Wrong-doer notified.—In such case, where the town, upon being sued, notifies the wrong-doer thereof, and that it will look to him for indemnity, the judgment concludes him as to the facts thereby adjudicated. McNaughton v. City of Elkhart, 85 Ind. 384, 391.

Sidewalk—Visible defect—Negligence.—A city is not liable to one who sustains an injury by reason of a defective sidewalk, if the latter could have avoided the injury by looking, and shows no excuse for failing to look. City of Plymouth v. Milner, 117 Ind. 324, 326.

A complaint against an incorporated town for an injury resulting from a defective sidewalk, which fails to aver notice to the corporation of the defect, or facts by reason of which the law will impute notice, or from which it may be reasonably inferred, is bad on demurrer. Town of Spiceland v. Alier, 98 Ind. 467, 469.

Dangerous sidewalk unprotected—Signals—Complaint.—Where, in an action against a city to recover damages for personal injuries, it was averred in the complaint that the sidewalk along a particular street was twelve feet in width; that the city had constructed a portion of the walk over a ditch, in an alley, only three feet wide, leaving it without any protection at the sides, or any lights or danger signals, so that the

plaintiff in passing along the sidewalk, without knowledge of the situation or condition of the walk at the alley, stepped off into the ditch, thereby sustaining the injuries complained of, without any fault on her part, the complaint stated a good cause of action against the city for negligence. City of Portland v. Taylor, 125 Ind. 522.

Sidewalk obstructed—Complaint.—In an action against a town for personal injury occasioned by obstructions on a sidewalk, the complaint alleged that a certain railroad company, with full knowledge of the town, negligently obstructed a sidewalk adjoining certain real estate controlled and owned by said railroad company in said town, by causing to be placed thereon a large number of rolls of barbed wire, obstructing and rendering passage over the sidewalk dangerous to travelers passing thereon. It was sufficiently alleged that the place where the wire lay was a public sidewalk, although the name of the street was not alleged. Town of Rosedale v. Ferguson, 3 App. 596, 598.

Bicycle.—A bicycle is a vehicle, and is entitled to the rights of the road, but has no lawful right to the use of the sidewalk. Its use upon a public sidewalk is unlawful, and its rider liable for an injury inflicted upon a footman, although the act be unintentional. Mercer v. Corbin, 117 Ind. 450; Holland v. Bartch, 120 Ind. 46.

Crossing made by citizen.—A municipal corporation is not exempted from its liability for defects in a crossing by the mere fact that it was constructed by a private person. If such crossing is constructed in a public street, where the public pass on foot, and the same gets out of repair and becomes unsafe, and remains so for such a length of time that the proper authorities, in exercise of reasonable care and prudence, ought to have discovered the defect and repaired it, the corporation is liable for the negligence, without actual notice. City of Aurora v. Bitner, 100 Ind. 396, 400; Higert v. City of Greencastle, 43 Ind. 574; City of Huntington v. Breen, 77 Ind. 29; City of Indianapolis v. Lawyer, 38 Ind. 348.

Crossing, when dangerous.—A street crossing, consisting of plank raised from two to two and one-half inches in height above the level of a sidewalk, is a dangerous obstruction, and where the city negligently suffers such an obstruction to remain in one of its public sidewalks and street crossings, for an unnecessary period of time, it is liable to one who is injured while passing over the sidewalk and crossing, without notice or knowledge of the obstruction. Glantz v. City of South Bend, 106 Ind. 305, 309; City of Michigan City v. Boeckling, 122 Ind. 39, 41.

Gutter crossings.—It is the duty of a city not only to make her gutter crossings safe in the first instance, but to use ordinary care to see that they are kept safe. City of Indianapolis v. Scott, 72 Ind. 197.

Gutter crossing dangerous.—Where a city constructed an oval-shaped, iron gutter crossing 3 x 9 feet, in a public and much traveled street, the gutter crossing originally being perforated and creased, affording a secure foothold for passers-by, but by long use had become worn "smooth as a polished piece of wood, and very smooth, slick and slippery," so that no safe foothold was presented by it, except for a short space at each end, of the character of which crossing the city had knowledge for ninety days before an accident causing serious injury to a passer-by who was walking "slowly and carefully" along, and slipped and fell upon the crossing, the dangerous condition of the crossing being the sole cause of the injury, the city was liable in damages to the injured party. Lyon v. City of Logansport, 9 App. 21, 27.

Railroads—Culverts—Sewers.—If a city permit a railroad company to occupy and cross streets and alleys, and require it to construct culverts, and the city adopt them for its use, and they prove insufficient, or become out of repair, the city will be liable for injury resulting to adjoining property by reason of such insufficiency. While the city will not be liable for injury resulting from defective sewers constructed for the exclusive use of the railroad company, still she can not delegate her general power and adopt the work of the company as part of her general system without responsibility for de-

fects in the work. City of Indianapolis v. Lawyer, 38 Ind. 348; State v. Board, etc, 80 Ind. 478, 484; Lostutter v. City of Aurora, 126 Ind. 437; Stackhouse v. City of Lafayette, 26 Ind. 17.

Reckless and careless driving.—Reckless and careless riding or driving upon a public street, whereby another, without fault, is injured, is actionable. Simons v. Gaynor, 89 Ind. 165; Stringer v. Frost, 116 Ind. 477.

Municipal ordinances regulating the speed of driving may be considered in determining whether the defendant was guilty of recklessness in driving against the plaintiff. Simons v. Gaynor, 89 Ind. 165; Pennsylvania Co. v. Stegemeier, 118 Ind. 305.

Liability of infant.—An infant who negligently, and without any contributory fault on the part of a pedestrian, rides down and injures the latter while crossing a public street, is liable in damages. Stringer v. Frost, 116 Ind. 477.

Law of road—Use of street.—The statute which provides that any person who shall, when driving any vehicle, fail to pass to the right, when meeting another vehicle, etc., shall forfeit the sum of five dollars, etc., applies only to country roads. In cities and towns, in the absence of ordinances or a statute to the contrary, a person has the right to travel in and upon any part of the street, from curb to curb, so long as he does not interfere with the right of other travelers. City of Decatur v. Stoops, Ind. App. Ct., Jan. 10, 1899.

Cattle at large—Excavation in street.—It is not negligence in the owner of cattle to allow them to run at large in the streets of a town, where an ordinance thereof permits it, in which excavations are being made for the laying of gas pipes. One making an excavation in a public highway must keep it constantly guarded while it is dangerous. Noblesville, etc., Co. v. Teter, 1 App. 322; Silvers v. Nerdlinger, 30 Ind. 53.

Driving cattle through streets.—Persons driving cattle through the streets of cities or towns are bound to use the utmost diligence and care to avoid injuries to passers-by. Eichel v. Senhenn, 2 App. 208.

Foot passengers.—Persons about to cross a street on foot should use due care to avoid coming in contact with horsemen or vehicles; but they are not guilty of negligence *per se* in crossing a street at a place other than the usual crossing. Stringer v. Frost, 116 Ind. 477; Simons v. Graynor, 89 Ind. 165.

Foot passengers have equal rights in streets with other persons, and one is not guilty of negligence who fails to anticipate, and take special precautions against injury by persons riding or driving at an unusual and dangerous rate of speed. Stringer v. Frost, 116 Ind. 477.

Footmen standing in street, negligence.—One who stands heedlessly, at night, in the carriage-way, on a public street, where it is known that horses and vehicles are liable to pass momentarily, without taking any precaution to avoid danger, from persons riding or driving on the street, is guilty of negligence, and it is not error to so instruct the jury. Evans v. Adams Ex. Co., 122 Ind. 362.

Collision in public streets.—When a collision occurs in a public street by the united and contemporaneous negligence of two persons, neither can recover from the other for a resulting injury. Evans v. Adams Ex. Co., 122 Ind. 362.

Permitting objects calculated to frighten horses to remain on street.—Towns and cities, in the absence of contributory negligence, are liable for injuries resulting from the fright of horses of ordinary gentleness, at objects naturally calculated to frighten them, and which the corporation has negligently placed, or permitted to be placed and to remain, upon the street. Town of Rushville v. Adams, 107 Ind. 475; City of Crawfordsville v. Smith, 79 Ind. 308; Cleveland, etc., R. Co. v. Wynant, 114 Ind. 525.

If a person places in a public street or highway an object likely to cause animals to take fright, he will be liable to persons damaged who are without fault. Turner v. Buchanan, 82 Ind. 147.

Street coasting—Police officers.—A city, after having adopted an ordinance prohibiting upon its streets sports tending to produce bodily injury, was not liable for a collision upon a street whereby a traveler was injured, as the result of coasting for sport, though the sport was carried on by crowds publicly, in the presence of its officers and police, to the obvious danger of persons using the street. Faulkner v. City of Aurora, 85 Ind. 130, 134; City of Lafayette v. Timberlake, 88 Ind. 330, 331; City of Lafayette v. Rose, 88 Ind. 471.

Fireman—Risk assumed.—A fireman, in assuming the duties of his place, takes upon himself no risk arising out of negligence on the part of those in charge of the streets. Turner v. City of Indianapolis, 96 Ind. 51, 56.

Nuisance—Permanent obstructions.—A municipal corporation is guilty of maintaining a public nuisance if it places a permanent obstruction in a public street. A permanent structure, materially encroaching upon a public street in a thickly inhabited part of a large city, is a nuisance, *per se*. State v. Berdetta, 73 Ind. 185; Pettis v. Johnson, 56 Ind. 139; State v. Louisville, etc., R. Co., 86 Ind. 114; Bybee v. State, 94 Ind. 443; Elliott Roads and Streets, p. 476.

Same—Structures overhanging sidewalk.—The cornice of a building which projects over a sidewalk in a city, and which is being constructed in such a manner as to be dangerous to persons using the sidewalk, is a nuisance. The city has power to abate the same. Grove v. City of Ft. Wayne, 45 Ind. 429.

What will constitute a nuisance.—An unauthorized and illegal obstruction of the public ways of a town or city is a public nuisance. State v. Berdetta, 73 Ind. 185, 189; State v. Louisville, etc., R. Co., 86 Ind. 114, 116; State v. Baltimore, etc., R. Co., 120 Ind. 298, 299; Zimmerman v. State, 4 App. 583, 586.

No right by prescription.—A right to maintain a public nuisance can not be acquired by prescription. Sims v. City of Frankfort, 79 Ind. 446, 451; State v. Louisville, etc., R. Co., 86 Ind. 114, 116.

A railroad in the streets of a city is not of itself a nuisance, but an improper and unreasonable exercise of a right to use a street by a railroad company may become a nuisance. State v. Louisville, etc., R. Co., 86 Ind. 114, 116.

Nuisance.—A municipal corporation is liable for torts the same as an individual in certain classes of cases, among which is included nuisances. For a nuisance maintained upon its property the same liability attaches against a city as to an individual. City of New Albany v. Slider, Ind. App. Ct., Jan. 10, 1899; Haag v. Board, etc., 60 Ind. 511.

Nuisance—Street dump—Complaint.—A complaint which alleges that plaintiff is the owner, and with his family is in possession of a house and lot in a city as a residence; that said city has caused to be deposited large quantities of garbage, rubbish and filth, gathered from its public ways, near to the premises of plaintiff, thereby creating a nuisance consisting of a huge pile of decomposed and decaying vegetable and animal matter, from which noxious vapors, disagreeable and unhealthy odors are generated and emitted, whereby the air in and about said premises of plaintiff is impregnated, injuring plaintiff's health and causing him and his family to become diseased and sick, destroying the comfortable enjoyment of said premises, and greatly depreciating the value thereof to plaintiff's damage, presents a good cause of action for damages against the city. City of New Albany v. Slider, Ind. App. Ct., Jan. 10, 1899; City of New Albany v. Armstrong, Ind. App. Ct., March 8, 1899.

In such case where the jury finds in answer to interrogatories, and the undisputed evidence is, that there is no permanent injury to the property resulting from the nuisance, but that during the continuance of the nuisance the rental value of the property was depreciated, but there is neither finding nor evidence as to amount of the rental value, a verdict in favor of the plaintiff can not be upheld. City of New Albany v. Armstrong, Ind. App. Ct., March 8, 1899.

Railroad, use of streets.—Indictment against a railroad company for a nuisance by

obstructing the streets and public square of a town by its tracks, switches and buildings, and by the manner of their use. Special plea, that the defendant had lawfully acquired the right to use the *locus in quo* for the purposes of a railroad, and that in the use of its tracks, switches and buildings it created only such temporary obstructions as resulted from the reasonable and necessary transaction of its railroad business. The plea was good on demurrer. State v. Louisville, etc., R. Co., 86 Ind. 114, 117.

Right of property owner in street—Injunction—Indictment.—The permanent obstruction of a street is such an unlawful act as injures the property owners of the street, who have a right, as an essential incident to the enjoyment of their property, to the use of the street, in its full width, free from all obstructions of a permanent character; and this right may be vindicated either by injunction or indictment, and its violation established by evidence of a permanent encroachment upon the street. State v. Berdetta, 73 Ind. 185.

Obstruction of highway—Damages to abutting owner.—The owner of real estate abutting on a public highway can not maintain an action for the obstruction of such highway, unless some special injury, one not common to all who use the highway, has been sustained, where such abutting owner is not the owner in fee simple of any part of the highway. Pittsburgh, etc., R. Co. v. Noftsger, 148 Ind. 101.

Nuisance—Successive actions.—The improvement of a street by a municipal corporation is not a nuisance, though done in a negligent and unskillful manner; and hence the rule that the continuance of a nuisance will supply ground for successive actions has no application. City of North Vernon v. Voegler, 103 Ind. 314, 318.

Well and pump for public use.—A well originally dug in a street by a lot-owner may be taken charge of by the corporate authorities and made fit for convenient public use. A municipal corporation is not guilty of maintaining a nuisance where it does no more than construct a platform around the mouth of a well dug in the street by an abutting property-owner, and causes a pump to be placed in it for the use and convenience of the public. Lostutter v. City of Aurora, 126 Ind. 436, 439.

Well, hydrant, fountain and the like.—It is immaterial whether a well, hydrant, fountain or the like, was dug, or erected, by a municipal corporation as a part of a general plan of improvement, for a thing of that kind, promotive, as it presumptively is, of public convenience, may be adopted by the municipality and maintained for public use. Lostutter v. City of Aurora, 126 Ind. 436, 439.

Hitching post.—A hitching post properly located is not an unlawful obstruction in a street. The proper place for the post is just at the edge of the sidewalk and within the space where the curb should be. Whether it is so placed as to be an unreasonable obstruction in the street is a question of fact in each case. Weinstein v. City of Terre Haute, 147 Ind. 556.

Same—Contributory negligence.—Where a hitching post is placed in a street, and there is nothing to prevent one driving upon the street from seeing it, and no circumstance existing that excuses him from looking, and there is ample room to pass upon the street without hitting the post, one driving against it when he is not looking to see where he is driving, can not be held to be free from negligence. Weinstein v. City of Terre Haute, 147 Ind. 556.

Mandamus—Obstruction—Pleading.—A complaint in an action to compel a city by mandamus to remove an obstruction from an alley placed therein by a railroad company, with the consent of the city, must, in order to be sufficient, make it affirmatively to appear that an unlawful use is made of the alley. State v. City of New Albany, 127 Ind. 221, 222.

Action to abate—Evidence competent.—In an action for the abatement of a nuisance, by the removal of a railroad track, it is competent to prove that the plaintiff consented to the occupancy of the street, and assisted in making the fill upon which the track was laid. Burkam v. Ohio, etc., R. Co., 122 Ind. 344, 345.

Building material in street—Temporary obstructions—Permit.—The right to place building material in the street exists only in cases of necessity and after the taking of due precautions not to injure any person lawfully using the street. Neither the person erecting the building, nor the city itself, can escape liability simply by the issuance of a permit to place building materials upon the street. Senhenn v. City of Evansville, 140 Ind. 675; City of Indianaplis v. Doherty, 71 Ind. 5.

Same.—A city may permit a temporary obstruction of portions of a street by building materials when it may be necessary to do so in the erection of buildings; but the city must see that proper care is used to prevent injuries, or it will be liable for damages resulting from such obstructions. Wood v. Mears, 12 Ind. 515; City of Indianapolis v. Doherty, 71 Ind. 5.

The privilege given by a city to deposit building material in a street may be revoked by the council at any time, and the material caused to be removed, and a nuisance created thereby abated. City of Indianapolis v. Miller, 27 Ind. 394.

The power of the common council to authorize the obstruction of streets and alleys with building materials is legislative in its character, and can only be exercised by an ordinance passed under the formalities required by law. City of Indianapolis v. Miller, 27 Ind. 394.

A building permit which requires the party to whom it is issued to protect the public from the dangers of the obstructions authorized by the permit, does not relieve the city of the duty of exercising such reasonable diligence as the circumstances require to prevent the street from being occupied in such way as to endanger passers-by in their use of it in all proper ways. Cleveland v. King, 132 U. S. 295.

Bridges—Duties—Liabilities.—It is the duty of cities to keep bridges and crossing places of streams within the city in good repair, no matter by whom such bridges are constructed. A bridge on a street, and necessary to the legitimate use of the street, is a part of the street itself, and the city is as much bound to keep it in a reasonably safe condition for use as any other part of the street. City of Goshen v. Myers, 119 Ind. 196; Trout v. City of Elkhart, 12 App. 343; City of New Albany v. Iron, etc., Co., 141 Ind. 500; Board, etc., v. City of Washington, 141 Ind. 187; City of Wabash v. Carver, 129 Ind. 552; City of Logansport v. Justice, 74 Ind. 379; Lowrey v. City of Delphi, 55 Ind. 250; Board, etc., v. Washington Township, 121 Ind. 379; Spicer v. Board, etc., 126 Ind. 369; Town of Boswell v. Wakley, 149 Ind. 64; Elliott Roads and Streets, pp. 44, 45; 2 Beach Pub. Corp., § 1475; 2 Dillon Munic. Corp., § 728.

Municipalities are liable for negligence of officers in construction and repair of bridges, culverts, etc., even if counties are not. Town of Boswell v. Wakley, 149 Ind. 64; Board, etc., v. Bonebrake, 146 Ind. 311; Bonebrake v. Board, etc., 141 Ind. 62; Board, etc., v. Allman, 142 Ind. 573. See Elliott Roads and Streets, pp. 40, 41.

Negligence—Notice.—The rule of liability as to bridges is the same as to streets. Actual or constructive notice that the bridge is out of repair will render the city liable for damages to one who suffers injury without fault. Elliott Roads and Streets, p. 50.

County bridge—Acceptance by city.—A bridge constitutes a part of the highway upon which it is situate, and a city, by taking charge of and improving a highway, accepts and becomes charged with the maintenance of a bridge constructed thereon by the county. City of Goshen v. Meyers, 119 Ind. 196; Elliott Roads and Streets, p. 46; 2 Beach Pub. Corp., § 1475.

Bridges in cities and towns.—All bridges, the estimated cost of which shall exceed five hundred dollars, to be built within the corporate limits of any city or town within this state, shall be built by the board of county commissioners in the same manner and paid for out of the same funds that other bridges without such corporate limits of such town or city are by law built and paid for. R. S. 1894, § 3283.

Bridges in cities and towns—Who may build.—While the act of 1885 (R. S. 1894, § 3283), imposes the duty of constructing bridges in towns and cities in certain cases

upon the board of commissioners, still this act does not withdraw all power from towns and cities to build bridges, in such cases, when they deem it proper to do so. City of New Albany v. Iron, etc., Co., 141 Ind. 500.

Same—City—Contract ultra vires—Estoppel.—Where a city, without taking any steps to have the county commissioners build a bridge, procured a bridge to be built, and the contractor entered into the contract and constructed the bridge in good faith, the city can not set up in defense of the payment of the price therefor that its action in executing the contract and procuring the construction of the bridge was *ultra vires*. City of New Albany v. Iron, etc., Co., 141 Ind. 500.

Same—County commissioners—Mandamus.—The said act of 1885 (R. S. 1894, § 3283), authorizing county commissioners to build bridges within the limits of towns and cities, when the estimated cost shall exceed $500, does not confer power upon cities by mandate or otherwise to force the county board to build a bridge at any point deemed desirable or convenient by the city government. That must be left to the sound discretion of the commissioners, except in cases of extraordinary public necessity. And even if a public necessity should be shown for the bridge, it is the judgment of the board and not that of the city authorities which is to determine what kind of a bridge shall be built. Plans and specifications prepared and approved by the city can have no control over the action of the board. Board, etc., v. City of Washington, 141 Ind. 187.

Same—Duty of city to repair—Control.—Said act of 1885, which makes it the duty of boards of county commissioners to build all bridges within the corporate limits of any city or town within the state, the estimated cost of which exceeds $500, does not purport to in any other manner interfere with the absolute control of the city over the bridges, nor does it relieve cities from the duty of keeping them in repair. City of Wabash v. Carver, 129 Ind. 552.

Crossing bridge with a traction engine—Negligence.—In an action by an administrator for the death of his decedent, caused by a defective bridge, the general averment that such decedent was without fault is not overcome by specific averments showing that he attempted to cross the said bridge with a traction steam engine with water tank and threshing machine attached. City of Wabash v. Carver, 129 Ind. 552.

Defective condition of bridge—Presumption of notice.—Notice to a city of the defective condition of a bridge therein will be presumed from the continuation of such defect a sufficient length of time for the officers of such city to have had an opportunity to learn of such defect. City of Logansport v. Justice, 74 Ind. 378.

Wabash and Erie canal—Bridge.—A city is bound to keep in repair a bridge across a canal extending through the city, when a bridge is a part of the highway within the city limits. Lowrey, etc., v. City of Delphi, 55 Ind. 250; Board, etc., v. Ft. Wayne, etc., Co., 17 App. 36. See Elliott Roads and Streets, pp. 44, 45; and Common Council v. McClure, 2 Ind. 147.

But it is the duty of the successors of the state in the ownership of the canal to construct and maintain state and county road bridges over the canal. Board, etc., v. Ft. Wayne, etc., Co., 17 App. 36.

Bridge outside but adjoining town.—A bridge outside the corporate limits, connected with a free gravel road and constructed by the county, does not, by the fact that it leads up to and joins a street at the corporate line of the town, become a town bridge. The town is excluded from the control of a bridge so situated, the right of control being vested in the county, and the town in such case is not chargeable with the duty of maintaining the bridge. Board, etc., v. Washington Tp., 121 Ind. 379.

City's negligence—Contributory negligence.—The negligence of a city in not repairing a bridge will not relieve one about to cross a bridge from using due care. A person must use due care in driving upon a bridge, as well as in driving after he is upon the bridge. Riest v. City of Goshen, 42 Ind. 339.

Defective bridge—Assumed risk—Recovery.—If one knows of a danger (a defective bridge), and yet voluntarily encounters it, when, on account of darkness or other hin-

dering causes, he knows he can not see and avoid it, he takes the risk upon himself, and, if injured, can not recover damages therefor. Trout v. City of Elkhart, 12 App. 343; Riest v. City of Elkhart, 42 Ind. 343.

Decay of timbers—Notice.—A city is chargeable with knowledge of the natural tendency of timber to decay, and it is its duty to use ordinary care to detect and guard against the same. City of Indianapolis v. Scott, 72 Ind. 196.

One who does not know of a defect in a bridge is not guilty of negligence in passing over it because he has no business requiring him to do so. Board, etc., v. Bonebrake, 146 Ind. 311.

Same—Complaint.—Where the complaint in an action against a city alleged that a certain bridge in said city was out of repair, and the planking loose, etc., and that after the plaintiff had driven his horses upon the bridge with a loaded wagon, and was using due and reasonable care on his part to draw forward said load, the horses were injured through the defects in the bridge; the complaint was bad on demurrer, because its allegations did not show that the plaintiff used due care in driving upon the bridge, or that he was ignorant of the condition of the bridge, and because there was no general averment that the injury occurred without his fault. Riest v. City of Goshen, 42 Ind. 339.

Dangerous excavations—Notice.—Where a city, while constructing a bridge, made an excavation in the bed of a shallow stream where it was crossed by a street, and constructed a levee from the bank to the pit, and, knowing that the children of persons residing near were accustomed to play in the vicinity, left it, in the absence of workmen, without safeguards of any kind, by reason of which a child five years old, while at play, without any fault upon the part of its parents, fell into the pit and was drowned, it was liable in an action for damages. City of Indianapolis v. Emmelman, 108 Ind. 530, 535.

Safety of stream prior to excavation—Evidence.—Where, on the trial of the action, the mother testified to the general character of the stream and to its comparative safety for children before the excavation was made therein, further testimony that she had never, before the death of her child, heard of any one being drowned in the stream, is admissible. City of Indianapolis v. Emmelman, 108 Ind. 530.

Bridge at state line—Purchase by city.—That any city of this or an adjoining state is hereby authorized to purchase the shares of stock in any bridge company or corporation owning a bridge across any stream forming the boundary line between this and an adjoining state, where either terminus of such bridge is within or adjoining such city; and all purchases of such shares of stock heretofore made by any such city are hereby confirmed and made legal; and in case any city shall have heretofore purchased four-fifths of all the shares in any such bridge company or corporation, can not agree with remaining owners as to the price to be paid therefor, or can not, for any cause, obtain from such owners a valid title thereto, such city may condemn and appropriate such shares for public use, and all the assessments therefor shall be made by the city commissioners of such city. And upon such purchase of all the shares of stock as aforesaid, or upon condemnation and appropriation as aforesaid, the title to such bridge and the real and personal property of such company or corporation shall vest in such city, and such bridge and the real and personal property aforesaid shall be the public property of such city, and shall not be subject to taxation while owned by any such city; and such bridge shall be a public highway, free to all persons and vehicles, subject to such rules and regulations as may be passed by such city for the good government and protection and use of the same, and such fines for violation or neglect of any of the rules and regulations not exceeding $100, as the city may deem proper. R. S. 1894, § 4671.

Special verdict.—Insufficiency of.—In an action for tort, for failure of the city to keep a certain one of its streets in reasonably safe condition for travel, a special verdict is not sufficient to entitle plaintiff to recover damages unless it show the injury to have been caused by some negligent act of the defendant, and without any contributory negligence of the plaintiff. A special verdict is not to be scrutinized unreasonably, but is to be construed reasonably and fairly, yet it must, without aid from intendment or inference other than those necessarily following, contain within itself all those facts essential to establish the case before judgment can be rendered upon it in favor of him on whom rests the burden of proof. City of Elwood v. Carpenter, 12 App. 459; Lyon v. City of Logansport, 9 App. 21; Becknell v. Hosier, 10 App. 5; Branson v. Studebaker, 133 Ind. 147.

Where the facts are specially found, the plaintiff can not recover in an action for tort, unless the fact of freedom from contributory negligence is expressly or inferentially found. Trout v. City of Elkhart, 12 App. 343.

Where, in an action for damages caused by a defective sidewalk, the plaintiff admits that she passed over the same place about a month before she was injured, and that she then saw the hole which afterward caused her injury, and knew at the time of the accident that the hole was there, there should be, in order to entitle her to recover, something more in the special verdict descriptive of her care and conduct than the mere fact that "she was walking slowly." City of Bluffton v. McAfee, 12 App. 490.

Same—Inferential fact—When not warranted.—Under the circumstances of the case, as stated in previous note, the inferential fact that she "was passing along and over said place on said sidewalk and crossing with due care and caution," having no basis in fact except that "she was walking slowly," is not sufficient. City of Bluffton v. McAfee, 12 App. 490.

Same—Contributory negligence.—A finding that plaintiff, who sues for personal injuries caused by a defective sidewalk, "walked with ordinary care, and at her ordinary gait," is insufficient to show that she was free from contributory negligence. McQueen v. City of Elkhart, 14 App. 671.

Special verdict—Contributory negligence.—Where in a suit for damages against a city for personal injuries the special verdict of the jury contains no finding that plaintiff's decedent was free from contributory negligence, but contains a finding that the manner in which he was driving his horse at the time of the accident did not contribute to his injury, and the finding contains facts from which freedom from contributory negligence can be found, the judgment for defendant on the verdict is error. Ballard v. Citizens', etc., R. Co., 18 App. 522.

Special findings—General verdict.—Where it is found by answers to interrogatories that the city had no notice or knowledge of the defect in the sidewalk and the jury returns a general verdict in favor of the plaintiff there is not such irreconcilable conflict as to entitle the defendant to judgment on the interrogatories. City of Huntington v. Burke, 21 App. 655.

Contributory negligence a good defense.—In an action for injuries caused by a defective street, the facts found must show affirmatively that plaintiff was free from contributory negligence, to entitle her to judgment. Trout v. City of Elkhart, 12 App. 344.

But see Act of 1899, which provides that it shall not be necessary for the plaintiff to allege or prove the want of contributory negligence, but that contributory negligence shall be a matter of defense. Acts 1899, pp. 58, 59.

Defective sidewalk—Contributory negligence—Evidence.—Evidence that there was an electric arc lamp in a street 150 feet distant on each side, from the place of an accident to plaintiff on a defective sidewalk, and that the only obstruction to light was a row of deciduous trees at the outer edge of the sidewalk, is insufficient to require a finding that the place was sufficiently lighted to enable plaintiff to see the condition of the walk. City of Ft. Wayne v. Durnell, 13 App. 669.

Contributory negligence—Special verdict—Insufficiency.—Where the jury find, in an action for injuries sustained by falling into a ditch in a street, that the plaintiff was walking slowly and carefully when she was injured; that she knew that the ditch was in the street; that the night was dark; that she had reasonably good eye-sight; but there is no finding that she was using her sense of sight, or that she had the ditch in mind at the time, nor that she was looking out for the ditch or paying any attention to where she was going, nor is the inferential fact found that she was, under the circumstances, using due care and caution at the time she was injured, the court can not adjudge, as a matter of law, that plaintiff was entirely free from contributory negligence. City of Bloomington v. Rogers, 13 App. 121.

When two inferences may be easily drawn from the facts found relative to contributory negligence, then the ultimate inference of contributory negligence or freedom from such negligence is a question of fact for the jury. City of Bloomington v. Rogers, 13 App. 121.

Measure of damages—Loss of business—Evidence.—In an action by a physician against a city, to recover damages for a personal injury received on account of a defective bridge, proof of his professional earnings before and after the injury is admissible in evidence under a special allegation of damages on account of loss of business, not as a basis or measure of damages, but as aiding the jury to estimate the compensation to be awarded. City of Logansport v. Justice, 74 Ind. 378; Carthage Turnpike Co. v. Andrews, 102 Ind. 138; City of Indianapolis v. Gaston, 58 Ind. 224; City of Terre Haute v. Hudnut, 112 Ind. 542, 556.

Remedy over, when allowed.—If a municipal corporation be held liable for damages sustained in consequence of the unsafe condition of its streets or sidewalks, it has a remedy over against the person by whose act or conduct the street or sidewalk was rendered unsafe, unless the corporation was a wrong-doer as between itself and the author of the nuisance. Catterlin v. City of Frankfort, 79 Ind. 547, 548; McNaughton v. City of Elkhart, 85 Ind. 384, 391; City of Elkhart v. Wickwire, 87 Ind. 77, 80; Town of Centerville v. Woods, 57 Ind. 192; 2 Dillon Munic. Corp., 4th ed., §§ 1035, 1036; Elliott Roads and Streets, p. 540.

If a person wrongfully obstructs or renders a street defective, such person will be liable to the municipal corporation for the expense of removing the obstruction or the repair of the street. Town of Centerville v. Woods, 57 Ind. 192.

Notice to defend—Effect.—Where the person who wrongfully or negligently causes a public street to be made unsafe for travel is notified of an action against the municipal corporation, instituted by one who has suffered injury because of such wrongful and negligent act, the judgment will be conclusive against him as to the questions adjudicated in that action. McNaughton v. City of Elkhart, 85 Ind. 384, 391; City of Elkhart v. Wickwire, 87 Ind. 77, 80; Midland R. Co. v. Wilcox, 122 Ind. 84, 98.

Defendant, when not estopped.—In such a case, the defendant is not estopped by the judgment against the corporation from showing that he was under no obligation to keep the street in safe condition, and that it was not through his fault that the accident happened. Catterlin v. City of Frankfort, 79 Ind. 547, 549.

For facts stated upon which defendant was held not liable on action over by the city, see City of Elkhart v. Wickwire, 87 Ind. 77.

Pleading—Contributory negligence.—In an action by a city corporation against the author of a nuisance, if the complaint does not show that the defendant had notice of the action against the corporation, it must allege that the injured person was free from negligence contributing to his injury. Catterlin v. City of Frankfort, 79 Ind. 547, 549.

Juror—Tax-payer incompetent.—In an action against a city for damages resulting from an injury caused by a defective street or sidewalk, the fact that a juror is a resi-

dent tax-payer of a city is cause for challenge. City of Goshen v. England, 119 Ind. 368; Town of Albion v. Hetrick, 90 Ind. 545; Hearn v. City of Greensburg, 51 Ind. 119; Board, etc., v. Loeb, 68 Ind. 29, 33.

Improvement of Streets—Fixing and Changing Grade.

Improvements—Jurisdiction—Discretionary power—Control of.—The municipal authorities are invested with the power of determining when improvements are necessary, and the courts can not control this discretionary power by injunction. The common councils have exclusive original jurisdiction. City of Kokomo v. Mahan, 100 Ind. 242, 244; Leeds v. City of Richmond, 102 Ind. 372, 377; Town of Sullivan v. Phillips, 110 Ind. 320, 321; Weaver v. Templin, 113 Ind. 298, 299; Bass v. City of Ft. Wayne, 121 Ind. 389, 392; Mayor, etc., v. Roberts, 34 Ind. 471; Braden v. McNutt, 114 Ind. 214; Tufts v. State, 119 Ind. 232; Jackson v. Smith, 120 Ind. 520; Stein v. City of Lafayette, 6 App. 414; Elliott Roads and Streets, p. 338; 1 Dillon Munic. Corp., 4th ed., §§ 94, 95, 112, 379, 475; 2 Dillon Munic. Corp., 4th ed., §§ 832, 857, 934, 950.

Continuing authority to improve.—The authority to improve streets is a continuing one, and the corporate authorities may make a second or subsequent improvement, and collect the expense thereof from the adjoining lot-owners. City of Kokomo v. Mahan 100 Ind. 242, 244; Platter v. Board, etc., 103 Ind. 360, 370; Gavin v. Board, etc., 104 Ind. 201, 204; Macy v. City of Indianapolis, 17 Ind. 267.

The authorities of towns and cities have ample power to lay out, open, grade, regrade, level and pave or gravel streets and alleys, and to establish drains and sewers, culverts and embankments, whenever they are necessary for the improvement of such streets and alleys. City of Delphi v. Evans, 36 Ind. 90.

Jurisdiction—Irregularities.—Where the whole subject-matter of local improvement, and the assessments to be made in aid thereof, is conferred upon municipal corporations having charge of, and exclusive original jurisdiction over, such improvement, as in this state, the proceedings of such a corporation will not be held void where there has been an attempt to comply with a statutory requirement, though such attempt does not amount to a strict compliance with the statute, if the corporation, in addition to its jurisdiction over the subject-matter, acquires jurisdiction over the persons to be affected. Ricketts v. Spraker, 77 Ind. 371, 376; Argo v. Barthand, 80 Ind. 63, 66; Strieb v. Cox, 111 Ind. 299, 304; Ross v. Stackhouse, 114 Ind. 200, 204; Prezinger v. Harness, 114 Ind. 491, 497; City of Elkhart v. Wickwire, 121 Ind. 331, 337; Barber, etc., Co. v. Edgerton, 125 Ind. 455, 463; Jackson v. Smith, 120 Ind. 520. See Willard v. Albertson, App. Ct., No. 2785, May 24, 1899.

Street within city—Presumption—Proof.—Where an improvement has been made and property benefited, the property owner, seeking afterwards to show that the way improved did not belong to the city, must show that it was not acquired by condemnation, dedication, purchase or prescription. Jackson v. Smith, 120 Ind. 520. See Lewis v. Albertson, App. Ct., May 24, 1899.

Statute, when strictly construed.—A city or town can not compel abutting landowners to pay for street improvements unless empowered so to do by statute; and when so empowered, the statute will be strictly construed. Town of Marion v. Skillman, 127 Ind. 130, 140.

Statute, when liberally construed.—The power to make street improvements, to be paid for out of the city or town treasury, is liberally construed; and it is the exercise of a corporate function that is implied from the general words of the act of incorporation. Town of Marion v. Skillman, 127 Ind. 130, 140.

Estoppel.—A property owner can not quietly permit money to be expended on work which benefits his land, under a contract with the city, and then deny the power of the city to make the contract. Unless the proceedings under which a street improvement is being made are totally void, a property owner who stands by, and, without objection,

receives the benefit of the work, is estopped thereafter to question the legality of the proceedings. New Albany, etc., Co. v. Crumbo, 10 App. 360; City of Logansport v. Uhl, 99 Ind. 531; City of Lafayette v. Fowler, 34 Ind. 140; City of Evansville v. Pfisterer, 34 Ind. 36; McCoy v. Able, 131 Ind. 417; Taber v. Ferguson, 109 Ind. 227; Ross v. Stackhouse, 114 Ind. 200; Jenkins v. Stetler, 118 Ind. 275; Palmer v. Stumph, 29 Ind. 329; Powers v. Town of New Haven, 120 Ind. 185; Lewis v. Albertson, App. Ct., May 24, 1899; Willard v. Albertson, App. Ct., No. 2720, May 24, 1899; Elliott Roads and Streets, pp. 419, 420.

A request by a property owner for action by council on a contract is an affirmance of the contract. Johnson v. Allen, 62 Ind. 57.

Consequential damages—Liability.—A municipal corporation is not liable for consequential injuries resulting from the improvement of a public street or alley in a careful and skillful manner, but it is liable for negligence, either in devising the plans for such improvement, or in executing the same; and it is also liable for consequential damages resulting from a change of an established grade, whether it be guilty of negligence or not. City of New Albany v. Lines, 21 App. 380; Weis v. City of Madison, 75 Ind. 241, 245; Cummins v. City of Seymour, 79 Ind. 491, 493; City of Evansville v. Decker, 84 Ind. 325, 328; Platter v. City of Seymour, 86 Ind. 323, 325; City of Crawfordsville v. Bond, 96 Ind. 236, 241; City of Kokomo v. Mahan, 100 Ind. 242, 246; City of North Vernon v. Voegler, 103 Ind. 314, 317; City of Lafayette v. Wortman, 107 Ind. 404, 407; Rice v. City of Evansville, 108 Ind. 7, 11; Town of Sullivan v. Phillips, 110 Ind. 320, 322; City of Lafayette v. Nagle, 113 Ind. 425, 426; Davis v. City of Crawfordsville, 119 Ind. 1, 2; City of Anderson v. Bain, 120 Ind. 254, 261; Burkam v. Ohio, etc., R. Co., 122 Ind. 344, 346; City of Jeffersonville v. Meyers, 2 App. 532, 538; Stein v. City of Lafayette, 6 App. 414, 416; City of Aurora v. Fox, 78 Ind. 1; City of Delphi v. Evans, 36 Ind. 90; Macy v. City of Indianapolis, 17 Ind. 267; Snyder v. President and Trustees, 6 Ind. 237; City of Lafayette v. Bush, 19 Ind. 326; City of Vincennes v. Richards, 23 Ind. 381; City of Richmond v. Test, 18 App. 482; Elliott Roads and Streets, p. 350; 2 Dillon Munic. Corp., 4th ed., §§ 989, 990 and notes.

Consequential damages resulting from the grading of a public street do not constitute a taking or appropriation of property, within the meaning of the constitution. Weis v. City of Madison, 75 Ind. 241, 245; City of Kokomo v. Mahan, 100 Ind. 242, 246; City of Lafayette v. Bush, 19 Ind. 326; City of Delphi v. Evans, 36 Ind. 90; City of Lafayette v. Spencer, 14 Ind. 399.

Where the land of a citizen is not actually appropriated in the making of improvements, the owner is not entitled to have the damages first assessed and tendered; but when it becomes necessary in making such improvements to appropriate and use the real estate of a citizen his damages must be first assessed and tendered. City of Delphi v. Evans, 36 Ind. 90.

Negligence—Damages.—Municipal corporations are responsible to the same extent, and in the same manner, as natural persons, for injuries occasioned by negligence or unskillfulness in the construction of work for the benefit of the corporation. Ross v. City of Madison, 1 Ind. 281; City of North Vernon v. Voegler, 103 Ind. 314; City of Madison v. Ross, 3 Ind. 236; City of Logansport v. Wright, 25 Ind. 512; City of Indianapolis v. Huffer, 30 Ind. 235.

Damages—Successive actions.—In an action for injury to real estate caused by the negligence of corporate officers in constructing a public work of a permanent character, as the grading and improvement of a street, all damages, past and prospective, must be recovered in one suit, and for fresh damages resulting from the original wrong, a second action can not be maintained. City of North Vernon v. Voegler, 103 Ind. 314; Stein v. City of Lafayette, 6 App. 414; Porter v. Midland R. Co., 125 Ind. 476; City of Lafayette v. Nagle, 113 Ind. 425.

But the wrong is a continuing one for which successive actions may be maintained by successive owners who suffer damage thereby when the improvement negligently

made is not of a permanent character. Where a city constructs drains in its streets and alleys which collect surface water and discharge it in a body upon an adjacent lot, the wrong is a continuing one, and successive actions may be maintained. City of New Albany v. Lines, 21 App. 380.

Inconvenience.—A city can not be held liable to an adjoining property owner for damages resulting from inconveniences caused by the improvement of the street, when the work is done with reasonable care and dispatch. Cummins v. City of Seymour, 79 Ind. 491.

Plans—Error of judgment—Negligence.—A municipal corporation is not liable for mere errors of judgment as to the plan of a public improvement, but is responsible for negligence in devising the plan of an improvement, as well as for negligence in executing the work. Weis v. City of Madison, 75 Ind. 241, 250; Cummins v. City of Seymour, 79 Ind. 491, 494; City of Evansville v. Decker, 84 Ind. 325, 326; City of North Vernon v. Voegler, 103 Ind. 314, 316; Rice v. City of Evansville, 108 Ind. 7, 8; City of Terre Haute v. Hudnut, 112 Ind, 542, 544; City of Valparaiso v. Adams, 123 Ind. 250; City of New Albany v. Ray, 3 App. 321; City of Peru v. Brown, 10 App. 597; City of Indianapolis v. Huffer, 30 Ind. 235; City of Seymour v. Cummins, 119 Ind. 148; Elliott Roads and Streets, pp. 339, 354.

Defective plan—Inference of negligence.—Negligence will not be inferred, as a matter of law, from the fact that culverts are defective in plan, and become obstructed and filled up with dirt and sand. City of Peru v. Brown, 10 App. 597.

If the plan adopted by a city for the improvement of the street is so defective that the adjoining property is injured by being made inaccessible, or rendered unhealthy on account of stagnant water, the city will be liable for damages. City of Seymour v. Cummins, 119 Ind. 148.

Plans—Specifications—Presumption.—It is the statutory duty of the city civil engineer to prepare plans and specifications of proposed street improvements, and it will be presumed that he prepares them in proper time and in conformity to the ordinances. Smith v. Duncan, 77 Ind. 92, questioned; Taber v. Grafmiller, 109 Ind. 206, 208; Taber v. Ferguson, 109 Ind. 227.

Such plans and specifications are competent evidence in a suit to collect a street improvement assessment. Taber v. Ferguson, 109 Ind. 227.

Adoption of plan.—Where the common council of a city directed that a plan for the improvement of S. street be prepared, which was accordingly done and reported, and the action of the council thereon appeared on its record thus: "The survey and plan for the improvement of S. street by J. is accepted," an adoption of the plan was sufficiently shown. City of Aurora v. Fox, 78 Ind. 1, 10.

Street improvements—Negligence.—Where an incorporated town or city undertakes the improvement of its public streets, and does the work negligently or unskillfully, it will be liable in damages to an abutting lot-owner for such injuries to his lot and premises as result directly from its negligence or unskillfulness in the improvement of such streets. Town of Princeton v. Gieske, 93 Ind. 102, 105.

An ordinance of a municipal corporation directing the construction of a work within the general scope of its powers is a judicial act, for which the corporation is not responsible, but the execution of the work is a ministerial act, and the corporation is responsible that it is done in a safe and skillful manner. City of Logansport v. Wright, 25 Ind. 512.

Where an incorporated town itself undertakes the improvement of its streets, and it is sued by an abutting proprietor to recover damages resulting from its negligence in doing the work, it is no defense to the action that the improvement of the streets enhanced the market value of the plaintiff's property; and, therefore, evidence offered in such a case of such increased market value was incompetent and was properly excluded. Town of Martinsville v. Shirley, 84 Ind. 546, 549.

Nuisance, when not abatable.—The authority of the common council of a city, as to the manner of improving streets and alleys, being an agency of the state in the exercise of legislative power, can not be controlled by the courts, and where the improvement is such that it cuts off ingress and egress to and from property, the nuisance is one which can not be abated, and there can only be one recovery for damages present and prospective, and that by the owner of the property when the injury occurred. Stein v. City of Lafayette, 6 App. 414, 421.

Street improvement—Liability.—Sections 3624 to 3628, R. S. 1894 (*post*, §§ 219-223), apply only when a city seeks to improve its streets at the expense of the abutting owners, and they do not limit the general powers over streets conferred by other provisions of law; and when a city, in the exercise of its general powers, and at the expense of its treasury, grades a street, it is not liable to adjoining proprietors for consequential injuries merely because it fails to comply with the requirements of those sections. City of Delphi v. Evans, 36 Ind. 90, criticised; City of Aurora v. Fox, 78 Ind. 1, 4.

Contractor—Possession of street for improvement—Interference—Damages.—When a city enters into a contract for the improvement of a street, it grants to the contractor, and those acting under him, the right to take possession of the street for the purpose of making the improvement; and, thereafter, the city has no right to interfere with the legitimate prosecution of the work, and any interference by it, resulting in injury or damage to the contractor or sub-contractors, it must answer for. City of Dunkirk v. Wallace, 19 App. 298.

Where a contractor is in possession of street under a contract with the city for its improvement, and is prosecuting the work, and city retakes possession of the street for the purpose of constructing a sewer therein, and after the construction of the sewer turns possession of the street over to another contractor under a new contract for its improvement, the city must pay the first contractor for the work done by him under his contract prior to the retaking of possession by the city for the construction of the sewer. City of Dunkirk v. Wallace, 19 App. 298.

Councilman—Ordinance.—The consent of a councilman can not affect the force of an ordinance directing the improvement of a street enacted by the municipal legislature, or give a right to fix the lines of a street and complete an unfinished contract. Sims v. City of Frankfort, 79 Ind. 446.

Improvements out of repair.—A city is liable, if it negligently and knowingly permit any public improvement to become out of repair, for the damages ensuing. Stein v. City of Lafayette, 6 App. 414, 417.

Where the gist of an action stated in the complaint is negligence of the municipality in failing to keep a drain or open ditch in repair, by carelessly and negligently allowing the same to fill up with sand and other obstructions, and by building across the drain approaches to adjoining alleys without placing drains under the approaches, by reason of which obstructions the water overflowed the drain, and flowed into plaintiff's cellar, keeping it damp and unhealthful, injuring the foundation of the house, and destroying large quantities of personal property mentioned, the complaint states a cause of action. City of Valparaiso v. Cartwright, 8 App. 429, 430.

In such case, where the facts found by the special verdict were, substantially, those alleged in the complaint, and, in addition, that the ditch was so defectively constructed as not to be adequate to carry off the water, the special verdict is sufficient to support the theory of the complaint, and plaintiff is entitled to recover. City of Valparaiso v. Cartwright, 8 App. 429, 430.

Earth taken from street.—In the improvement of a street the earth taken from one portion thereof may be used to fill another portion, but earth can not be taken from a street that is being improved and used on a street not being improved. City of Delphi v. Evans, 36 Ind. 90; City of Aurora v. Fox, 78 Ind. 1; Musselman v. Manly, 42 Ind. 462.

Grade and change of grade.—Cities and towns are not liable for consequential damages necessarily caused in grading or changing the grade of a street, except they are made liable by some statute, the constitution or by the charter of incorporation. City of Valparaiso v. Adams, 123 Ind. 250; Snyder v. Town of Rockport, 6 Ind. 237; Macy v. City of Indianapolis, 17 Ind. 267; City of Seymour v. Cummins, 119 Ind. 148; Baker v. Town of Shoals, 6 App. 319; City of Delphi v. Evans, 36 Ind. 90; City of Terre Haute v. Turner, 36 Ind. 522; Elliott Roads and Streets, p. 336; 2 Dillon Munic. Corp., 4th ed., §§ 989, 990.

A city is not liable for consequential damages caused by an original grading and improvement of its streets, unless the work be negligently performed, in which case it is liable for the injury caused by its negligence. City of Jeffersonville v. Myers, 2 App. 532; Davis v. City of Crawfordsville, 119 Ind. 1; City of Valparaiso v. Adams, 123 Ind. 250; City of Wabash v. Alber, 88 Ind. 428.

A city may not change a street grade legally established by it, without first assessing and paying, or tendering, the damages occasioned by such change, to the abutting property owner. City of Logansport v. Pollard, 50 Ind. 151; City of Kokomo v. Mahan, 100 Ind. 242; City of Lafayette v. Wortman, 107 Ind. 404; City of Huntington v. Griffith, 142 Ind. 280; Keehn v. McGillicuddy, 15 App. 580; Stein v. City of Lafayette, 6 App. 414; City of Anderson v. Bain, 120 Ind. 254.

Note.—For fuller collection of authorities on fixing and changing grade of streets see *ante*, § 91.

Good complaint and instruction.—In an action against a municipality and others for damages for injury to property of the plaintiffs alleged to have resulted from the building of an embankment, which raised the established grade of the street, the complaint alleged that the defendants wrongfully and unlawfully constructed, and caused to be constructed, the embankment, etc. The above allegation was sufficient to charge the city with liability, and it was not necessary to aver that the alleged wrongful action of the city was authorized by its common council. An instruction to the jury that the verdict might be against the city alone or against the other defendants alone, if the evidence should so warrant, was proper. City of Jeffersonville v. Myers, 2 App. 532, 535.

Abutting owner's consent—Waiver.—In such an action, the plaintiffs could not recover damages if they consented to the raising of the grade of the street, unless the damages grew out of the unskillful manner of doing the work, and not on account of raising the grade. If the plaintiffs were induced to waive objection to the progress of the work on the condition that certain expenditures should be made in building walls and otherwise doing the work in a specific manner, and the work was not done as promised, the measure of damages would be the damage sustained on account of the work not being done as promised. City of Jeffersonville v. Myers, 2 App. 532, 539.

Drainage—Drainage commissioners.—The cities of the state have exclusive jurisdiction of the matter of drainage within their limits, and there is no authority for the construction of drains in cities by drainage commissioners under the direction of the circuit court. Anderson v. Endicutt, 101 Ind. 539; Romaine v. Judson, 128 Ind. 403.

Drainage assessment—Collateral attack.—The jurisdiction of the circuit court to establish a ditch, under the drainage law of 1881, partly within the limits of an incorporated city, and levy benefit assessments upon city property, can not be questioned by a property owner in a suit to collect an assessment. State v. Jackson, 118 Ind. 553.

Surface water—Injury by.—A city is not liable for injuries consequent merely upon the careful and skillful improvement of its streets, whereby surface water is thrown upon private property, but it is liable if it collect the water in a channel and pour it upon another's land, within or without its corporate boundaries. Weis v. City of Madison, 75 Ind. 241, 248; City of Evansville v. Decker, 84 Ind. 325, 328; City of North Vernon v. Voegler, 89 Ind. 77, 79; City of Crawfordsville v. Bond, 96 Ind. 236, 242;

Davis v. City of Crawfordsville, 119 Ind. 1, 2; Town of Monticello v. Fox, 3 App. 481, 488; City of New Albany v. Ray, 3 App. 321; Patoka Township v. Hopkins, 131 Ind. 142; Rice v. City of Evansville, 108 Ind. 7; Stein v. City of Lafayette, 6 App, 414; Elliott Roads and Streets, pp. 340, 363.

Natural water-courses—Obstruction.—If a city in the improvement of streets obstructs a natural water-course, it is liable to the persons damaged. Weis v. City of Madison, 75 Ind. 241; Hebron, etc., Co, v. Harvey, 90 Ind. 192; Elliott Roads and Streets, p. 361.

Ravines through which surface water occasionally flows are not natural water-courses. To constitute a natural water-course there must be a bed and banks and evidences of a permanent stream of running water. Rice v. City of Evansville, 108 Ind. 7; Board, etc., v. Bailey, 122 Ind. 46; Elliott Roads and Streets, p. 361.

Drainage—Contributory negligence.—A municipal corporation has no right to construct a ditch in such a manner as to collect surface water into a channel and pour it upon lands where it is not accustomed to run, and in a complaint for such injury it is not necessary to aver that the plaintiff was without fault. City of North Vernon v. Voegler, 89 Ind. 77, 79.

Embankments and outlets.—A city may divert surface water from the public highways, and to do so may build embankments or enlarge outlets. Weis v. City of Madison, 75 Ind. 241.

Drainage—Outlet.—Where, by its system of improvement and drainage, a city has accumulated a large flow of water upon a particular street, it is its duty to provide for the escape of the water without damage to adjoining property. City of Indianapolis v. Lawyer, 38 Ind. 348; City of Crawfordsville v. Bond, 96 Ind. 236; City of Ft. Wayne v. Coombs, 107 Ind. 75.

Enjoining street improvement.—Before the courts will, at the suit of an abutting land-owner, enjoin municipal authorities from making street improvements, at the public expense at least, it must be shown that there has been a clear invasion of the rights of such complaining land-owner. Town of Marion v. Skillman, 127 Ind. 130, 139.

Irreparable injury necessary.—Before an injunction will be granted, in such an instance, it must be shown that unless granted the abutting lot-owner would suffer irreparable injury. Town of Marion v. Skillman, 127 Ind. 130, 141.

Injunction—Complaint—Answer.—In an action for injunction by a lot-owner against a city, where the complaint alleged that plaintiff's lot had been improved with reference to the recognized line of the street as laid out and used for more than twenty years, and while the municipal officers stood by and saw such improvement made without objection, and that the city was about to sever from the side of the lot a strip of ground claimed as a part of the street, without an assessment and tender of damages, an answer that an ordinance to improve the street was duly passed, notice given, proposals received and a contract made for grading and graveling the street, and that, upon a survey by the proper officer, the strip of ground appeared to be a part of the street properly dedicated to the public use and platted in the original plat, was sufficient on demurrer. Sims v. City of Frankfort, 79 Ind. 446.

Quieting title—Void in part—Tender.—One who seeks to quiet title to land sold for an assessment for drainage is not entitled to a general decree while any part of the assessment is due. One who would save his title must pay, or tender payment of, the lien. Unless the assessment is wholly void he is not entitled to a general decree. Jackson v. Smith, 120 Ind. 520, 524; Montgomery v. Wasem, 116 Ind. 343.

An assessment for construction of sewer drainage is within the subject of the jurisdiction of the common council, and can not be declared void in a collateral attack to quiet title to land sold for the assessment, unless it appears there was no authority over the particular improvement ordered or the particular property assessed. Jackson v. Smith, 120 Ind. 520, 523.

Abutting Owners—Title—Rights—Liabilities—Duties.

Abutting owner—Title—Fee.—While the dedication of the highway is to the public, yet, through the same act of dedication, private rights are conferred which the donor can not retake, nor the legislature impair, except to take for a public use, upon compensation to the owner. A conveyance of land bounded by a street conveys the fee to the center of the street. The right of the owner of the abutting lot is a property right. Ross v. Thompson, 78 Ind. 90, 94; State v. Berdetta, 73 Ind. 185; Cummins v. City of Seymour, 79 Ind. 491; Indiana, etc., R. Co. v. Eberle, 110 Ind. 542; City of Lafayette v. Nagel, 113 Ind. 425; Burkam v. Ohio, etc., R. Co., 122 Ind. 344; Cox v. Louisville, etc., R. Co., 48 Ind. 178; City of Logansport v. Shirk, 88 Ind. 563; Lostutter v. City of Aurora, 126 Ind. 436, 438; Kincaid v. Indianapolis, etc., Co., 124 Ind. 577; Egbert v. Lake Shore, etc., R. Co., 6 App. 350; Haslett v. New Albany, etc., R. Co., 7 App. 603; Town of Rensselaer v. Leopold, 106 Ind. 29; Terre Haute, etc., R. Co. v. Bissell, 108 Ind. 113, 116; Common Council, etc., v. Croas, 7 Ind. 9; Haynes v. Thomas, 7 Ind. 38; Tate v. Ohio, etc., R. Co., 7 Ind. 479; Brotzman v. Indianapolis, etc., R. Co., 9 Ind. 467; City of Indianapolis v. Kingsbury, 101 Ind. 200; City of Richmond v. Smith, 148 Ind. 294; Gaston v. Bailey, App. Ct., May 24, 1899; 2 Dillon Munic. Corp., 4th ed., §§ 587*b*, 656*a*, 656*b*; Elliott Roads and Streets, pp. 15, 112, 129.

Plat—Rights of lot-owners.—Purchasers of lots have the right to have all streets that are marked on the plat by which they purchased kept open as streets, and their rights are not confined to the part of the street in front of the lot so purchased by them. City of Indianapolis v. Kingsbury, 101 Ind. 200, 211; Decker v. Evansville, etc., R. Co., 133 Ind. 493.

The laying out of an addition to a town, recording the plat, and selling lots with reference to the adjoining streets and alleys, give to the proprietors of such lots a private right in such streets or alleys, distinct from the claim of the public, which even the legislature can not take away, unless to appropriate such streets or alleys to a public use. Common Council, etc., v. Croas, 7 Ind. 9; Haynes v. Thomas, 7 Ind. 38; Elliott Roads and Streets, p. 114.

By the making and recording of a town plat, the designation of streets, lanes and alleys on the plat gives to the public only an easement therein for such use as the public have a right to make of them; but the fee remains in the proprietor. Cox v. Louisville, etc., R. Co., 48 Ind. 178; Board, etc., v. Indianapolis, etc., Co., 134 Ind. 209.

Non-user of street.—Streets and alleys in towns and cities do not revert to the adjoining lot-owners because of non-user. The provisions of R. S. 1894, § 6759, respecting highways not opened and used within six years from the time of being laid out, do not apply to streets and alleys in cities. Common Council, etc., v. Croas, 7 Ind. 9.

Diverting street to another use.—A street can not be diverted from the use to which it was dedicated, and an additional burden can not be laid upon the property abutting on the street without lawful authority, and compensation paid or tendered. Lostutter v. City of Aurora, 126 Ind. 436.

Use for market—Injunction.—A city has no power to authorize the occupancy of a public street for market purposes. Such act would be the taking of the abutter's fee-simple right in the street for uses not authorized by law, and the city may be enjoined from doing so. City of Richmond v. Smith, 148 Ind. 294.

Adjoining property—Indianapolis.—The state, having laid out for its seat of government the town of Indianapolis, upon land donated by the United States for such purpose, and having made and filed maps thereof as required by law, vested in the town for the public use such rights and interests in the streets and alleys as would have been vested in it if a citizen proprietor had laid out the town in the same way; and the state's grantee in fee-simple of a lot by its number, abutting upon a public street, and his assignees, acquired such rights and interests in the street as would be conferred by a like conveyance from such a citizen proprietor of a town; that is, such grantee and

his assignees took the fee, subject to the public use, to the center line of such street. Terre Haute, etc., R. Co. v. Scott, 74 Ind. 29, 37.

Use of for storage—Obstruction.—A street may be used temporarily and in a reasonable manner, by an adjoining owner, for loading and unloading goods, and, perhaps, for other purposes, when such use is necessary, but he has no right to appropriate a portion of the highway as a stable yard or as a storage place for his drays or wagons when the same are not in use. Town of Ladoga v. Linn, 9 App. 15, 20.

Individual occupancy—Estoppel.—The mere occupancy of a street by an individual, without objection by the municipal authorities, creates no estoppel. City of Lawrenceburgh v. Wesler, 10 App. 153, 163; Cheek v. City of Aurora, 92 Ind. 107.

There can be no such thing as a permanent, rightful, private possession of a public street. State v. Berdetta, 73 Ind. 185, 189; Sims v. City of Frankfort, 79 Ind. 446, 451; Wolfe v. Town of Sullivan, 133 Ind. 331, 335; Pettis v. Johnson, 56 Ind. 139; Cheek v. City of Aurora, 92 Ind. 107.

Actions by citizens and lot-owners—Damages.—An action for damages can not be maintained by a private citizen, or an abutting lot-owner, against one who obstructs a public highway, unless such citizen or abutting lot-owner, by reason of such obstruction, has sustained some damage peculiar to himself, and not suffered by the public generally. Recovery in such case is limited to injury different in kind, and not simply in degree, from that suffered by the community in general. Dantzer v. Indianapolis, etc., R. Co., 141 Ind. 604; Waltman v. Rund, 94 Ind. 225; Dwenger v. Chicago, etc., R. Co., 98 Ind. 153; Indiana, etc., R. Co. v. Eberle, 110 Ind. 542; Fossion v. Landry, 123 Ind. 136; Cummins v. City of Seymour, 79 Ind. 491; Chicago, etc., R. Co. v. Eisert, 127 Ind. 156.

Actions for damages—Injunction.—When a lot-owner suffers damage different in kind from the public by reason of an obstruction in the street, he may maintain an action for damages, or suit for injunction in a proper case; he is entitled to remedies provided by law for the protection of rights in real property. See cases, *supra*, and Elliott Roads and Streets, pp. 536, 538; Cox v. Louisville, etc., R. Co., 48 Ind. 178; Pettis v. Johnson, 56 Ind. 139; Tate v. Ohio, etc., R. Co., 7 Ind. 479; Chicago, etc., R. Co. v. Eisert, 127 Ind. 156; City of Richmond v. Smith, 148 Ind. 294.

Obstructing alley—Dirt.—If dirt is dug up and removed from an alley in a city, thus rendering the alley impassable and causing injury to adjoining property, and no order or ordinance of the city has authorized the same, and it is not done under a contract with the city, an action by an adjoining property owner will lie for damages sustained by reason of such removal. Musselman v. Manly, 42 Ind. 462.

In a suit by the owner for invasion of his right that the street in front of his lot shall forever be kept open to its full width, he is entitled to nominal damages at least. Haynes v. Thomas, 7 Ind. 38.

Injunction by individual—Obstruction.—A private individual may maintain an injunction because of an obstruction of a public street, where such obstruction peculiarly affects him, although it does not affect the general public, if the damages are irreparable, such as affecting the free use of a residence, or an abutting lot, cutting off ingress or egress thereto, and endangering the property, life and health of persons residing thereon. Chicago, etc., R. Co. v. Eisert, 127 Ind. 156, 160.

Telephone conduits under sidewalk—Injunction.—A complaint by the abutting lot owner, for an injunction to prevent a telephone company from laying conduits for wires under the sidewalk, is bad on demurrer if it fails to allege that the owner of the abutting lot owns the fee in the walk or street, or that the walk or street was dedicated to public use by one who at the time owned the fee in both the street and the lot. The averment of present ownership of the fee must be directly made and not by way of recital. Erwin v. Central, etc., Co., 148 Ind. 365.

Right of abutting owner to dig trench in alley—Consent of municipal authorities—Ordinance prohibiting excavation.—An abutting property owner may dig a trench

in a public alley for the purpose of making a sewer connection without the consent of the municipal authorities, unless there is an ordinance to the contrary, and the existence of the ordinance must be made to appear by the party having the burden of proof. Zimmerman v. Baur, 11 App. 607.

Excavation in public alley for sewer—Violation of ordinance—Proximate cause of injury.—Where a trench is excavated in a public alley for the purpose of tapping a public sewer in violation of a city ordinance, one whose horse, in passing along the alley, steps into the excavation and is injured, can not recover therefor by reason of the violation of the ordinance, such breach of duty not being the proximate cause of the injury. Zimmerman v. Baur, 11 App. 607.

Excavations by lot-owner.—Owners of property on a street who make excavations in a street or sidewalk must properly protect the same or they will be liable to any one injured by falling into such excavations. Silvers v. Nerdlinger, 30 Ind. 53; Wickwire v. Town of Angola, 4 App. 253; Gaston v. Bailey, App. Ct., May 24, 1899.

Excavation—Duty of abutting owner.—Where an excavation is made in a sidewalk with the consent of the municipality, the abutting property owner is bound to exercise ordinary care and diligence to maintain it in a safe condition. Wickwire v. Town of Angola, 4 App. 253, 257.

Excavation on lot.—When the public have, by permission, traveled on foot for years over an open city lot, it is the duty of the owner upon making an excavation in the pathway, with a view to erecting a building, to put some guard or warning for public protection, and a failure to do so gives a right of action to one who, without fault, is injured thereby. Graves v. Thomas, 95 Ind. 361; Carskaddon v. Mills, 5 App. 22.

Excavation—Damages—Evidence.—In an action against a city to recover damages for unlawful excavations made adjoining plaintiff's lot, evidence showing what would be the cost of a wall along the line of the plaintiff's lot, to protect it from caving, is admissible, the necessity for such a wall being a question for the jury. City of Aurora v. Fox, 78 Ind. 1.

Defective walk, liability of lot-owner.—The defendants owned a lot with a business building thereon, abutting upon one of the public streets of a town. There was an area in the sidewalk in front of said building, partly covered by a flagstone and partly open, for the purpose of light and of gaining access to the basement. The open portion was guarded by an iron railing. The stone was placed on a secure foundation, but partly on account of decay and partly on account of an unusually severe rain-storm, the foundation gave way and one side of the stone was thrown forward so as to render the sidewalk dangerous. The stone was removed from its dangerous position with the knowledge and consent of the municipality, and the area thereby left uncovered and unguarded for a period of three weeks. During that interval a pedestrian fell into the excavation caused by the removal of the stone, and was injured, and recovered a judgment against the municipality. In an action against the abutting property owners by the city, they can not escape liability by showing that the particular part of the area which caused the injury was of no benefit to and was not used by them, as the area must be considered as an entirety. Although the area was excavated by a prior owner and a remote grantor of the defendants by and with the consent of the town, the defendants were liable for a failure to keep it in a safe condition, if they maintained and used it. It is presumptively a beneficial appurtenance to the realty. If the injury was caused by the giving way of the foundation walls which supported the flagstone, those walls were made necessary by the area, and it was the duty of the defendant to maintain them in a safe condition. Wickwire v. Town of Angola, 4 App. 253, 257.

Abutting owner—Independent contractor—Liability.—An abutting lot-owner who lets a contract to another to do a particular work which is not intrinsically dangerous and does not necessarily create a nuisance, as for instance, the erection of a building upon his lot, or the tearing down of an old one, or the laying of a drain in the adjoin-

ing street or alley, reserving to himself no control over such work, except the right to require it to conform to a particular standard when completed, is not liable for the negligence of the party to whom the contract is let in obstructing the street, or alley or gutter. Ryan v. Curran, 64 Ind. 345; Zimmerman v. Baur, 11 App. 607; Bohrer v. Dienhart, etc., Co., 19 App. 489; New Albany, etc., Mill v. Cooper, 131 Ind. 363.

Same.—But where the abutting lot-owner expressly directs the placing of material so as to obstruct the street or gutter he is liable for the negligent acts of the contractor in respect to such obstructions. Bohrer v. Dienhart, etc., Co., 19 App. 489.

Railroads—Street Railways.

Power to grant occupancy of street to railroads.—Cities have power to grant to railroad companies the right and privilege to lay down and use railroad tracks over, along or across the streets, highways and alleys. Burkam v. Ohio, etc., R. Co., 122 Ind. 344; Kistner, etc., v. City of Indianapolis, 100 Ind. 210; Tate v. Ohio, etc., R. Co., 7 Ind. 479; Haslett v. New Albany, 7 App. 603; 3 Elliott Railroads, §§ 1076, 1077, 1078.

Conditions.—The municipal corporation in granting a right to a railroad company to occupy the streets may impose reasonable conditions, and such conditions will be binding on the railroad company accepting the grant, if not repugnant to the franchise granted to the company by the legislature, or to constitutional or statutory provisions. 2 Elliott Railroads, § 361; 3 Elliott Railroads, § 1081 and cases; Elliott Roads and Streets, p. 565.

Some of the conditions which it has been held may be imposed are, that other companies may be permitted to use the tracks, that the company shall repair the street crossings, pay a license fee for the use of the streets, comply with regulations as to location of tracks, etc. 2 Elliott Railroads, § 361; 3 Elliott Railroads, § 1081 and cases.

Exclusive power—Railroad tracks.—Under this section the common council of an incorporated city has exclusive power over the streets, highways and alleys within such city, and may grant a railroad company the right and privilege to lay down and use railroad tracks over, along or across such streets, highways or alleys. Under the forty-second clause of § 3541, R. S. 1894 (*ante*, § 124), such common council may provide, by ordinance, for the security of citizens and others from the running of trains through the city, and, to that end, may require such railroad company to provide and use suitable safeguards at the intersections of streets, highways or alleys, or elsewhere within such city; but such city is not liable in damages for injuries to persons or property which may result from the non-exercise of such legislative power by its common council. Kistner v. City of Indianapolis, 100 Ind. 210, 218.

Regulation and control—Police power.—All rights granted or contracts made by municipal corporations for the occupancy of streets by railroads are subject to the exercise of police power, and the municipalities may impose all reasonable regulations for the protection of life, health, comfort, property, etc. Indianapolis, etc., R. Co. v. Kercheval, 16 Ind. 84; 3 Elliott Railroads, § 1082; Elliott Roads and Streets, p. 58.

A city, in granting a right of way to a railroad company to use a street, does not deprive an abutting owner of his proprietary right in the street. The grant by the municipal corporation simply grants the privilege the city has power to grant. In granting such a privilege a city exercises a power delegated to it by the sovereign, and is not liable for exercising such power. Burkam v. Ohio, etc., R. Co., 122 Ind. 344.

Location of railroad on street—Damages.—The construction of a railroad track along a street on which locomotives and trains of cars are used, is a new use or appropriation of the soil, and entitles the owner of the fee to an action for damages, and to all other remedies provided by law for the protection of rights in real property. Cox v. Louisville, etc., R. Co., 48 Ind. 178; Terre Haute, etc., R. Co. v. Scott, 74 Ind. 29;

Sharpe v. St. Louis, etc., R. Co., 49 Ind. 296; Chicago, etc., R. Co. v. The Whiting, etc., R. Co., 139 Ind. 297; Protzman v. Railroad Co., 9 Ind. 467; Burkam v. Ohio, etc., R. Co., 122 Ind. 344; Indianapolis, etc., R. Co. v. Smith, 52 Ind. 428; Tate v. Ohio, etc., R. Co., 7 Ind. 479; Terre Haute, etc., R. Co. v. Rodel, 89 Ind. 128; 1 Beach Pub. Corp., § 663; Elliott Roads and Streets, p. 160.

Street railway not an additional burden.—A street railway is not an additional burden to that of the general easement in the street, and the owners of the fee are not entitled to damages on account of the construction thereof on a public street. Eichels v. Evansville, etc., R. Co., 78 Ind. 261; Indianapolis, etc., R. Co. v. Citizens', etc., R. Co., 127 Ind. 369; Chicago, etc., R. Co. v. The Whiting, etc., R. Co., 139 Ind. 297.

Electric and cable roads.—Cable roads are not an additional burden. 1 Elliott Railroads, § 9 and cases, and 3 Elliott Railroads, §§ 1088, 1135; 1 Beach Pub. Corp., § 664.

Telephone system.—The reasonable use of the streets of a city for the equipment of a telephone system is not a new and additional servitude, for which the abutting property owner is entitled to compensation. Magee v. Overshiner, 150 Ind. 127.

Right of street railroad to cross steam railroad at street crossing—Injunction.—Since a street railway is not an additional burden to that of the easement which the general public has in the street, and the street railway company's right to use the street is founded on that easement, it must be held that the right of a street railway to cross over the tracks of a steam railway laid on such street is subject to no conditions other than those to which the general public is subject in traveling over such street. Hence it is not error to enjoin a steam railway company from interfering with a street railway company where the latter is proceeding to construct a proper crossing at its own expense. Chicago, etc., R. Co. v. Whiting, etc., Street R. Co., 129 Ind. 297; Chicago, etc., R. Co. v. Hammond, etc., R. Co., 151 Ind. 577.

Upon the question of the degree of care to be exercised by those in charge of a railroad train, and the conductor of a street car, at a crossing, see Madison, etc., R. Co. v. Taffe, 37 Ind. 361.

Right of way—Appropriation of—Assessment of damages—What included in.—Where proceedings, in pursuance of the statute, to appropriate a right of way, and for the assessment of damages sustained by property owners along the right of way or abutting upon a street upon which the proposed road is to be located, are resorted to, future necessities, as well as the present needs of the company, are conclusively presumed to be taken into consideration, and where damages are assessed it includes all damages, present and prospective, resulting from the construction, and from all necessary and proper use of the right of way on the street or highway by the railroad company for railroad purposes. White v. Chicago, etc., R. Co., 122 Ind. 317; Porter v. Midland R. Co., 125 Ind. 476; Chicago, etc., R. Co. v. Eisert, 127 Ind. 156; Chicago, etc., R. Co. v. Hunter, 128 Ind. 213; Rehman v. New Albany, etc., R. Co., 8 App. 200; 3 Elliott Railroads, § 1004.

Additional tracks—Side track or switch.—After such assessment of damages, no additional assessment can be made for additional tracks, side tracks or switches, the same not constituting an additional burden not included in the original appropriation. White v. Chicago, etc., R. Co., 122 Ind. 317; Chicago, etc., R. Co. v. Eisert, 127 Ind. 156.

Right of way—User.—The constant and exclusive use by a railroad company of part of a street of a town, as and for a right of way, can not in any time ripen into an absolute ownership of such part. Indianapolis, etc., R. Co. v. Ross, 47 Ind. 25.

Dedication—Street and railroad crossings.—Where, by platted additions to a town, streets are dedicated to the public which cross a railroad track, and the railroad company constructed crossings over its track, and such streets and crossings were used by the public for general use as a public highway for six or seven years, the public acquired

such rights therein as could not be divested by the railroad company tearing up the approach and crossing. Evansville, etc., R. Co. v. State, 149 Ind. 276.

Dedication condition, effect of—Additional track.—The use of a street for a railroad is a public use, and is not necessarily destructive of the character of the public way; and a condition annexed to a dedication that a railroad company should have the right to lay a track or tracks in the street dedicated is not void. City of Noblesville v. Lake Erie, etc., R. Co., 130 Ind. 1, 5.

When a donor of a street attaches a condition to it that a railroad company shall have the right to lay its tracks therein; and such company lays and uses only one track in such street, it does not lose its right to lay therein an additional track, even though more than twenty years have elapsed between the grant and the assertion of its right to lay the additional track. City of Noblesville v. Lake Erie, etc., R. Co., 130 Ind. 1, 5.

Right of way—Effect of grant.—A grant of the right of way for a railroad does not carry by implication the right to raise the street beyond the limits of the right of way, nor release the railroad company from the damages accruing to the abutting land-owner. Egbert v. Lake Shore, etc., R. Co., 6 App. 350, 352.

Abutting owner—Wrongful construction—Ejectment—Injunction.—An abutting owner may maintain an action against a railroad company, which wrongfully builds its track upon the street, and where there is no waiver or estoppel he may maintain ejectment or injunction. Porter v. Midland R. Co., 125 Ind. 476, 477; Terre Haute, etc., R. Co. v. Rodel, 89 Ind. 128; Cox v. Louisville, etc., R. Co., 48 Ind. 178; 2 Elliott Railroads, § 630.

Limitation—Damages.—But where such owner stands by, without objecting, until the rights of the public and the third parties have intervened, he may maintain neither ejectment nor injunction, but may resort to an action for damages. The action for damages for the injury to the property by the wrongful occupancy must be brought within six years from the completion of the grade, or it will be barred by the statute of limitations, which limits to six years actions for injuries to real property. Porter v. Midland R. Co., 125 Ind. 476, 478; Strickler v. Midland R. Co., 125 Ind. 412; Protzman v. Indianapolis, etc., R. Co., 9 Ind. 467.

An abutting owner, who expressly consents to the occupancy of a street, can not afterward enjoin the use of the street nor recover damages. Burkam v. Ohio, etc., R. Co., 122 Ind. 344.

Abutting owner's special interest.—A municipal corporation has the right to grant permission to a railroad company to build its tracks over and upon its streets, but such grant does not transfer any proprietary rights of the persons owning lands abutting on such streets, such permission being simply a grant of the right to share with the general public the use of the easement, and to that extent the power of the city is unlimited; but such a grant does not impair or destroy the right of an abutting land-owner, owning the fee in the street, to recover damages for the additional burden imposed upon his land. If, however, the railroad is not constructed upon that part of the street in which he owns the fee, before he can recover damages he must allege and prove injuries to his property different from those sustained by the general public. A proceeding based upon §§ 917–921, R. S. 1894, can only be available when there has been an actual taking of property. Haslett v. New Albany, 7 App. 603, 605.

The owner of land appropriated for a railroad can not be required to initiate proceedings, under the statute, for the assessment of damages for such appropriation. Cox v. Louisville, etc., R. Co., 48 Ind. 178.

An owner of a lot abutting upon a street may have a peculiar and distinct interest in the easement in the street in front of his lot, which includes the right to have the street kept open and free from any obstruction which prevents or materially interferes with the ingress and egress to and from his lot, which is an interest distinct from that

possessed by the general public, and is appendant to the lot and the improvements thereon. Decker v. Evansville, etc., R. Co., 133 Ind. 493, 496.

Abutting owner—Damages recoverable.—Where a railroad company appropriates land for a right of way, and the owner institutes suit for damages, he can only recover damage for the land so appropriated and the depreciation in value, because of said railroad, of the land abutting thereto; and where the land is laid out into lots the owner can only recover for the depreciation in value of such lots as abut on the land so appropriated for a right of way, and where only a part of a lot abuts on the land so appropriated, the railroad company will be liable in damages for its depreciation in value, because of said railroad, only in the ratio of the abutting part of said lot to the whole of said lot. Evansville, etc., R. Co. v. Charlton, 6 App. 56, 64.

The abutting owner, notwithstanding the grant by the municipality, has a right to recover such damages as he may have sustained by the additional burden imposed upon his land. His right to compensation, however, is against the railroad company, and not against the city. Burkam v. Ohio, etc., R. Co., 122 Ind. 344, 346; Pittsburgh, etc., R. Co. v. Harper, 11 App. 481.

What abutting owner must show.—It is incumbent upon a property owner who seeks to recover damages for the construction of a railroad track in a street to show that the additional burden caused injury to his property. Where there are no damages there can be no recovery. Indiana, etc., R. Co. v. Eberle, 110 Ind. 542, 547; Burkam v. Ohio, etc., R. Co., 122 Ind. 344, 346.

Obstruction of street—Pleading—Special injury.—An abutting lot-owner can not maintain an action against a railroad company for constructing and operating its railroad upon the street of a city, where the injuries complained of are such only as he sustains in common with the public generally; and a complaint which fails to allege special injury to the plaintiff, or that such use and occupation of the street are without leave of the city, is insufficient. Terre Haute, etc., R. Co. v. Bissell, 108 Ind. 113, 116; Dwenger v. Chicago, etc., R. Co., 98 Ind. 153; Indiana, etc., R. Co. v. Eberle, 110 Ind. 542; Dantzer v. Indianapolis, etc., R. Co., 141 Ind. 604; Decker v. Evansville, etc., R. Co., 133 Ind. 493.

Answer to abutter's complaint.—Complaint by the owner of a lot having buildings thereon, used for worship and a school, alleging the use of the street adjoining by a railroad company for its track and running cars thereon, whereby worship was interrupted, and the children attending the school were imperiled, and the street was obstructed, etc. Answer, that the railroad was operated in the usual way necessary for such business; that the railroad was nine feet wide, and none of it upon the plaintiff's premises, being beyond the center of the street, and was constructed by leave of the city and in manner as required by an ordinance; that the street was sixty-six feet wide and was not obstructed save as the running of cars carefully and as is usual might temporarily have that effect as to its general use. The answer was good. Dwenger v. Chicago, etc., R. Co., 98 Ind. 153, 156.

"Community in general" defined.—Where a railroad company has secured from the proper municipal officers the right to lay their railroad track in a certain street, which right, as a street, was acquired by more than twenty years' adverse user, and the fee of which was not in the adjoining lot-owners, a person who had leased a lot abutting on said street, and erected a business house thereon, has no right to enjoin the company from laying their railroad track, when such company has not assessed, or tendered to the plaintiff, the damages he will sustain by reason of said track and its use as such, unless he can show that he will suffer damages thereby different from the community in general, and the term "community in general" means those who reside in the immediate vicinity of the railroad, and are subject to the inconveniences incident to its structure. Decker v. Evansville, etc., R. Co., 133 Ind. 493, 495.

Injunction—Complaint.—A complaint against a railroad company alleging that the

plaintiffs are owners of lots abutting on a certain street in a city, that the defendant has taken possession of said street in front of said lot, and has laid down its track thereon and used the same, but not alleging that the defendant intends or threatens to continue such use, to the injury of the plaintiffs, or at all, does not show a good ground for an injunction to prevent the defendant from continuing to maintain and use such railway. Roelker v. St. Louis, etc., R. Co., 50 Ind. 127; Cox v. Louisville, etc., R. Co., 48 Ind. 178.

Viaducts—Bridges—Grade crossings, etc.—The legislature may delegate to municipal corporations the power to require railroads to construct viaducts, bridges, tunnels, etc., and to change grades, etc. Chicago, etc., R. Co. v. Nebraska, 170 U. S. 57; New York, etc., R. Co. v. Bristol, 151 U. S. 556; Wabash R. Co. v. Defiance, 167 U. S. 88; State v. Missouri Pacific R. Co., 33 Kan. 176; Elliott Roads and Streets, pp. 32, 33.

Mandamus.—Where a railroad company is under obligation to construct viaducts or bridges it may be mandated to construct the same. Elliott on Railroads, §§ 639, 1111, and notes and cases; Elliott Roads and Streets, p. 33.

Grade, change of—Abutter injured.—Where a railroad company raises the grade of its tracks, and, in order to restore an intersecting highway to its former state as required by § 5153, R. S. 1894, it fills and raises the grade of such street beyond its right of way, and in front of the property of a private abutting land-owner, thereby materially interfering with such owner's ingress and egress to and from his property, the railroad company is liable to him for the damage done. The approaches to a crossing, whether extending beyond the right of way or not, are a part of it. Egbert v. Lake Shore, etc., R. Co., 6 App. 350, 353.

The fact that the change of the grade of the street was made to conform to the voluntary change of grade of the railroad, under authority of, and in compliance with, a statute, will not relieve the railroad company from liability. Egbert v. Lake Shore, etc., R. Co., 6 App. 350, 356; Pennsylvania Co. v. Stanley, 10 App. 421.

Where such change of grade cuts off one entrance to an alley which affords one of the means of ingress and egress to and from lots abutting on such alley, and causes a material diminution in the value of the lots, recovery by the owner can not be defeated on the ground that his injury is not different from that suffered by the general public. Pennsylvania Co. v. Stanley, 10 App. 421.

A railroad company is liable in damages for injury occasioned by the construction of a raised railroad track along a street of a city, thereby causing the water from rains and freshets to flow upon adjacent real estate, and also for injury occasioned by reason of the construction of an embankment, on a street approaching a crossing of said track, in front of a lot in a city occupied by a dwelling house, thereby rendering the approach to the lot in the front on such street impossible for carriages, wagons and vehicles, and inconvenient for foot passengers. Indianapolis, etc., R. Co. v. Smith, 52 Ind. 428.

Change of grade—Liability to traveler.—When a railroad company is empowered and ordered by a city ordinance to raise its track at the crossing of an intersecting street, it has the right and it becomes its duty to do so, but with the exercise of this privilege and the discharge of this duty, it must assume the obligation to the public imposed by R. S. 1894, § 5153, to restore the street and its sidewalks to their former condition of usefulness, so far as it can by the exercise of reasonable care and diligence, and failing to do so, it is guilty of maintaining a nuisance, and liable to a traveler who, by reason thereof, sustains an injury without fault on his part. Cincinnati, etc., R. Co. v. Claire, 6 App. 390, 394.

Approaches—Company's duty.—The approaches to the part of the street and sidewalk crossing the track and right of way are a part of the crossing, and it is incumbent upon the company to place and maintain the approaches, as well as the crossing, in a condition reasonably calculated, in contemplation of the surrounding circumstances, to insure the safety of persons passing over the track and upon the street and sidewalk at

the crossing. Cincinnati, etc., R. Co. v. Claire, 6 App. 390, 394; 3 Elliott Railroads, § 1111.

Joint liability of company and city.—That it was also the duty of the city, in such case, to provide and maintain a reasonably safe street and sidewalk, can not relieve the railroad company. The general rule in such case is that both are primarily liable. Cincinnati, etc., R. Co. v. Claire, 6 App. 390, 395.

Allegations—Proof—Variance.—Where the erection and maintenance of steps from the crossing to the sidewalk, in such case, is treated as the gravamen of the action, the fact that the evidence does not show them to be of the exact size and dimensions averred in the complaint does not make a fatal variance. Cincinnati, etc., R. Co. v. Claire, 6 App. 390, 397.

Maintenance of street crossing.—Where a railroad company crosses a street or highway with its track, the company must maintain the street or highway in a reasonably safe condition for the use of the public. Pennsylvania Co. v. Frund, 4 App. 469, 472; Evansville, etc., R. Co. v. Carvener, 113 Ind. 51; Louisville, etc., R. Co. v. Smith, 91 Ind. 119; Delzell v. Indianapolis, etc., R. Co., 32 Ind. 45; Indiana, etc., R. Co. v. Barnhart, 115 Ind. 399; Terre Haute, etc., R. Co. v. Clem, 123 Ind. 15; Evansville, etc., R. Co. v. Crist, 116 Ind. 446; Louisville, etc., R. Co. v. Pritchard, 131 Ind. 564; Seybold v. Terre Haute, etc., R. Co., 18 App. 367; 3 Elliott Railroads, §§ 1092, 1096; Elliott Roads and Streets, p. 600.

Street and railroad crossings.—A railroad company is required by statute to construct crossings over its tracks where the same cross the streets of an incorporated town, and the failure of a town to enact an ordinance requiring a railroad company to construct such crossing will not relieve the company of such duty. This duty is imposed by statute, but exists also independent of any statute. Evansville, etc., R. Co. v. State, 149 Ind. 276; Indianapolis, etc., R. Co. v. State, 37 Ind. 489; 3 Elliott Railroads, §§ 1092, 1102.

The duty of a railroad to construct street crossings over its tracks is the same whether the street or highway was open before or after the railroad was built. Evansville, etc., R. Co. v. State, 149 Ind. 276.

Complaint—Demand.—A complaint against a railroad company by an incorporated town to require it to construct street crossings across its tracks, which alleges the refusal of such company to construct the crossings, need not allege a demand upon the part of the town. Evansville, etc., R. Co. v. State, 149 Ind. 276.

Duty to fence, in towns and cities.—A railroad company is liable for the killing, by its locomotive or car, of an animal within a town or city, between the crossings of streets and alleys, if the railroad be not fenced, but could be fenced, at such place. It is not for the courts to create exceptions to the statutory rule on this subject. Indianapolis, etc., R. Co. v. Lindley, 75 Ind. 426; Pittsburgh, etc., R. Co. v. Laufman, 78 Ind. 319; Jeffersonville, etc., R. Co. v. Dunlap, 112 Ind. 93; Louisville, etc., R. Co. v. Hart, 2 App. 130; Wabash, etc., R. Co. v. Williamson, 3 App. 190; Toledo, etc., R. Co. v. Cupp, 9 App. 244; Wabash, etc., R. Co. v. Tretts, 96 Ind. 450.

Mandate.—A mandate will lie to require a railroad company to make their tracks on streets to conform to the grade of the street, and to make the crossings of streets and highways over the tracks safe and convenient. Indianapolis, etc., R. Co. v. State, 37 Ind. 489; Cummins, etc., v. Evansville, etc., R. Co., 115 Ind. 417; Clawson, etc., v. Chicago, etc., R. Co., 95 Ind. 152; Elliott Railroads, §§ 639, 719, 1092, 1096.

Where a railroad company constructed its railroad upon the streets of a city under an ordinance which required the company, where the grade of said railroad should be higher than the street, alley, or public ground, to "fill up each side of their said road, to form a convenient passage over the same," and the company in constructing the road erected an embankment upon which it placed its track, and the city caused the remainder of the width of said street to be filled up and graded level with the embank-

ment and the railroad, the company having refused to do so, the city could recover the cost of such filling up and grading. Indianapolis, etc., R. Co. v. City of Lawrenceburg, 34 Ind. 304.

Suit for mandate—Not removable to federal court.—An action by a city commenced in a state court to procure a writ of mandamus to compel a railroad company to change and reconstruct an over-head crossing erected by the company over and across a highway constituting one of the streets of the city, which crossing is alleged to be an unlawful and unnecessary obstruction of the traveling public, is not removable from the state court into a circuit court of the United States. State of Indiana v. Lake Erie etc., R. Co., 85 Fed. Rep. 1.

Railroad—Street crossing—Obstruction—Signals—Negligence.—The failure to give signals of the approach of the train at a street crossing is negligence per se, and fixes the liability of the railroad company to one who, without concurring negligence, is injured thereby. Lake Shore, etc., R. Co. v. Boyts, 16 App. 640; Cincinnati, etc., R.Co., v. Butler, 103 Ind. 31; Pittsburgh, etc., R. Co. v. Burton, 139 Ind. 357; Louisville, etc., R. Co. v. Rush, 127 Ind. 545; Railway Co. v. Schmidt, 126 Ind. 290; Hadley v. Lake Erie, etc., R. Co., 21 App. 675; Ohio, etc., R. Co. v. Hill, 7 App. 255. See Elliott Railroads, *contra*, § 1206.

Same—Travelers—Trains—Right of passage.—The rights of travelers and the railroad company at a street crossing are equal, yet in respect to the priority of passage the right of the company is superior. Ohio, etc., R. Co. v. Walker, 113 Ind. 196; Louisville, etc., R. Co. v. Schmidt, 147 Ind. 638; Louisville, etc., R. Co. v. Phillips, 112 Ind. 59; Pennsylvania Co. v. Krick, 47 Ind. 368.

The negligent or careless sounding of the whistle or the blowing off of steam at a public street or highway, or at a public crossing, in such manner as to make an unusual noise, and thereby cause horses driven along or over such street, highway, or crossing to take fright, which results in an injury, is an actionable wrong. Louisville, etc., R. Co. v. Schmidt, 147 Ind. 638; Indianapolis, etc., R. Co. v. Boettcher, 131 Ind. 82; Cincinnati, etc., R. Co. v. Gaines, 104 Ind. 526.

Right to make noise—Limitation of.—Railroad companies, in the operation of their trains, have the right to make all reasonable and usual noise incident thereto, whether occasioned by the escape of steam, rattling of cars, etc., and persons whose duties call them near a railroad must be presumed to know of this right, and to act with reference thereto. Where the law confers the right to use a dangerous element, the only restriction on such use is that it be not abused. Louisville, etc., R. Co. v. Schmidt, 134 Ind. 16; 2 Elliott Railroads, § 418.

The damages to the property on account of the noise may be an element of damage for which the owner will be entitled to recover. 3 Elliott Railroads, §§ 978, 996.

Blowing whistle, etc.—Frightening horses—Negligence.—The mere sounding of a whistle of a locomotive, even at a place of extraordinary danger, is not negligence per se, but for negligence in the blowing of the locomotive whistle in populous parts of a city and the making of other noises, such as permitting steam to escape, from which horses are frightened and caused to be injured, railway companies are liable. Rodgers v. Baltimore, etc., R. Co., 150 Ind. 397; Chicago, etc., R. Co. v. Cummings, App. Ct., May 24, 1899; 3 Elliott Railroads, § 1264.

Failure to give signal—Negligence per se.—It is negligence per se for a railroad company to fail to give the statutory signals at public crossings, but to entitle an injured party to recover he must show that such negligence was the proximate cause of the injury, and that he was not guilty of contributory negligence. Baltimore, etc., R. Co. v. Conoyer, 149 Ind. 524; Baltimore, etc., R. Co. v. Young, 146 Ind. 374; Chicago, etc., R. Co. v. Thomas, 147 Ind. 35; but see 3 Elliott Railroads, § 1206 and cases.

But by recent statute the rule as to contributory negligence has been changed, and contributory negligence is now a matter of defense. Acts 1899, p. 58.

A person approaching a railroad crossing has a right to assume that the company will obey the law, by giving the required signals of an approaching train; and if such person, after having exercised due care, and employed his senses of seeing and hearing, to ascertain if a train is approaching, and thereby avoid danger, can neither see nor hear an advancing or moving train, he is justified in presuming that he can pass over the crossing in safety. Baltimore, etc., R. Co. v. Conoyer, 149 Ind. 524.

Railroad laid in public street—Mutual rights.—Where a railroad track is laid in a public street the rights of the public and the railroad company respecting the use thereof are mutual, though those of the latter are paramount. A person is not a trespasser who walks along such track, and if in doing so his foot becomes fastened in an opening which exists by reason of the negligent construction of the track, and he is run upon by a train of the railroad company, which is negligently managed, he being without fault, the railroad company is liable for the injury sustained. Louisville, etc., R. Co. v. Phillips, 112 Ind. 59; 3 Elliott Railroads, § 1093; Terre Haute, etc., R. Co. v. Yant, 21 App. 486.

Where a public street crosses a railroad track, a foot passenger has a right to cross the railroad anywhere in the street, and to cross otherwise than by a foot path made for convenience is not negligence, though thereby his foot becomes so fastened between the rail of the track and a guard rail that he can not escape an approaching train, and in consequence is injured. Louisville, etc., R. Co. v. Head, 80 Ind. 117.

Railroad—Construction of in highway—Injury to person near track.—Where a railroad company constructs its road-bed along and over a public highway, extending through a town, rendering the use of such highway for vehicles impossible, but the public continued to use it for a footway, and on each side of the track a space three feet wide is kept smooth by the company for the use of foot passengers, the company will be liable to a person who is injured while walking along the footway by being struck, when at a distance of forty feet from the track, by a cross tie falling from a derailed car of a passing train, such car being derailed by the negligence of the company. In such case the person is on the public highway, where he has a right to be, and he may recover from the company for the injuries sustained. Louisville, etc., R. Co. v. Downey, 18 App. 140.

Railroad crossing—Contributory negligence—Presumption.—A person approaching upon a street or highway a railroad crossing known by him to be dangerous, must exercise care in proportion to the danger to be avoided. He must use his senses, must listen for signals or the noise of approaching trains, must observe signs put up as warnings, and look for trains where there is a view of the track; if he is injured at the crossing, the fault is prima facie his own, and he must show affirmatively that his own negligence did not contribute to the injury; and in approaching a crossing he must assume that there is danger and act with ordinary care and prudence on that assumption. Hancock v. Lake Erie, etc., R. Co., 21 App. 10; Chicago, etc., R. Co. v. Hedges, 118 Ind. 5; Ohio, etc., R. Co. v. Hill, 117 Ind. 56; Louisville, etc., R. Co. v. Stommel, 126 Ind. 35; Smith v. Wabash R. Co., 141 Ind. 92; Cincinnati, etc., R. Co. v. Duncan, 143 Ind. 524; Pennsylvania Co. v. Meyers, 136 Ind. 242.

But as to burden of showing contributory negligence see Acts 1899, p. 58.

A railroad company is clearly guilty of actionable negligence, when, in the nighttime, without light, signal or warning, it suddenly and rapidly moves an engine across a public street, thereby causing personal injury to a traveler on the crossing. Ohio, etc., R. Co. v. Hill, 7 App. 255.

Crossing—Contributory negligence—Ordinance—Safety-gate.—It is not, as a matter of law, negligence for one at a railroad crossing to fail to wait long enough after one train has passed going in one direction to see whether another train is approaching from an opposite direction, where the safety-gates required by ordinance are open, indicating

that no train is approaching; but failure to operate the safety-gates as required by an ordinance is negligence. Indianapolis Union R. Co. v. Neubacher, 16 App. 21.

Same—Invitation of flagman or gate-keeper.—Where a person rides or drives up to a railroad crossing by the invitation or direction of a flagman or gate-keeper there stationed, and is injured at such crossing from trains, machinery, or appliances of the railroad company, he has the right to recover, because the invitation or direction was an assurance of safety upon which he had a right to rely. Louisville, etc., R. Co. v. Schmidt, 147 Ind. 638; Cleveland, etc., R. Co. v. Keely, 138 Ind. 600.

Backing train—City ordinance requiring watchman on—Failure to give warning.—A city ordinance, requiring a watchman to be stationed on the rear end of trains running backward through the city, in order to avoid accidents, does not require the watchman to stop the train or sound a warning when he has reason to believe that the person in the way of the train can and does see it approaching, and is in a situation to avoid danger by the exercise of his own volition; and the failure of the watchman to so act under the circumstances does not charge the company with negligence. Cincinnati, etc., R. Co. v. Long, 112 Ind. 166.

Obstruction of street crossing by railroad train—Obstruction in street—Proximate cause.—When street crossing is obstructed by a railroad train and a person is injured by falling over an obstruction in the street in making a detour to avoid the train, the obstruction of the crossing by the railroad train is not the proximate cause of the injury. Enochs v. Pittsburgh R. Co., 145 Ind. 635.

Crossing street railroad track—Duty of pedestrian to look and listen—Negligence.—It is the duty of a pedestrian or one driving upon a street about to cross a street railroad track to look and listen for approaching cars; failure to do so is negligence per se. Citizens', etc., R. Co. v. Helvie, Ind. Sup. Ct., March 9, 1898; Young v. Citizens', etc., R. Co., 148 Ind. 54. See Citizens, etc., R. Co. v. Abright, 14 App. 433.

The rules that govern as to the crossing of steam railroads by travelers upon the highway are not fully applicable to street railroad crossings in cities. Persons crossing street railway tracks in a city are not obliged to stop, as well as look and listen, before going over the tracks, unless there is some circumstance which would make it ordinarily prudent to do so. Evansville, etc., R. Co. v. Gentry, 147 Ind. 408; Connor v. Citizens', etc., R. Co., 105 Ind. 62; Citizens', etc., R. Co. v. Spahr, 7 App. 23; Citizens', etc., R. Co. v. Abright, 14 App. 433; Muncie, etc., R. Co. v. Maynard, 5 App. 372, 382.

Railroad right of way—Street.—The use of a railroad right of way without the consent of the railroad company, unless founded on some claim of right, is not sufficient to authorize the traveling public to regard that part of said way as a part of the street or highway. Louisville, etc., R. Co. v. Miller, 12 App. 414.

If a railroad company permit a portion of their right of way adjoining their tracks to be used for twenty years as a public street, such permitted user will operate as a dedication of the ground for a street or highway for a width not greater than is actually occupied by the public at the end of the period. Blumenthal v. State, Ind. App. Ct., Oct. 28, 1898.

Same—Street, actual use beyond boundaries as platted.—If a part of a railroad right of way was occupied and recognized as a part of a street before the construction of the railroad, and such use, occupancy and recognition thereafter continued, then, as between the railroad company and the public, it would perhaps be proper to say to the jury that the rights of persons upon the street, as such, would be determined by the question as to what was in fact the street, and not what was included in the plat. Louisville, etc., R. Co. v. Miller, 12 App. 414.

Street railroad—Power to grant right of way.—The ordinary and incidental powers of a municipal corporation are not broad enough to include the power to grant a street railway company the right to lay tracks and conduct the business of transporting pas-

sengers upon and over the streets of the municipality. Eichels v. Evansville, etc., Co., 78 Ind. 261, 263; Elliott Roads and Streets, pp. 562, 563.

The grant of authority to lay and maintain street railway tracks upon the public streets of cities may be conferred by the legislature, either in express words or by necessary implication. Eichels v. Evansville, etc., R. Co., 78 Ind. 261.

Charter constitutes a contract.—A charter granted by the common council to a street railway company to construct and operate a street railway within the corporate limits of a city, constitutes a contract between such railway company and the city. Western Paving, etc., Co. v. Citizens', etc., Co., 128 Ind. 525, 529; Williams v. Citizens', etc., Co., 130 Ind. 71, 73.

Obstruction of street—Liability of city.—If a city permit a street railway company to so construct its tracks upon a street as to cause injuries to persons using the street, the city will be liable for the damages caused to persons employing ordinary care. City of Michigan City v. Boeckling, 122 Ind. 39.

Exclusive privileges.—A municipal corporation can not grant to a street car company the exclusive privilege of using its streets for street railway purposes. Indianapolis, etc., R. Co. v. Citizens', etc., R. Co., 127 Ind. 369; Elliott Roads and Streets, p. 566 and cases.

No exclusive privilege in street.—In an action against a street railway company to recover damages on account of an injury to the plaintiff's horses, carriage and harness, it was not error for the court to refuse to submit interrogatories to the jury based upon the theory that if the plaintiff could have traveled some other street than the one on which the accident occurred, and thus have avoided meeting the cars, it was his duty to have done so, and his failure to do so was such negligence as to preclude a recovery. Muncie, etc., R. Co. v. Maynard, 5 App. 372, 378.

Care required by company.—An instruction to the jury in such action that the servants of the company were not required to stop their train unless it was necessary to do so to avoid the injury, but if they could see that a collison was inevitable or reasonably probable, then they should make all reasonable effort to avoid the injury, correctly stated the rule of law as to the degree of care required of the defendant. Those in charge of an engine upon a street car track upon seeing a team of horses near the track showing signs of fright must, in order to relieve the company from liability, heed the danger, slacken the speed, and, if necessary to avoid injury, stop the train. Muncie, etc., R. Co. v. Maynard, 5 App. 372, 383.

Street railway company—Common carrier—Skill and care required.—A street railway company is a common carrier of passengers, with duties and responsibilities analogous to those of a railway company, and is required to exercise the highest degree of care and skill in the transportation of passengers, by providing suitable tracks, rolling stock, etc., keeping pace with science, art and modern improvements in their application to such transportation. Citizens', etc., R. Co. v. Twiname, 111 Ind. 587.

Defective tracks.—A street railway company is guilty of negligence when it attempts to run its cars over a palpably defective place in its track, when by the use of such increased vigilance and care as are practicably available the safety of its passengers is not well assured. Citizens', etc., R. Co. v. Twiname, 111 Ind. 587.

Implied invitation to passengers—Contributory negligence.—When a duly equipped car is placed upon a street railway track, under circumstances indicating that it is ready to receive passengers and about to proceed on its way for their transportation, an invitation to all suitable persons to enter and become passengers is implied, and the acceptance of such an invitation can not be held to be contributory negligence on the part of a passenger, although he may have knowledge that portions of the track over which he is to be carried are defective, he having a right to presume that all necessary precautions have been taken to secure his safety. Citizens', etc., Co. v. Twiname, 111 Ind. 587.

Injury—Care required.—It is the duty of a street railway company to run its cars with a due regard to the rights of infirm persons, aged persons, and children of tender years, for all classes of citizens have a right to freely use the public streets; and, as this is the duty of the company, it is liable if it does not use due care to prevent injury to the various classes of persons that may lawfully use the streets. Citizens', etc., R. Co. v. Stoddard, 10 App. 278, 283. See Citizens', etc., Co. v. Carey, 56 Ind. 396; 3 Elliott Railroads, § 1094.

Rules as to boarding cars.—The rules governing the boarding of steam railway cars do not apply in all their vigor to street railways. The motor power used does not affect the rules. Citizens', etc., R. Co. v. Spahr, 7 App. 23, 26; Connor v. Citizens', etc., R. Co., 105 Ind. 62.

Boarding car, when negligence.—Whether a person in boarding a moving street car is guilty of negligence must depend upon the circumstances of each particular case; and such can not be negligence per se unless the act be such that, under circumstances, but one conclusion can be arrived at, and that of negligence. Citizens', etc., R. Co. v. Spahr, 7 App. 23, 31; Connor v. Citizens', etc., R. Co., 105 Ind. 62.

Habit or custom—Incompetent proof.—It was not error to refuse to allow a witness to testify that it was not the custom, and that people were not in the habit of trying to get on cars at the rate of speed that the car was going, such testimony being not that of a fact, but a conclusion. Citizens', etc., R. Co. v. Spahr, 7 App. 23, 28.

Remaining upon platform.—It is not contributory negligence per se for a passenger to remain upon the platform of a street railway car. It is a question for the jury. Marion, etc., R. Co. v. Shaffer, 9 App. 486; Terre Haute, etc., R. Co. v. Lauer, 21 App. 466.

Stopping and starting car.—It is the duty of a street railway company, before re-starting its car, to see and know that no passenger is in the act of alighting, and the fact that a car was stopped a reasonable length of time, or that the driver supposed the passengers had alighted, does not relieve it from liability for injuries to a passenger attempting to alight, caused by the starting of the car. Anderson v. Citizens', etc., R. Co., 12 App. 194.

Plaintiff, while riding on defendant's street car, gave a signal to the motorman to stop. When the car had almost come to a stand, she stepped on the platform and gave another signal, which she thought was a signal to stop. The car immediately started forward with a jerk, and plaintiff was thrown therefrom and injured. It was not shown that the motorman or conductor knew of her danger, or that the second signal was necessary, or that it was the signal to stop, and not the regular signal for starting the car. Plaintiff's injuries were caused by her own act. Sirk v. Marion, etc., R. Co., 11 App. 680.

Railroad crossing—Care required—Instruction.—The same rule of care governing travelers approaching railroad crossings does not apply to those approaching street railway crossings.

Where, in such an action, the evidence clearly showed that the plaintiff made every effort to avoid the collision, but on account of the frightened condition of the horses he could not control them, an instruction requested by the defendant was properly refused to the effect that if the plaintiff could have seen the car approaching and he did not escape, and his property was injured, the law presumes either that he did not look, or if he did look, that he did not heed what he saw, and that such conduct was negligence in itself. Muncie, etc., R. Co. v. Maynard, 5 App. 372, 382.

It is not negligence for one driving along a street on which there is a car track to drive his vehicle in the tracks, where the public have been in the habit of using the tracks for the same purpose, and the street outside of the tracks is torn up for repairs. Citizens', etc., R. Co. v. Lowe, 12 App. 47.

Complaint—Averment of negligence.—In an action against a street railroad company for personal injuries, a complaint which charges that the defendant's servant "negligently ran said car against the wagon," is not demurrable for want of an allegation of negligence. Citizens', etc., R. Co. v. Lowe, 12 App. 47.

Special verdict—Contributory negligence.—When a special verdict finds that a passenger on a street car going south upon a street upon which there are double tracks gets off the car at midnight before it stops at a crossing, and walks rapidly across the tracks behind the car from which he alighted against a car approaching upon the other tracks from the opposite direction, said approaching car being lighted with electricity with the headlight burning, the view between the tracks looking to the south being unobstructed, but does not find that plaintiff was free from fault, the court can not say as matter of law that the conduct of the passenger was that of a reasonably prudent person. Stowers v. Citizens, etc., R. Co., 21 App. 434.

Negligence, sufficient finding of.—In an action against an electric railroad company, for wrongful death by a collision, it appeared that deceased was driving along the track; that when the wagon was about three hundred feet from a car approaching on another track the horse became frightened, and jumped across the track; and before the car struck the wagon the horse turned around on the track, and that the motorman kept ringing the gong until within thirty feet of the wagon. The evidence was sufficient to support a finding that the motorman could have avoided the collision. Citizens', etc., R. Co. v. Lowe, 12 App. 47.

Negligence, question for the jury.—Plaintiff was driving a two-year-old colt when the collision with defendant's street car occurred. On the night of the accident, plaintiff drove the animal past defendant's cars several times and left it standing near defendant's tracks, and it was not frightened. After plaintiff started home, and while a car was a square distant, the horse became frightened, and plaintiff had no opportunity to turn off the street, but kept at the edge of the street, and, when the car was within forty feet, the horse attempted to cross the track. At the point where the accident occurred, there was a light shining across the street, and the motorman might, in the exercise of ordinary care, have seen plaintiff when he and plaintiff were a square apart, but, instead of slackening speed, he drove the car along at the rate of eight miles an hour. The questions whether defendant was negligent, and whether plaintiff contributed to the injury, were for the jury. Marion, etc., R. Co. v. Carr, 10 App. 200, 205.

Right in streets—Operation—Frightening horses.—Duly licensed street car companies have as much right to run their cars in the streets as others have to drive through them with their horses and vehicles; and such companies are not ordinarily liable for horses taking fright at the usual appearance or noise of the cars while being operated in a proper and usual manner. Terre Haute, etc., R. Co. v. Yant, 21 App. 486.

Motorman—Duty.—A motorman operating a car in a lawful manner is not under obligation to at once stop or slacken the speed of the car at the sight of a frightened horse on the public way adjacent to the track, held by his owner in a manner from which it might fairly be supposed he would be able to control him. In such case the motorman is not bound to stop his car or slacken the speed thereof until he sees some evidence that the driver will not be able to control the horse. Terre Haute, etc., R. Co. v. Yant, 21 App. 486.

219. Petition for street improvements.—68. When the owners of two-thirds of the whole line of lots or parts of lots (and measuring only the front line of such lots as belong to persons resident in such city) bordering on any street or alley, consisting of one whole square between any two streets crossing the same; or, if the common

council deem it expedient, for any reasonable distance upon any street or alley less than one whole square or block,—shall petition the common council to have the sidewalks graded and paved, or the whole width of the street graded and paved, or for either kind of improvement; or for lighting such street according to the general plan of such improvement in said city,—the common council may cause the same to be done, by contract given to the best bidder, after advertising to receive proposals therefor. And the common council shall have power to compel the owner or owners of any lot or a part of a lot on any street or alley, or upon any part of any street or alley, to repair the sidewalks in front of their respective lots or parts of lots; and in case the owner or owners of any lot or part of a lot on any street or alley or any part thereof, fail or refuse to repair the sidewalks in front of their lots, the common council may cause such repairs to be made by the street commissioner, at the cost and expense of the owner or owners of such lot or lots; and the city shall have a lien on such lot or lots for the reimbursement to her of the cost of such improvement. And the common council are hereby invested with full powers to pass by-laws and ordinances providing how and in what manner the repairs shall be made, and in what manner the same shall be assessed and collected from such owner or owners, and the manner in which the lien of the city for the expense incurred by her may be enforced against the lot or lots of such owner or owners: *Provided*, That any incorporated city having a population less than ten thousand may, by a two-thirds vote of all the members of the common council, cause plank or gravel walks, of such dimensions as such council may determine, to be constructed, either upon the natural grade of the sidewalks therein, or any modification thereof established by such council, and the costs and expenses of any such improvements, or repairs thereto, shall be a lien upon the real estate fronting thereon, and shall be assessed and collected in the same manner as now prescribed by law for collecting assessments for improving streets, alleys, and sidewalks: *Provided, further*, That when the state of Indiana is the owner of property on or along the street or streets proposed to be improved as hereinbefore provided, the common council shall not contract for the execution of said improvements involving the state in any liability, without first obtaining the written consent and approval of the auditor and treasurer of state, but such city may make such improvements at her own expense. R. S. 1894, § 3624.

See *post*, §§ 1107–1135.

Statute construed.—This section and succeeding sections apply only where a city seeks to improve its streets at the expense of the abutting owners, and do not limit the general powers over streets conferred by other provisions of law; and where a city, in the exercise of its general powers and at the expense of its treasury, grades a street, it is not liable to adjoining owners for consequential damages merely because it fails to comply with the requirements of this and the succeeding sections. City of Aurora v. Fox, 78 Ind. 1; Cummins v. City of Seymour, 79 Ind. 491.

The power to make street improvements, to be paid for out of the city's or town's treasury, is liberally construed; and it is the exercise of a corporation function that is im-

plied from the general words of incorporation. Town of Marion v. Skillman, 127 Ind. 130.

Petition.—Any agreement or combination among parties petitioning for the improvement of a street, by which a few individuals, desirous of causing the improvement to be made, procured the signatures of others to the petition by paying, or agreeing to pay, a consideration therefor, either directly or indirectly, is a fraud on the law and contrary to public policy, and is void. Maguire v. Smock, 42 Ind. 1.

Persons signing a petition for the improvement of a street may, by a remonstrance, withdraw their names from such petition. Noble v. City of Vincennes, 42 Ind. 125.

Improvement without petition.—Upon a two-thirds vote of the common council improvements may be made without petition. City of Lafayette v. Fowler, 34 Ind. 140; Yeakel v. City of Lafayette, 48 Ind. 116; Moberry v. City of Jeffersonville, 38 Ind. 198; Baker v. Tobin, 40 Ind. 310; City of Indianapolis v. Imberry, 17 Ind. 175; Ray v. City of Jeffersonville, 90 Ind. 567.

Improvements without letting contract.—A municipal corporation may construct ordinary public works through its officers and servants in cases where the whole expense is to be paid out of the corporate treasury, and is not bound to let such work out to independent contractors. City of Aurora v. Fox, 78 Ind. 1, 4; Cummins v. City of Seymour, 79 Ind. 491, 493; Platter v. City of Seymour, 86 Ind. 323, 324.

Order for improvement—Proceedings required.—The improvement may be under an ordinance, a motion or resolution, but whatever mode may be adopted, it must comply with the requirements of the charter. It must be in writing, and where there is a petition for the improvement it must be passed by a vote of a majority of the council, or by two-thirds vote where there is no petition. The order made must be entered of record, together with the vote on its passage, showing that it was adopted by the requisite vote, and this order must be followed by an advertisement for proposals to do the work, and there must be a written contract made and reported to and approved by the common council. City of Delphi v. Evans, 36 Ind. 90; City of Indianapolis v. Imberry, 17 Ind. 175; Merrill v. Abbott, 62 Ind. 549; Smith v. Duncan, 77 Ind. 92; Taber v. Grafmiller, 109 Ind. 206; Ray v. City of Jeffersonville, 90 Ind. 567; Wren v. City of Indianapolis, 96 Ind. 206; Baker v. Tobin, 40 Ind. 310; De Puy v. City of Wabash, 133 Ind. 336; McEneney v. Sullivan, 125 Ind. 407; City of Terre Haute v. Turner, 36 Ind. 522; Elliott Roads and Streets, p. 349.

Ordinance, when sufficient.—An ordinance for a street improvement must specify the nature and plan of the work in such manner as to afford a basis for letting the contract. An order which does not specify of what wood the blocks shall be made, how they shall be laid, and to what grade, but leaves these and like particulars to the city engineer, is insufficient, and will not warrant a precept for the enforcement of an assessment. Such delegation of the powers and duties of the council to the engineer is not permissible. Smith v. Duncan, 77 Ind. 92, 95; Merrill v. Abbott, 62 Ind. 549; Taber v. Grafmiller, 109 Ind. 206. See Martindale v. Palmer, 52 Ind. 411.

An ordinance providing that a street shall be "improved by graveling in the street, brick sidewalks and paved gutters," according to specifications to be prepared by the city civil engineer, and providing for the advertisement for bids and the assessment of abutting property, is not void for uncertainty, but is sufficient to authorize the letting of a contract for the work. Ross v. Stackhouse, 114 Ind. 200, 207.

Resolution, when sufficient.—A resolution adopted by the common council of a city authorizing the improvement of a sidewalk is sufficient if it provides that the improvement shall be of a designated character, and contains enough to constitute the basis for letting the contract, without specifying with particularity of detail what such improvement shall be. Taber v. Grafmiller, 109 Ind. 206, 207.

A resolution of the common council providing for the improvement of a street is sufficient, if it gives a general direction as to the character of the improvement, without describing it in detail. Taber v. Ferguson, 109 Ind. 227, 234.

For an order held insufficient see Merrill v. Abbott, 62 Ind. 549.

The common council of a city may, under R. S. 1894, § 4289 (*post*, § 1108), declare in the same resolution the necessity for a proposed street improvement, and order the same to be made. It is not necessary under said section to first pass a resolution declaring the necessity of such improvement, and then afford those interested an opportunity to be heard as to the necessity for the construction of said work before a valid order can be made for such improvements. It is a substantial compliance with the requirements of the statute to embrace both matters in one resolution, and the doing so will not render the proceedings void. Quill v. City of Indianapolis, 124 Ind. 292, 295; Barber, etc., Co. v. Edgerton, 125 Ind. 455, 463.

Sidewalks.—The word "street" is generic and embraces sidewalks, and under authority to improve streets a municipal corporation may improve sidewalks. Taber v. Grafmiller, 109 Ind. 206.

Order for not a judgment.—An order entered by the common council of a city to make a particular improvement is not in the nature of a judgment. It is a mere preliminary step, looking to a public improvement to be made or not, as the common council in its discretion may determine, from which it may recede at any time before the contract for the improvement is concluded. Barber, etc., Co. v. Edgerton, 125 Ind. 455, 462.

Owners charged with notice.—The statute for the incorporation of cities makes provision for the publication of only such ordinances as are penal in their character. It is the duty of residents of the city to take notice of the acts and proceedings of the common council relating to public matters, and property-holders knowing that improvements are being made must inform themselves as to the authority by which it is done. City of Elkhart v. Wickwire, 121 Ind. 331, 340.

Informalities—Evansville charter.—The provision in the former charter of the city of Evansville, that mere informalities of the common council in ordering the improvement or in making the assessment or apportioning the cost shall not be available to the property owner as a defense, does not deprive him of any substantial right, but refers to objections which do not affect the merits of the proceedings. Garvin v. Daussman, 114 Ind. 429, 437.

Adoption of plan.—Where the common council of a city directed that a plan for the improvement of S. street be prepared, which was accordingly done and reported, and the action of the council thereon appeared on its record thus: "The survey and plan for the improvement of S. street by J. is accepted," an adoption of the plan was sufficiently shown. City of Aurora v. Fox, 78 Ind. 1, 10.

Plans—Specifications—Presumption.—It is the statutory duty of the city civil engineer to prepare plans and specifications of proposed street improvements, and it will be presumed that he prepares them in proper time and in conformity to the ordinances. Smith v. Duncan, 77 Ind. 92, questioned. Taber v. Grafmiller, 109 Ind. 206, 208.

Are competent evidence.—The plans and specifications prepared by the city engineer are competent evidence in a suit to collect a street assessment. Taber v. Ferguson, 109 Ind. 227, 234.

Notice inviting proposals—Bids.—If the common council of a city direct that notices inviting proposals for the improvement of a street shall be published in two newspapers, publication in one is not sufficient. Taber v. Ferguson, 109 Ind. 227.

Notice of letting—Standing by—Estoppel.—Where it appears that the common council of a city has given any sort of notice of the letting of a contract for the improvement of a street, its sufficiency can not be inquired into after the work has been done, under color of the proceedings, with the acquiescence of the parties benefited. Taber v. Ferguson, 109 Ind. 227, 232; Ross v. Stackhouse, 114 Ind. 200, 205; Wiles v. Hoss, 114 Ind. 371, 380; Clements v. Lee, 114 Ind. 397, 399.

Estoppel of lot-owner.—Where a common council acquires jurisdiction and makes a

contract for a street improvement, a party benefited, who stands by, without objecting, until the work is completed, is liable for the amount assessed against him as benefits. Jenkins v. Stetler, 118 Ind. 275, 277; De Puy v. City of Wabash, 133 Ind. 336, 339; Elliott Roads and Streets, p. 420.

Objections when to be made.—If the property owner denies the power of the city to order the improvement and make the contract, he must test the question before the work is done. City of Logansport v. Uhl, 99 Ind. 531, 541; Taber v. Ferguson, 109 Ind. 227; Palmer v. Stumph, 29 Ind. 329; Hellenkamp v. City of Lafayette, 30 Ind. 192; Busenbark v. Clements, App. Ct., April 25, 1899.

The letting of contracts for the work must be properly advertised. Kretsch v. Helm, 45 Ind. 438; Moberry v. City of Jeffersonville, 38 Ind. 199; McEwen v. Gilker, 38 Ind. 233; Taber v. Ferguson, 109 Ind. 227. See Martindale v. Palmer, 52 Ind. 411.

As to what is and is not a sufficient notice of the letting of a contract, see Case v. Fowler, 65 Ind. 29; Case v. Johnson, 70 Ind. 31; Yeakel v. City of Lafayette, 48 Ind. 116; City of Logansport v. Puterbaugh, 46 Ind. 550; Moberry v. City of Jeffersonville, 38 Ind. 199.

As to sufficiency of notice, including notice to non-residents, under the special charter of the town of Huntington, see Loughridge v. City of Huntington, 56 Ind. 253.

Letting bids—Power to choose.—The common council has the power to choose between bidders for street work, and when it has done so its decision is final. Boyd v. Murphy, 127 Ind. 174, 177; Elliott Roads and Streets, pp. 441, 442.

Presumption of good faith.—It will be presumed by the courts that the council, in letting a bid, acted in good faith and for the best interests of both the city and the property-holders, and that it exercised its discretionary power wisely. Boyd v. Murphy, 127 Ind. 174, 177.

Bids and additional work.—After bids are received the council may let the contract to the highest bidder, upon condition that he perform extra street improvement work not specified in the improvement ordinance and advertisement for bids, even though such extra work has never been ordered by the council by any resolution or ordinance, and may assess abutting property according to the rate imposed upon it by such bid. Boyd v. Murphy, 127 Ind. 174, 177.

Bids—Right to reconsider.—The common council of a city, which has rejected all bids received in pursuance of due notice of the letting of a contract for a street improvement, may, at a subsequent meeting, without a re-advertisement for bids, reconsider the vote of rejection and award the contract to one of the original bidders. Ross v. Stackhouse, 114 Ind. 200, 203.

Contracts, how executed.—Bids for a street improvement must be reported to the council, and that body must award the contract, which must be in writing and filed with the proper officer. Budd v. Kraus, 79 Ind. 137, 139; City of Delphi v. Evans, 36 Ind. 90; City of Indianapolis v. Imberry, 17 Ind. 175; City of Logansport v. Blakemore, 17 Ind. 318; Moberry v. City of Jeffersonville, 38 Ind. 198.

Officer can not contract with city.—An officer of a city can not enter into a contract with the city for the improvement of a street. City of Ft. Wayne v. Rosenthal, 75 Ind. 156, 160; Case v. Johnson, 91 Ind. 477, 489; Benton v. Hamilton, 110 Ind. 294; City of Brazil v. McBride, 69 Ind. 244.

City may change contract.—The governing body of a city may, within reasonable limits, modify and change contracts for the improvement of streets. Sims v. Hines, 121 Ind. 534, 540; Board v. Silvers, 22 Ind. 491; Hellenkamp v. City of Lafayette, 30 Ind. 192.

After an order and contract is made for the improvement, and it is determined what property will be benefited thereby, the line of improvement can not be extended and other property charged with the expense thereof. City of Columbus v. Storey, 35 Ind. 97.

Time to complete—Extension.—In the absense of fraud, the time for the completion

of a street improvement under a contract may be lawfully extended by a vote of the common council. Jenkins v. Stetler, 118 Ind. 275, 278; Terre Haute, etc., R. Co. v. Nelson, 130 Ind. 258, 260; City of Lafayette v. Fowler, 34 Ind. 140.

A provision in a contract for a street improvement, providing for a forfeiture for failing to complete the work in a given time, may be enforced or not by the city at its option, and the property owner can not complain. Gulick v. Connely, 42 Ind. 134.

Length of improvement.—A street may be improved for a greater length than one whole square, or block, under one order and contract. City of Lafayette v. Fowler, 34 Ind. 140.

Council and mayor—Relative powers.—The common council of a city alone has power to obligate a city, and the mayor of the city, in executing contracts, acts simply as the instrument or agent of the council. He can only bind the city according to the authority given him, and without such authority he can not enter into a contract for paving a street whereby a contractor can acquire a lien on abutting property. State v. City of Michigan City, 138 Ind. 455.

Assignment of contracts.—If a contract for an improvement provides that it shall not be assigned, an assignee can not collect assessments made for the improvements. Deffenbaugh v. Foster, 40 Ind. 382.

It the city council ratifies the assignment of a contract, it is the same as if assent had been originally given to the assignment. Taber v. Ferguson, 109 Ind. 227; Sims v. Hines, 121 Ind. 534.

Contract assigned and recognized.—Where the transcript affirmatively shows that the assignment of a contract for a street improvement was recognized and acted upon as valid by the common council, it will be sufficient, although there was no formal order entered approving the assignment. Sims v. Hines, 121 Ind. 534, 539.

Invalid contract.—If a contract for a street improvement is invalid, neither the city nor property owner is liable to the contractor for the expense of the improvement. A person contracting with a city, for the improvement of a street in such city, is bound to take notice of the provisions of the general law regulating such improvements; and must also ascertain whether the common council have so conducted the letting as to render the property holders liable for the improvement, and whether the street ordered improved is within the city limits, etc. Johnson v. City of Indianapolis, 16 Ind. 227; Newman v. Sylvester, 42 Ind. 106; Clements v. Lee, 114 Ind. 397; State v. City of Michigan City, 138 Ind. 455.

It is the duty of the contractor to inform himself as to an ordinance on which his contract is based and which is to form the basis of his claim. State v. City of Michigan City, 138 Ind. 455.

If a city council acts beyond its jurisdiction in making a contract for street improvement, the members of the council are not personally liable to the contractor. Newman v. Sylvester, 42 Ind. 106; Clements v. Lee, 114 Ind. 397.

A city does not become liable for the expense of a street improvement because the city officers do not perform their duties. The remedy in such case is by mandate to compel the officers to do their duty. City of Greencastle v. Allen, 43 Ind. 346.

It is not necessary that the contract should literally follow the ordinance, it being sufficient that the pavement contracted for corresponded in kind with that provided for in the ordinance. Martindale v. Palmer, 52 Ind. 411.

Lighting streets—Statute construed.—In this section the words, "for lighting such street according to the general plan of such improvement in said city," embraces the street fixtures necessary for the purpose referred to, including the pipes and lamp posts; and in the twenty-eighth clause of the fifty-third section of this statute, the words, "the expense of lighting any street," refer only to the expense of lighting after the fixtures have been put up. In the former case, the expense can not properly be assessed upon real property in proportion to its appraised value. Nelson v. City of LaPorte, 33 Ind. 258.

Surplus earth—Abutting owner's right to.—The surplus earth, gravel and other materials excavated from the street in its improvement are the property of the abutting owner, subject to the right of the city to use them in the improvement of other streets under the same general plan of improvement. The abutting owner may remove the same, but can not require the city to deliver them to him at such place as he may designate. If the owner does not remove the surplus materials within a reasonable time, he is deemed to have abandoned the same. Haas v. City of Evansville, 20 App. 482.

[Acts 1881, S., p. 391. In force April 14, 1881.]

220. Cost, how apportioned.—69. In all contracts specified in the last preceding section, the cost thereof shall be estimated according to the whole length of the street or alley, or the part thereof to be improved, per running foot; and the city shall be liable to the contractor for so much thereof only as is occupied by public grounds of the city bordering thereon and the crossing of streets and alleys, and the owners of the lots bordering on such street or alley or the part thereof to be improved shall be liable to the contractor for their proportion of the cost, in the ratio of the front lines of the lots owned by them to the whole improved line; and in making the assessments against such owners for the improvement, the ground shall be assessed across the ground fronting or immediately abutting on such improvement, back to the distance of fifty feet from such front line, whether such ground be subdivided by platting or conveyance or in any other manner. All assessments where the ground to be assessed is held by more than one owner shall be in proportion of the fair cash value of each parcel, less the value of improvements, to be determined by the city engineer; and in case of a sale upon a precept, each parcel shall be offered and sold separately, beginning with the front parcel, and so on to the last or rear parcel: *Provided*, That when the owner of any lot shall have made any improvement in front of his lot in accordance with the general plan for the improvement of such street, and under the direction of the city engineer, he shall be entitled to a reasonable allowance therefor upon his proportion of the cost of such improvement, which reasonable allowance shall be determined by the said engineer: *Provided*, That all contracts made by any city, or by any officer under the authority thereof, for public improvements or otherwise, in the profits whereof any officer of such city shall be interested, directly or indirectly, shall be void. R. S. 1894, § 3625.

Constitutional.—This section is held not unconstitutional because it authorizes the assessment of lands not bordering on the street to be improved, the same being within fifty feet of such improvement; nor because it makes no provision for the assessment of benefits and damages occasioned by such improvements. Ray v. City of Jeffersonville, 90 Ind. 567; Bass v. City of Ft. Wayne, 121 Ind. 389.

Repealed, by implication.—The body of this section, relating to assessments for street improvements, was repealed by implication by the succeeding section, act of April 13, 1885 (R. S. 1894, § 3626), saving only contracts entered into before the passage of the act. Crowell v. Jaqua, 114 Ind. 246, 247; City of Evansville v. Summers, 108 Ind. 189, 194; City of Frankfort v. Ross, 128 Ind. 438, 440; Van Sickle v. Belknap, 129 Ind. 558; Reeves v. Grottendick, 131 Ind. 107, 116.

This section is not open to the objection of cutting off all right of appeal from the apportionment of the assessment by the engineer. Appeal is given by a subsequent section. Ray v. City of Jeffersonville, 90 Ind. 567.

Assessments.—Under this section, an assessment for street improvements can only be made on property abutting on the street, and extending back fifty feet from the front line. Niklaus v. Conkling, 118 Ind. 289.

Assessment—Engineer.—The assessment required to be made by the city engineer under this section is a ministerial act which the legislature had the power to impose on such officer, and it is not his act which deprives the lot-owner of his property in event of sale. Smith v. Duncan, 77 Ind. 92, distinguished; Ray v. City of Jeffersonville, 90 Ind. 567, 572; Taber v. Grafmiller, 109 Ind. 206, 208; Reeves v. Grottendick, 131 Ind. 107, 113; City of Terre Haute v. Mack, 139 Ind. 99.

Assessment lien—When it attaches.—Although the work under a contract for the improvement of a street be completed, yet the lien therefor does not attach to the property adjoining until the estimate is made; and the lien does not relate back to the time when the work was commenced. Jones v. Schulmeyer, 39 Ind. 119; Langsdale v. Nichlaus, 38 Ind. 289; Van Sickle v. Belknap, 129 Ind. 558; Peru, etc., R. Co. v. Hanna, 68 Ind. 562.

The estimate constitutes the assessment; the assessment, when valid, creates the lien. There can be no lien in the absence of an assessment, and no assessment without a sufficient description of the property assessed. Peru, etc., R. Co. v. Hanna, 68 Ind. 562.

The lien attaches at the time fixed by the statute. Elliott Roads and Streets, pp. 432, 433.

Liability of city.—A city is not liable for the cost of a culvert constructed presumably under R. S. 1894, § 3625, but reported as "city extra" work, but is only liable for improvements on which public grounds of the city border and for the street and alley crossings. City of New Albany v. Conger, 18 App. 230.

When the statute and contract thereunder provide for the payment of an improvement from assessments against property benefited, the contractor must look to the assessments, and to them alone, for his compensation, and if they fail, without dereliction or wrong on the part of the city, the city can not be charged as debtor. Peake v. New Orleans, 139 U. S. 342.

[Acts 1885, p. 207. In force April 13, 1885.]

221. Apportionment of cost of improvement.—1. That in all contracts heretofore made or which may be hereafter made by order and under the direction of the common council of any city in this state for the grading, paving, guttering and improvement of any street or alley in such city, the cost of such improvements shall be estimated according to the whole length of the street or alley, or the part thereof to be improved per running foot; and the city shall be liable to the contractor for so much thereof only as is occupied by public grounds of the city bordering thereon, and the crossings of streets and alleys; and the owners of lots bordering on such street or alley, or the part thereof to be improved, shall be liable to the contractor for their proportion of the cost, in the ratio of the front lines of lots owned by them to the whole improved line; and in all cases where such improvement shall have been made, or may hereafter be made on any street or alley running along or through any unplatted lands lying within the corporate limits of such city, the cost of such improvements shall be estimated according to the whole length of the

street or alley or the part thereof to be improved per running foot, and the owners of such unplatted lands bordering on such street or alley or the part thereof to be improved shall be liable to the contractor for their proportion of the cost, in the ratio of the front lines of such unplatted lands owned by them to the whole improved line; and in making the assessment against such owners for the improvement, such unplatted lands shall be assessed across the ground fronting or immediately abutting on such improvement back to the distance of one hundred and fifty feet from such front line, and the contractor shall have a lien thereon for the value of such improvements: *Provided, however,* That where such land is subdivided, the land lying immediately upon and adjacent to the line of the improvement shall be primarily liable to and for the whole cost of the improvement, and should that prove insufficient to pay such cost, then the second parcel and other parcels in their order to the rear parcel of said one hundred and fifty feet shall be liable in their order; and if the owners of such unplatted lands fail to pay for such improvements within sixty days after the completion of the same, such contractor may enforce his said lien in the circuit court of the county where such city is situated, and the court shall ascertain the value of such improvements according to the contract price therefor and render a judgment for the amount thereof against the owner of such lands, and direct that such lands, or so much as may be necessary, be sold by the sheriff upon an order of sale issued upon such judgment, without relief from valuation or appraisement laws, and the sheriff shall issue to the purchaser a certificate of sale therefor, which shall entitle the holder thereof, his heirs or assigns, to a deed therefor within one year from the date of such sale: *Provided,* That the owner of such lands may redeem from any such sale under the provisions of the law now in force concerning the redemption of lands sold upon execution and foreclosure of mortgages. R. S. 1894, § 3626.

Repeal.—This section repeals the body of the next preceding section except as to contracts made before the passage of this section. Crowell v. Jaqua, 114 Ind. 246; Reeves v. Grottendick, 131 Ind. 107.

This section does not repeal the second succeeding section, but only modifies the same so far as to require that assessments against unplatted land shall be enforced by proceedings in the circuit court, instead of by the issuance of a precept to the city treasurer. For the enforcement of assessments against platted lands within the limits of a city, a precept may be issued as heretofore. Crowell v. Jaqua, 114 Ind. 246.

This section does not enlarge the lien of the contractor where the work was completed and sale had prior to the passage of this section. Niklaus v. Conkling, 118 Ind. 289.

This section does not in any manner affect clause 43 of § 53 (*ante*, § 124) of the general act for the incorporation of cities, relating to the construction of sewers, drains and cisterns. City of Elkhart v. Wickwire, 121 Ind. 333.

Assessments.—The power to assess lands back one hundred and fifty feet only exists when there is a tract of unplatted land extending back that distance, but a public highway can not be crossed and lands beyond it assessed, although the same may be within one hundred and fifty feet of the street. City of Frankfort v. State, 128 Ind. 438.

If the estimate of the city civil engineer is adopted and approved by the common council, that is a sufficient assessment; and the fact that the resolution adopting the estimate provides that property owners who have paid part of a former assessment

which has been vacated, shall have credit for such payment, does not impair the effectiveness of such assessment. Reeves v. Grottendick, 131 Ind. 107.

Engineer's duties—Estimate.—The engineer is the proper officer to make and certify the estimates. Reeves v. Grottendick, 131 Ind. 107, 113; Taber v. Grafmiller, 109 Ind. 206; Van Sickle v. Belknap, 129 Ind. 558; Linville v. State, 130 Ind. 210; Ray v. City of Jeffersonville, 90 Ind. 567.

Power to levy an assessment.—A city has no power to make an assessment for local improvements except such as is conferred by its charter, and any substantial departure from the mode of proceeding prescribed by the statute will vitiate the assessment. Churchman v. City of Indianapolis, 110 Ind. 259, 267; Elliott Roads and Streets, pp. 370, 371.

Authority to levy statutory.—The authority to levy an assessment is purely statutory, and no other assessment than such as the statute prescribes can be made. Niklaus v. Conkling, 118 Ind. 289, 291.

Power to assess abutting lot-owners with the cost of grading and paving a street does not, of itself, authorize a city or town to assess such owners with the cost of repairing such street. Town of Marion v. Skillman, 127 Ind. 130, 140.

Assessment—Construction of statutes.—Statutes conferring power upon municipalities to make assessments for street improvements must be strictly construed. Niklaus v. Conkling, 118 Ind. 289, 291; Town of Marion v. Skillman, 127 Ind. 130; Elliott Roads and Streets, pp. 371, 373, 374.

Improvements regarded as benefits.—Assessments for street improvements are upheld on the ground that the adjacent property upon which the cost of the improvement is assessed is enhanced in value to an amount equal to the sum assessed against it, and that the owners have received peculiar benefits which the citizens do not share in common. The municipality, as such, is not benefited by the improvement, and there is, hence, neither a legal nor moral obligation to pay. Quill v. City of Indianapolis, 124 Ind. 292, 299; City of New Albany v. Cook, 29 Ind. 220; Barber, etc., Co. v. Edgerton, 125 Ind. 455; Ross v. Stackhouse, 114 Ind. 200; Lipes v. Hand, 104 Ind. 503, 508; Heick v. Voight, 110 Ind. 279; Elliott Roads and Streets, p. 391.

A statute which authorizes the assessment of abutting property for the cost of a public improvement without reference to special benefits resulting to the property from the improvement is void. Norwood v. Baker, 172 U. S. 269; 19 Sup. Ct. 187; Loeb v. Trustees, etc., 91 Fed. Rep. 37.

Agricultural land—Assessment.—Land within the limits of a city, although held for agricultural purposes, is subject to local assessment for street improvements. Taber v. Grafmiller, 109 Ind. 206; Kalbrier v. Leonard, 34 Ind. 497.

Church property.—Church property is subject to assessment for the improvement of a street on which it is situated. Rausch v. Trustees, etc., Christ Church, 107 Ind. 1.

Public square.—The public square of a county bordering on a street is liable for an assessment for the improvement of the street, but such square can not be sold to pay such assessment. Lowe v. Board, etc., 94 Ind. 553; Board, etc., v. Schrader, 36 Ind. 87; Westfall v. Hunt, 8 Ind. 174.

Lands dedicated for park purposes.—Where a city orders the graveling of a street in which are located two strips of land originally dedicated for park purposes, and accepted by it as such, the cost of graveling the parks can not be assessed on the abutting owners under an ordinance rendering them liable for the improvement, "except so much thereof as is occupied by the public grounds owned by said city bordering thereon." Bennett v. Seibert, 10 App. 369.

The city, having assumed the expense of graveling the parks, and having ordered the improvement on this basis, can not afterwards impose that additional burden on the lot-owners. Bennett v. Seibert, 10 App. 369.

The city is the "owner" of the land dedicated to park purposes, within the meaning of the ordinance excepting abutting owners from liability for graveling so much of the

street as is "occupied by the public grounds owned by the city," though it may not have the fee-simple title thereto. Bennett v. Seibert, 10 App. 369.

Railroad right of way—Assessment of.—The right of way of a railroad company which abuts upon a street may be assessed for the improvement of the street; also for the construction of a sewer. Personal judgment may be rendered for such assessment, but the right of way can not be sold therefor. Personal property may be sold. Pittsburg, etc., R. Co. v. Hays, 17 App. 261; Peru, etc., R. Co. v. Hanna, 68 Ind. 562; Indianapolis, etc., Co. v. Ross, 47 Ind. 25; Lake Erie, etc., R. Co. v. Bowker, 9 App. 428; Louisville, etc., R. Co. v. State, 8 App. 377; Louisville, etc., R. Co. v. Boney, 117 Ind. 501; Louisville, etc., R. Co. v. State, 122 Ind. 442; 2 Elliott on Railroads, § 786 and cases.

When the statute provides for assessing only the property fronting on the street for its improvement, property not fronting upon the street can not be assessed for such improvement. City of New Albany v. Cook, 29 Ind. 220.

Married women.—Coverture is no reason why real estate belonging to a person under such disability should not be assessed for its share of the cost of an improvement. Ball v. Balfe, 41 Ind. 221.

Lien of assessment—Unplatted land—Enforcement.—Under this section the lien of the assessment on unplatted lands may be enforced by the contractor by foreclosure in the circuit court. Van Sickle v. Belknap, 129 Ind. 558; Crowell v. Jaqua, 114 Ind. 246. In such action the complaint must aver all the acts done by the municipal officers, and all facts essential to show their authority, but it is not necessary to incorporate in the complaint, by reference or otherwise, any written instrument except the estimate or assessment. Van Sickle v. Belknap, 128 Ind. 558.

Vacating void assessment—Re-assessment.—If an assessment is void for not giving the name of the owner of the lot assessed, it may be vacated by the common council and a new assessment made. A failure to state the name of a lot-owner correctly is sufficient to warrant a vacation of the assessment. Reeves v. Grottendick, 131 Ind. 107.

Same—Street railway.—Where, by contract between a street railway company and a city, it is left to the judgment of the council whether they would assess the cost of pavement between the rails against the railway company or against the abutting property, the assessment for the cost between the rails of the street railway can not attach to the abutting property when the ordinance directs that it shall be levied against the property of the company, and the contractor is sent to it for his pay. The street improvement could only be made on the order of the common council, and the assessment for its cost could be directed only against the specific property designated in the ordinance. State v. City of Michigan City, 138 Ind. 455.

Opening street—Improvement proceedings—Appeal from.—Where an appeal is taken from proceedings to improve a street, the city is not compelled to stop the work while the appeal is pending; and, in such case, if, on appeal, the city prevails, the work may be finished under the original proceedings, but if the property owner is successful, and the court decides that there is some irregularity in the proceedings, the city may correct the same or begin anew, according to the determination of the court on appeal. If, however, the court, on appeal, adjudges the entire proceedings void, and no appeal is taken from such judgment, and the city does not proceed anew under the statute, it amounts to an abandonment of the appropriation of the land, and the title to the property reverts to the owner. Morris v. Watson, 8 App. 1.

[Acts 1867, p. 33. In force March 14, 1867.]

222. Payment—Lien—Order without petition.—70. When any such contract shall have been made, or shall have been heretofore made and shall have been in progress of fulfillment, the common council shall have power to cause estimates to be made, from time to

time, of the amount of work done by the contractor, and to require such amount to be paid to him, deducting a reasonable percentage to secure the completion of the contract, until the whole shall be finished, and to prescribe the time within which the whole shall be completed; and such estimates shall be liens upon the grounds upon which they are assessed, to the same extent that taxes are a lien, and shall have the same preference over other demands The common council, with the concurrence of two-thirds of the members thereof, may order or cause any or all of the improvements mentioned in the preceding section, and repairs of any kind on streets and alleys, to be made in like manner, without such petition; and either charge and cause any and all of the expenses thereof to be assessed and collected, as hereinafter provided, when petition is made, or, if it is deemed just and right by the common council, to cause such expenses, or any part thereof, to be paid out of the general revenue of the city. R. S. 1894, § 3627.

Satisfaction of liens, see *post*, § 1119.

Estimates—Council—Mandate.—Mandate lies against a city as a corporation at the suit of a contractor, to compel the making of correct estimates of work done by him in the improvement of its streets, according to terms of his contract, so far as the same may be chargeable to abutting real estate, and neither the city engineer nor any other city officer is a necessary party. Wren v. City of Indianapolis, 96 Ind. 206, 213; City of Greenfield v. State, 113 Ind. 597; Chapin v. Osborn, 29 Ind. 99.

In such case the city can not object, on demurrer to the complaint, that it does not show that the letting of the work was properly advertised, or that a grade was fixed by the ordinance providing for the improvement, or that the work was not finished according to contract, the city's fault preventing; and where it was averred that the ordinance was passed by a unanimous vote of the council, it is not necessary, in view of the statute (R. S. 1894, § 3627), to allege that there was a petition therefor. Wren v. City of Indianapolis, 96 Ind. 206, 217.

In such case mandate will lie against both the municipal corporation and the common council, or other officers whose duty it is to act, or against either of them, to enforce the performance of a duty incumbent on the corporation. When the action is brought against the common council it is properly brought against it as a body and not against the members individually. Wren v. City of Indianapolis, 96 Ind. 206; City of Greencastle v. Allen, 43 Ind. 347.

Where a contract, valid on its face, is entered into with the common council of a city for the improvement of a street, the expense of which is to be collected from adjacent lot-owners, and work is performed under it, it is the duty of the council to order an estimate, when applied for, leaving the validity of the contract to be controverted by the property owners; and in case of a refusal to order such estimate, mandamus is an appropriate remedy. City of Greenfield v. State, 113 Ind. 597, 599; State v. Haworth, 122 Ind. 462, 478.

Estimate—After refusal.—The final order of the common council directing an estimate is not affected by a previous order refusing to do so. Taber v. Ferguson, 109 Ind. 227, 233.

An assessment for a street improvement should show the amount for which each lot or piece of land is liable. Balfe v. Johnson, 40 Ind. 235.

Final estimate—Precept—Presumption.—In the absence of an answer showing that the improvement was not completed according to the contract, the court must presume that the city engineer, in reporting a final estimate, and the common council, in ordering a precept, did their duty. Jenkins v. Stetler, 118 Ind. 275, 278.

The final estimate and assessment for a street improvement may be amended or corrected by the common council. Ball v. Balfe, 41 Ind. 221.

Estimate assigned—Ratification.—A ratification by the common council of an assignment of the estimate by the contractor is equivalent to precedent authority, and entitles the assignee to collect the assessments. Taber v. Ferguson, 109 Ind. 227, 233.

Acceptance of work—Effect—Prima facie evidence.—The acceptance of work, by the proper city authorities, done under a contract for a street improvement, is only prima facie evidence that the work has been done in substantial compliance with the terms of the contract. Gulich v. Connely, 42 Ind. 134. See Darnell v. Keller, 18 App. 103; Elliott Roads and Streets, pp. 416, 417.

Cost.—The cost of the improvement, whether first or second, is chargeable to the adjoining property, or payable out of the general fund of the city, as may be determined by city council. City of Lafayette v. Fowler, 34 Ind. 140; Yeakel v. City of Lafayette, 48 Ind. 116; City of Kokomo v. Mahan, 100 Ind. 242.

Cost payable out of general fund.—When the cost of a street improvement is payable out of the general funds of the city, a strict compliance with the statutes as to letting contracts where the property owners pay for the improvements is not essential. City of Indianapolis v. Mansur, 15 Ind. 112; City of Aurora v. Fox, 78 Ind. 1; Cummins v. City of Seymour, 79 Ind. 491; Town of Marion v. Skillman, 127 Ind. 130; Platter v. City of Seymour, 86 Ind. 323.

It is not necessary, in order to render the contract valid, that the council should enter of record its determination, whether the improvement contracted for shall be paid for by the property owners, or out of the general fund of the city; but where the council determines to pay out of the general fund, such an order should be made of record. City of Indianapolis v. Amberry, 17 Ind. 175.

Advance payment--Completion of work by surety.—Under an earlier act for the incorporation of cities, where the contractor received from a property owner in advance of the estimates the full amount for which the property owner would have been liable upon the completion of the improvement, and the contractor then died, leaving the work incomplete, and the surety then completed the work upon the contract to save himself from liability thereon, he could not recover against the property owner so making the advance payment, as such payment was a satisfaction of the demand. Broker v. City of New Albany, 12 Ind. 417.

223. Payment, how enforced.—71. In case any of the owners of lots or parcels of ground on which such assessments have been made shall fail or refuse, for the space of twenty days after the date of the estimate, to pay the amount thereof due by such person to such contractor, such contractor shall file his affidavit in the clerk's office of said city, stating that the whole or some part of said assessment remains unpaid, showing the amount paid and the amount due; that the estimate thereof has been duly made, and that the work estimated has been done according to contract. It shall be the duty of the clerk, at the next or any subsequent meeting of the common council, to report the said affidavit to the council, whose duty it shall be to cause a precept to issue for the collection of such assessment, or any unpaid balance thereof, which precept shall be signed by the mayor and attested by the clerk, and sealed with the seal of said city, and shall set forth the name of the person against whom the assessment is made, the description of the lot or land on which it is made, the amount of such assessment, and the date of the estimate, which shall be directed to the treasurer of such city, commanding him to make such assessment, or unpaid balance there-

of, within ten days after receiving such precept, of the owner in whose name such assessment is made, which precept the clerk shall forthwith deliver to the treasurer, who shall serve the same by reading the same, personally, to such owner, or by leaving a copy of such precept at his last or usual place of residence; or, if such owner be unknown, or not a resident of such city, then by publication for three successive weeks in a weekly newspaper printed and published in the city, briefly setting forth the facts of the estimate, the amount due, that the work has been done as contracted, the name of the person whose property is to be sold, the description of the property, and the date of the order of said precept by the said council, and giving notice that if such assessment be not paid within twenty days after publication, he will proceed to make the same by levy and sale of the lot or land whereon the same is assessed. Any owner of land, or his representatives, aggrieved by such precept, may appeal therefrom, within twenty days after such demand or publication, to the circuit court of the county wherein such city is situated, upon filing sufficient bond with the clerk of said city, conditioned for the payment of whatever judgment may be rendered against such appellant in said court; and such appeal shall stay all proceedings by such treasurer. And the trial of such appeal shall be conducted as other trials of civil causes are conducted in said court; provided that no question of fact shall be tried which may arise prior to the making of the contract for the said improvement under the order of the council. The clerk shall, upon the filing of said bond, forthwith make out and certify, under his hand and official seal, a true and complete copy of all papers connected in any way with the said street improvement, beginning with the order of council directing the work to be done and contracted for, and including all notices, precepts, orders of council, bonds, and other papers filed in said matter; which transcript shall be in the nature of a complaint, and to which the appellant shall answer upon rule. And in case the court and jury shall find, upon trial, that the proceedings of said officers, subsequent to said order directing the work to be done, are regular; that a contract has been made; that the work has been done, in whole or in part, according to the contract; and that the estimate has been properly made thereon,—then said court shall direct the said property to be sold and conveyed by the sheriff thereof, as the said treasurer is hereinafter directed to sell and convey property liable to street improvements: *Provided,* That nothing herein shall be so construed as to prevent any person from obtaining an injunction upon the proceedings prior to the making of any such improvements. If no such appeal shall have been taken as aforesaid, it shall be the duty of such treasurer, within ten days after the expiration of said twenty days, to levy said precept upon the lot or land therein described, and to sell the same, or so much thereof as may be necessary to pay such assessment with costs and charges. But before any such sale, he shall give notice of the time and place thereof, by advertising the same for three weeks successively in a newspaper printed and published nearest

to such lot or land, if any such be printed and published within the county wherein such city is situated, and by posting up written or printed notices thereof in at least three public places in said city. And every such sale shall be by public auction, and upon or near the premises or in the city court room of said city, in the discretion of said treasurer. And no sale of said lot or land previous or subsequent to the date of such estimate, and subsequent to the date of such petition or determination of the common council to make such improvement without petition, shall invalidate or affect any sale thereof in pursuance of this act. Upon the sale of any lot or land by virtue of such precept, and the payment of the purchase-money, the treasurer (or, in case of his death or going out of office, his successor) shall execute, acknowledge, and deliver to the purchaser a certificate of conveyance for the premises; which shall be valid and effectual to convey all the right, title, and interest of any such owner or purchaser from him as aforesaid, except as hereinafter provided, and shall be prima facie evidence of all the facts recited therein. In case the purchaser of any real estate under a precept, as aforesaid, having paid the purchase-money therefor, shall die before a certificate of conveyance, as herein provided, shall have been executed to him, the treasurer shall convey the same to the heirs or devisees of such deceased purchaser. The proceeds of any such sale shall be applied as follows, to wit: *Firstly*, To the payment of such assessment, with interest thereon from the date of such estimate, and all costs accrued thereon by reason of said sale; and, *Secondly*, The residue of such proceeds shall be paid to the owner, or his or her heirs or representatives, of such real estate, or, if unknown, it shall be paid into the city treasury; and such city shall at all times be responsible to such owner, heirs, or representatives for such residue. The purchaser under such precept shall hold such real estate subject to the lien of the unpaid part of its proportion of the whole cost of the improvement. The treasurer shall be entitled to a commission of five per cent. on the first hundred dollars, and three per cent. on any excess above that sum; but when the money is paid to him without sale, one-half commission only shall be received by him. For levying on the real estate and advertising the same, he shall receive one dollar; for personal demand for payment, twenty-five cents; for return of the precept, with his doings thereon, one dollar; for making certificate on sale of real estate, one dollar. He shall indorse on said precept the time of receiving the same, and, within three months thereafter, he shall make return thereof to the clerk, with his proceedings thereon. Any purchaser failing to pay the purchase-money shall be subject to the like penalties and proceedings as purchasers at sheriff's sale are by the laws of this state. The owner of any lot or land sold as aforesaid, or his agent or attorney, heirs or representatives, may redeem the same at any time within one year after the day of sale, by paying to the purchaser, or to the city treasurer for the use of the said purchaser, or his heirs or assigns, the sum mentioned in his certificate and the amount of all subsequent assessments paid by the purchaser,

with fifty per cent. on the whole sum, and interest from date of purchase or time of payment: *Provided*, That infants, idiots, insane persons, and *femes covert* may redeem any such lot or land belonging to them, sold for assessment as aforesaid, within one year from expiration of such disability. Claimants of a part of such land, or of any undivided part of the same, may redeem the whole as other owners may redeem. If such owner, or any person on his behalf, shall fail to redeem such land within one year as aforesaid, at the expiration thereof, and on production of the certificate of purchase, the treasurer shall execute to the purchaser, his heirs or assigns, in the name of the city, a conveyance of the real estate so sold; which shall vest in the grantee an absolute estate in fee-simple, subject, however, to all claims which the city may have thereon for assessments or liens or [other] incumbrances. Such certificate and final conveyance shall resemble, as nearly as may be, the certificate and conveyance for tax-sales, and be prima facie evidence of all the facts recited therein. R. S. 1894, § 3628.

This section was not repealed by the act of 1885 (*ante*, § 221 ; R. S. 1894, § 3626), but was only modified as to the collection of assessments against unplatted lands. Crowell v. Jaqua, 114 Ind. 246.

The provisions of this section directing the manner of sale of property for a street improvement, is not in conflict with § 22, article 4, of the constitution. Brookbank v. City of Jeffersonville, 41 Ind. 406.

Precept—Estimate essential.—Without an estimate for work done in improving a street, as required by the preceding section, no valid precept for the collection thereof can be issued. The city civil engineer is the proper officer to make the estimate and apportion the costs to each lot or tract of land. Ray v. City of Jeffersonville, 90 Ind. 567, 572; Goring v. McTaggart, 92 Ind. 200, 203; Van Sickle v. Belknap, 129 Ind. 558, 561; Reeves v. Grottendick, 131 Ind. 107, 113; Lammers v. Balfe, 41 Ind. 218.

Same—Mandate.—The engineer and common council can be compelled by mandate to make estimate and issue precept. Chapin v. Osborn, 29 Ind. 99; City of Indianapolis v. Patterson, 33 Ind. 157; Wren v. City of Indianapolis, 96 Ind. 206; City of Greencastle v. Allen, 43 Ind. 347; Elliott Roads and Streets, p. 437.

Assessment—When sufficient.—If the estimate of the city civil engineer is adopted and approved by the common council, that is a sufficient assessment; and the fact that the resolution adopting the estimate provides that property-owners who have paid part of former assessments which have been vacated shall have credit for such payments does not impair the effectiveness of such assessment. Reeves v. Grottendick, 131 Ind. 107, 115.

Where the common council approved an estimate and ordered it paid its power was exhausted, and it could not thereafter rescind the assessment and adopt another for a less sum. City of Indianapolis v. Patterson, 33 Ind. 157.

The last and corrected estimate of the work done and cost of the improvement is the one on which the precept should issue. McGill v. Bruner, 65 Ind. 421.

Precept—Order—Issuing.—Under this section a city clerk has no authority to issue a precept for the collection of an assessment for a street improvement, without an order of the council, and a sale under a precept so issued is absolutely void; and in a suit by a purchaser under a precept against lot 20, to quiet his title, a record of proceedings of the council showing the ordering of a precept against lot 52 is not admissible, nor is parol evidence admissible showing that the council intended to order the precept against lot 20. Langohr v. Smith, 81 Ind. 495, 497.

Same—Signature of mayor.—Precepts issued for the collection of assessments should

be signed by the mayor. Signature of member of council acting temporarily as president thereof is not sufficient, and precept so signed is void, and sale of property thereon will be enjoined. City of Jeffersonville v. Patterson, 32 Ind. 140.

Contractor's affidavit essential.—A precept issued without the filing of an affidavit by the contractor, embodying in a substantial manner all of the requirements of this section providing for such affidavit, is void; and where the complaint for the enforcement of an assessment shows an insufficient affidavit, it is bad on demurrer. Clements v. Lee, 114 Ind. 397, 400.

Joint contractor's affidavit.—The affidavit of one of two or more joint contractors to obtain a precept is sufficient. Ray v. City of Jeffersonville, 90 Ind. 567, 574; Jenkins v. Stetler, 118 Ind. 275, 278; Reeves v. Grottendick, 131 Ind. 107, 111.

Survivor's affidavit sufficient.—Where the work in improving a street is completed by two joint contractors, and after the assessment is made one dies, a precept may issue thereafter in favor of both, and the affidavit to obtain such precept may be made by the survivor. Ray v. City of Jeffersonville, 90 Ind. 567, 574.

Affidavit, when sufficient.—It is sufficient if the affidavit for a precept substantially conform to the statutory requirements; and it need not contain a recapitulation of all the steps that have been taken previous thereto in the proceedings. R. S. 1894, § 3628; Balfe v. Johnson, 40 Ind. 235, and Clements v. Lee, 114 Ind. 397, distinguished. Reeves v. Grottendick, 131 Ind. 107, 112.

The affidavit filed for a precept must show the making of an estimate and the amount for which each parcel or lot of land is liable. Balfe v. Johnson, 40 Ind. 235.

If the notice to the property owner of the amount of the assessment contains a description of the property owned, and such notice is combined with the affidavit for a precept, the latter need not contain a description of the lot against which it is desired to obtain a precept. Reeves v. Grottendick, 131 Ind. 107, 112.

Affidavits—Some good—Some not.—If there is a joint appeal from several precepts, and the several precepts are included in one transcript, and on such appeal the transcript is treated by the appellants as a single complaint, the overruling of a demurrer for want of facts is not an available error in the supreme court, even though some of the affidavits for precepts are defective. Reeves v. Grottendick, 131 Ind. 107, 113.

Variance of names of contractors.—A variance between the names of the contractors as set out in the precept and in the proceedings of the council is immaterial if it reasonably appears that one and the same person is meant. Reeves v. Grottendick, 131 Ind. 107, 114.

Void precept—Injunction.—Injunction lies to restrain a sale of real estate upon a void precept issued on account of a street improvement. Goring v. McTaggart, 92 Ind. 200, 201; Bishop v. Moorman, 98 Ind. 1, 2; City of Ft. Wayne v. Shoaff, 106 Ind. 66, 67; Balfe v. Lammers, 109 Ind. 347, 349; City of Jeffersonville v. Patterson, 32 Ind. 140; Elliott Roads and Streets, p. 441.

The common council has no right to issue a precept on an improper assessment. Lammers v. Balfe, 41 Ind. 218.

The making of a correct assessment, after a precept has issued on an incorrect one, can not relate back so as to make the precept good and defeat an appeal from the precept. Lammers v. Balfe, 41 Ind. 218.

A precept issued for the collection of the assessments on two lots in gross, without directing the sale of each separately, is voidable but not void. Martindale v. Palmer, 52 Ind. 411.

Assessments—Enforced—Other assessments can not be inquired into.—The validity or accuracy of any other assessment than the one sought to be enforced can not be questioned. If that appears to be accurate and enforcible the contractor is entitled to judgment. Sims v. Hines, 121 Ind. 534

In an action upon a note or due bill given by A., the claim evidenced by the note or

due bill being based upon a street improvement ordered to be made by the common council, a motion by the defendant to make the mayor and common council parties plaintiff was properly overruled. For fuller statement of facts see McDonald v. Yeager, 42 Ind. 388.

Assessment void as to others.—The owner of property against which a precept to collect an assessment has been issued can not object to its enforcement on the ground that assessments against neighboring lots are void. Reeves v. Grottendick, 131 Ind. 107, 115.

The rule that a property owner can not complain because other property was not also assessed, applies only where the assessment was accurate, and not where the assessment was wrongfully made. Crawfordsville, etc., Assn. v. Clements, 12 App. 464.

Right of appeal—Apportionment.—Section 2 of the act of April 14, 1881 (*ante* § 220), is not open to the objection of cutting off all right of appeal from the apportionment of the assessment by the city engineer; R. S. 1894, § 3628, gives such appeal. Ray v. City of Jeffersonville, 90 Ind. 567, 571.

Appeal is a direct attack.—An appeal from a city precept foreclosing an assessment lien on a lot for a street improvement is a direct, and not a collateral, attack on the validity of the assessment. Crawfordsville, etc., Assn. v. Clements, 12 App. 464.

Right of appeal statutory.—The right to appeal from a precept is a statutory right, and there is no inherent right of appeal from it. Reeves v. Grottendick, 131 Ind. 107, 109.

Appeal from precept—Parties—Bond.—On an appeal from a precept issued to enforce the collection of an assessment for the improvement of a street, the contractor who did the work, and for whose benefit the precept is issued, is the proper party plaintiff, and not the city. The appeal bond in such case should be made payable to the contractor, and not to the city. First Presbyterian Church v. City of Lafayette, 42 Ind. 115; Bennett v. Seibert, 10 App. 369.

Where, in the action, the city appears as the party plaintiff, and the cause is allowed to proceed to final judgment without objection, and the court, in the judgment, orders the money when collected to be paid to the contractor, the judgment will be substantially a judgment in favor of the contractor, and the supreme court will deem the complaint amended by making him the plaintiff. First Presbyterian Church v. City of Lafayette, 42 Ind. 115.

Appeal—Defective bond—Dismissal.—Where, upon appealing under this section, from a precept to collect an improvement assessment, a defective bond is given, the circuit court may require a sufficient bond to be given, and if this is done a motion to dismiss the appeal should be overruled. Bennett v. Siebert, 10 App. 369.

Where a precept, issued for the collection of an assessment for a street improvement, is abandoned by the city before sale, and upon a new order of the common council a second precept issues for the same assessment, the time within which an appeal may be taken is to be computed from the time of giving notice under the second precept. Halstead v. City of Attica, 28 Ind. 378.

Transcript—Liberal construction.—By statute the transcript certified to the circuit court by the city clerk, in an appeal from a street improvement, constitutes the complaint of the contractor; and it should not be construed with rigid strictness against him, and ought to stand, unless there is some defect in it which affects the substantial rights of the parties. Reeves v. Grottendick, 131 Ind. 107, 109; Phillips v. Jollisaint, 7 App. 458, 459; McGill v. Bruner, 65 Ind. 421.

Amendment—Transcript or precept.—The circuit court has no authority to amend the transcript or precept, or to authorize an amendment thereof, but such amendments must be made by the order or with the consent of the common council, after which an amended transcript may be filed. Jenkins v. Stetler, 118 Ind. 275, 278; Balfe v. Johnson, 40 Ind. 235; Lammers v. Balfe, 41 Ind. 218; McGill v. Bruner, 65 Ind. 421.

Where the affidavit on which the precept has issued is defective, such affidavit can not be amended on appeal. Balfe v. Johnson, 40 Ind. 235.

Under act of 1857, upon appeal the transcript must contain a copy of the contract for the improvement; also, the act authorizing collection of assessments by precept is constitutional. City of Logansport v. Blakemore, 17 Ind. 318; Flournoy v. City of Jeffersonville, 17 Ind. 169.

Where the improvement is without petition, the transcript must show that two-thirds of the members of the council voted for the order of improvement. Moberry v. City of Jeffersonville, 38 Ind. 198; Baker v. Tobin, 40 Ind. 310; Yeakel v. City of Lafayette, 48 Ind. 116.

Where it does not appear from the transcript that, on the line of the improvement ordered, there are public grounds, or street or alley crossings, it is not necessary that the transcript should show that provisions have been made for the payment by the city for street or alley crossings, or for improvement in front of public grounds. Moberry v. City of Jeffersonville, 38 Ind. 198.

Omissions in transcript—Certiorari.—Where the transcript omits any material proceeding had before the common council, the proper practice is, not by a motion to make certain, but, upon cause shown, to procure a *certiorari* upon, or an order against the city clerk, to supply the omission. McGill v. Bruner, 65 Ind. 421.

Where such transcript shows that, upon the completion of the improvement, a complete and corrected estimate of the cost had been made by the city engineer, and adopted by the common council, in the stead of partial estimates made during the progress of such improvement, the omission of such partial estimates from the transcript does not render it insufficient. McGill v. Bruner, 65 Ind. 421.

On an appeal from a precept issued for the collection of an assessment for a street improvement, if it appears from an amended transcript that the precept was issued on an imperfect final estimate, and that the perfected final estimate was filed after the appeal was taken, and after a demurrer was sustained to the original transcript, the amended complaint or transcript will be bad on demurrer. Lammers v. Balfe, 41 Ind. 218.

A remonstrance against a proposed improvement is not a part of the transcript. Brookbank v. City of Jeffersonville, 41 Ind. 406.

When demurrer will lie.—Although irregularities or errors may be disclosed by the transcript, a demurrer will not lie, unless the errors or irregularities affirmatively appear to have occurred after the contract was entered into with the city. Sims v. Hines, 121 Ind. 534, 538.

As the transcript is in the nature of a complaint, it is good on demurrer if it shows some notice. If the notice is insufficient the fact must be set up as a defense by way of answer, if the sufficiency of the notice can be inquired into at all—which is doubted. Taber v. Ferguson, 109 Ind. 227; Clements v. Lee, 114 Ind. 397.

Defense, answer.—If there is any defense, except a jurisdictional one, it must be made by way of answer in order to give the contractor an opportunity to avoid it, if he can, by way of reply. Sims v. Hines, 121 Ind. 534, 538.

Same—Estimate—Presumption.—In the absence of an answer showing that the improvement was not completed according to contract, the court must presume that the city engineer and the common council, in ordering a precept, did their duty. Jenkins v. Stetler, 118 Ind. 275.

An answer directed to the entire transcript, but presenting a defense to only part of the sum for which the precept was issued, is bad on demurrer. Hellenkamp v. City of Lafayette, 30 Ind. 192.

Where an assessment for a street improvement has been made upon a lot as being owned by two persons jointly, an answer on an appeal by one of such persons from a precept issued for the collection of such assessment, alleging that such persons were, at

the date of the estimate, and still are, owners in severalty of distinct parts of the lot, presents a good defense. Romig v. City of Lafayette, 33 Ind. 30.

It is a sufficient answer that at the date of the estimate on which the precept was issued the person taking the appeal owned, and has since owned, only a portion of the lot against which the precept is directed, which portion does not adjoin the street improved. Romig v. City of Lafayette, 33 Ind. 30; City of New Albany v. Cook, 29 Ind. 220.

Appeal—What questions triable.—In an appeal from a judgment enforcing an assessment made for a street improvement, where the transcript shows jurisdiction, no question of fact can be tried which arises prior to the making of the contract. Nor will any defect or irregularity which occurred prior to that time affect the right of the contractor to enforce collection of the assessment. The questions to be tried on appeal are whether a contract was made or not, and whether the proceedings subsequent to the order for the improvement are regular, and whether the work has been done according to the contract or not. Moberry v. City of Jeffersonville, 38 Ind. 198; McEwen v. Gilker, 38 Ind. 233, and Kretsch v. Helm, 45 Ind. 438, overruled; Taber v. Ferguson, 109 Ind. 227, 231; Ross v. Stackhouse, 114 Ind. 200, 204; Wiles v. Hoss, 114 Ind. 371; Clements v. Lee, 114 Ind. 397, 399; Jenkins v. Stetler, 118 Ind. 275, 277; Sims v. Hines, 121 Ind. 534, 537; Ball v. Balfe, 41 Ind. 221; Gulick v. Connely, 42 Ind. 134; Budd v. Kraus, 79 Ind. 137; Boyd v. Murphy, 127 Ind. 174; Reeves v. Grottendick, 131 Ind. 107; Hellenkamp v. City of Lafayette, 30 Ind. 192; Martindale v. Palmer, 52 Ind. 411.

Questions antedating contract.—No question that reaches back of the time of the contract for street improvement can be litigated on an appeal from a precept; and no irregularity in the proceedings prior to that time can be drawn in question. The steps taken in the proceedings prior to that time need not be incorporated in the transcript. Boyd v. Murphy, 127 Ind. 174, 177; Reeves v. Grottendick, 131 Ind. 107, 110.

Whether or not the ground ordered improved is a public street or not can not be questioned on appeal. Moberry v. City of Jeffersonville, 38 Ind. 198.

Damages, set-off.—Upon an appeal from a judgment enforcing a street improvement assessment, this section prescribes what shall be tried, and in such a proceeding evidence is not admissible to show that the contractor wrongfully removed gravel and other material. Such alleged damages can not be set off against the assessment. Sims v. Hines, 121 Ind. 534, 537.

The proceedings up to and including the making of the contract will be deemed legal. Trustees, etc., v. Rausch, 122 Ind. 167.

If the city council adjudges that the notice of letting a contract is sufficient, the matter can not be inquired into on appeal from a precept to collect an assessment. Ross v. Stackhouse, 114 Ind. 200; Clements v. Lee, 114 Ind. 397; Wiles v. Hoss, 114 Ind. 371; Martindale v. Palmer, 52 Ind. 411.

Presumption.—Upon appeal it will be presumed that the street under improvement was legally laid out and opened, and that if the land-owner was damaged thereby and claimed compensation, he received it. Kalbrier v. Leonard, 34 Ind. 497.

Upon appeal, when council has adjudged the notice sufficient, an inquiry into such incidental facts as the rejection of bids and the subsequent reconsideration of the vote of rejection, can not be had. Ross v. Stackhouse, 114 Ind. 200.

There is a line of cases holding that the transcript on appeal must show that an order of council was duly passed ordering the improvement, and that the letting of the contract was duly advertised. The most if not all of these cases seem to have been overruled by the cases above cited. Moberry v. City of Jeffersonville, 38 Ind. 198; McEwen v. Gilker, 38 Ind. 233; Kretsch v. Helm, 45 Ind. 438; Baker v. Tobin, 40 Ind. 310; Stewart v. City of Jeffersonville, 41 Ind. 153; Brookbank v. City of Jeffersonville, 41 Ind. 406; City of Logansport v. Legg, 20 Ind. 315.

The decision of the council as to which of the bids should be accepted can not be inquired into on appeal. Boyd v. Murphy, 127 Ind. 174.

Where it appears that the common council has given any sort of notice of the letting of the contract for the improvement of the street, its sufficiency can not be inquired into after the work has been done, under color of the proceedings, with the acquiescence of the parties benefited. Clements v. Lee, 114 Ind. 397.

The transcript or complaint, on appeal from a precept, must show that at meetings of the council, when the improvement was ordered, a quorum was present. But see cases, *supra*. Brookbank v. City of Jeffersonville, 41 Ind. 406.

Appeal, effect on proceedings.—Where an appeal is taken from proceedings to improve a street, the city is not compelled to stop the work while the appeal is pending; and in such case, if, on appeal, the city prevails, the work may be finished under the original proceedings, but if the property owner is successful, and the court decides that there is some irregularity in the proceedings, the city may correct the same or begin anew, according to the determination of the court on appeal. If, however, the court, on appeal, adjudges the entire proceedings void, and no appeal is taken from such judgment, and the city does not proceed anew under the statute, it amounts to an abandonment of the appropriation of the land, and the title to the property reverts to the owner. Morris v. Watson, 8 App. 1, 5.

Where, in a proceeding for the opening of a street, the property owner appeals, and such proceedings are held null and void, and the property owner then accepts damages from the city for the appropriation of the land as a street, the property owner is estopped from denying the validity of the lien of an improvement assessment in favor of the contractor who improved the street under proceedings concurrent with the proceedings for opening the street so held void. Morris v. Watson, 8 App. 1.

Conclusiveness of judgment.—Where, on appeal by a property owner from a precept, the proceedings are sustained, and judgment is rendered in favor of the contractor, the latter is concluded by it, if unappealed from, as to all questions before the court, including the validity of the estimate and the sufficiency of the description, and can not take out another precept. Balfe v. Lammers, 109 Ind. 347, 350.

The finding of the court upon appeal should show the dates and amounts of the several assessments, and from such finding the sheriff can calculate the interest to the date of sale. Brookbank v. City of Jeffersonville, 41 Ind. 406.

Costs.—The costs which accrue upon an appeal from a precept should be adjudged against the losing party personally. Brookbank v. City of Jeffersonville, 41 Ind. 406.

Estoppel.—Unless the proceedings under which a street improvement is being made are totally void, a property owner who stands by, and, without objection, receives the benefit of the work, is estopped thereafter to question the legality of the proceedings. New Albany, etc., Co. v. Crumbo, 10 App. 360; City of Lafayette v. Fowler, 34 Ind. 140; City of Evansville v. Pfisterer, 34 Ind. 36; McCoy v. Able, 131 Ind. 417; Taber v. Ferguson, 109 Ind. 227; Ross v. Stackhouse, 114 Ind. 200; Jenkins v. Stetler, 118 Ind. 275; Palmer v. Stumph, 29 Ind. 329; Busenbark v. Clements, App. Ct., April 25, 1899; Elliott Roads and Streets, pp. 418–423.

A request by a property owner for action by council on a contract is an affirmance of the contract. Johnson v. Allen, 62 Ind. 57.

Injunction—Collateral attack.—Where there is no legal authority to make an assessment, its enforcement and collection may be enjoined. City of Terre Haute v. Mack, 139 Ind. 99; Crawfordsville, etc., Assn. v. Clements, 12 App. 464; Elliott Roads and Streets, pp. 440, 441.

If a property owner claims to be the owner of the ground ordered improved as a street, his remedy is by injunction to prevent the improvement. McGill v. Bruner, 65 Ind. 421.

Where a common council of a city undertook, without a petition from two-thirds of the property-owners interested, to improve a certain street, it is not enough—in a proceeding to enjoin the assertion of a lien on the property of the adjoining owners, on the ground that the proceedings to establish said improvements were void—to assert that

two-thirds of the adjoining lot-owners did not petition for the improvement. As such an action is a collateral attack upon the proceedings of the corporate officers, it is not proper as to any defects or irregularities which do not affect the jurisdiction; and a decision of the council, upon jurisdictional facts, is conclusive as against a collateral attack, and without a showing to the contrary it will be presumed that the council correctly decided jurisdictional questions. McEneney v. Town of Sullivan, 125 Ind. 407, 410; DePuy v. City of Wabash, 133 Ind. 336, 339.

Injunction will lie to restrain the collection of an assessment for a street improvement levied upon property which the city had no power to assess for such improvement. Balfe v. Lammers, 109 Ind. 347.

Questions as to the taking of the yeas and nays on the passage of an ordinance, as to the amount of the estimate and as to a mistake in describing the property, can not be presented by a complaint to enjoin the collection of a street improvement. Balfe v. Lammers, 109 Ind. 347.

An injunction will not be granted because, in performing the work, a portion of the lot has been wrongfully appropriated, the fence torn down, the soil removed and a sidewalk laid thereon. City of Indianapolis v. Gilmore, 30 Ind. 414.

Irregularities prior to the making of the contract are deemed waived, unless taken advantage of by an injunction suit, before the work is performed. City of Indianapolis v. Imberry, 17 Ind. 175; Board, etc., v. Silvers, 22 Ind. 491; Hellenkamp v. City of Lafayette, 30 Ind. 192.

The provision in the statute that no question of fact shall be tried on appeal which may arise prior to the making of the contract is constitutional. Board, etc., v. Silvers, 22 Ind. 491.

Sale—Notice.—The notice of the issuance of precepts for street improvements is not invalid as to an assessment where the notice states the amount of assessment at $32.10 instead of $32.20, the correct amount, as the law does not observe trifles. Burt v. Hasselman, 139 Ind. 196.

Non-resident—City not liable for deficiency.—Where one of the lots opposite which the street was improved was owned by a non-resident, and was sold for a sum less than the assessment, the contractor could not maintain an action against the city for the deficiency. City of New Albany v. Sweeney, 13 Ind. 245.

If a precept is issued and a sale made for more than is due, the sale is void and title does not pass. Wilson v. Poole, 33 Ind. 443; Naltner v. Blake, 56 Ind. 127.

Description of land.—If the property sold on assessment for a street improvement is insufficiently described, the sale will be void; but where the description in the estimate by the engineer, taken in connection with the ordinance providing for the improvement and the contract awarded under such ordinance, is such as would enable a person somewhat acquainted with surveying to find and identify the land, it is sufficient. Naltner v. Blake, 56 Ind. 127; Peru, etc., R. Co. v. Hanna, 68 Ind. 562.

For a description held sufficient, see Yeakel v. City of Lafayette, 48 Ind. 116.

Where, in making a street improvement, and as a part thereof, the city enters upon and appropriates a part of the adjoining lot, by erecting a wall thereon, the cost of constructing such wall, whether made with or without the consent of the owner, can not be included as a part of the assessment for the improvement of the street, and sale be made for the aggregate. Naltner v. Blake, 56 Ind. 127.

Sales—Caveat emptor applies.—The doctrine of *caveat emptor* applies as fully to sales upon assessments for street improvements as to any other analogous class of sales. Churchman v. City of Indianapolis, 110 Ind. 259, 267.

Deed—Effect of recital in.—A recital in a deed executed by a city treasurer upon a sale of lands in satisfaction of an assessment for a street improvement, that "it appearing from the records of the common council of said city, in the city clerk's office, that the aforesaid lands were legally liable for such assessment," was not a representation of

fact upon which the grantee had a right to rely. Churchman v. City of Indianapolis, 110 Ind. 259, 268.

Deed—Evidence aliunde.—Where recitals in a deed executed pursuant to a sale under a precept for the collection of an assessment for a street improvement are shown to be false by evidence *aliunde*, the recitals can not be treated as true. Langohr v. Smith, 81 Ind. 495, 499.

Setting aside sale—Plaintiff's remedy—Assessment.—In an action to quiet title to a lot, against a defendant's adverse claim of title through a purchase of a lot in satisfaction of a street improvement, a mistake by the city civil engineer in estimating the work done under the contract, and assessable against the lot, and other irregularities occurring subsequently to the making of the contract, having been inquired into by the court, the sale set aside and the amount chargeable against the lot ascertained, the plaintiff could not complain; for the defendant having a lien against the lot, the plaintiff was only entitled to have his title quieted to the lot, as to all claims of title except the lien for the assessment chargeable against it for the street improvement. Trustees, etc., v. Rausch, 122 Ind. 167.

Voluntary payment.—Money voluntarily paid on a demand in the nature of a tax—and a street improvement assessment is such—can not be recovered back in the absence of an express statutory provision authorizing such recovery. Churchman v. City of Indianapolis, 110 Ind. 259, 267.

Voluntary payment—Refunding.—There is no statute which authorizes the refunding by a city of money voluntarily paid upon an erroneous or irregular, or even wrongful, assessment for the improvement of a street. Churchman v. City of Indianapolis, 110 Ind. 259, 267.

Surplus earth—Validity of ordinance.—The validity of a provision in an ordinance authorizing a street improvement that surplus earth accumulating in the course of the improvement shall belong to the contractor, can not, under this section, be questioned in a proceeding to enforce an assessment. Jenkins v. Stetler, 118 Ind. 275, 277.

Repeal of law—Effect.—The repeal of the law under which the contract for a street improvement is made, after the work has been done and the precept ordering the sale of the property issued, does not take away the remedy of the contractor. His claim is merged in what is equivalent to a judgment and execution levied upon the property, and is a vested right which the legislature can not take away from him. Palmer v. Stumph, 29 Ind. 329; Phillips v. Jollisaint, 7 App. 458.

ARTICLE 5.—OPENING AND VACATION OF STREETS.

SEC.
224. City commissioners.
225. Proceedings in council.
226. Duty of commissioners.
227. Hearing and proceedings.
228. Assessment of damages and benefits.
229. Report.
230. Report.
231. Report as to infants and insane.
232. Action of council on report.
233. Duty of clerk—Lien.
234. Payment of damages.
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236. Report of collections.
237. Private corporations.
238. Appeal.
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240. Payment of damages.
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242. Vacation of streets, etc.
243. Proceedings of commissioners.
244. Report.
245. Action on report.
246. Clerk's duty.
247. Reference of report and proceedings.
248. Change of street on petition of abutters.
249. Removal of obstructions, etc.
250. Plats.
251. Pending proceedings.
252. Compensation and damages.

[Acts 1875 S., p. 17. In force May 17, 1875.]

224. City commissioners.—1. There shall be appointed, once in each year, by the circuit court in the county wherein is situated any city of this state incorporated under the general act for the incorporation of cities, five freeholders, residents of said city, who shall constitute a body to be called city commissioners and whose duty it shall be to hear and determine all matters appertaining to the acquisition, opening, laying out, altering, and straightening of streets, alleys, and highways within said city, and also to hear and determine all matters appertaining to the altering or straightening of streams within said city, and the taking of lands for sewerage purposes. Such commissioners shall serve for one year and until their successors are elected and qualified; and, before entering upon the duties of their appointment, shall take an oath to faithfully and impartially discharge their duties as commissioners; which oath shall be indorsed upon their certificate of appointment. The city clerk shall, within three days after such appointment, issue to each commissioner a certificate of his appointment. R. S. 1894, § 3629.

Constitutional law.—For constitutional provisions applicable, see *ante*, §§ 4 and 11, and notes.

Constitutional.—This act is not unconstitutional upon the ground that it attempts to confer executive power upon the judiciary contrary to art. 3 of the constitution; nor because it is an invasion of the right of local self-government. City of Terre Haute v. Evansville, etc., R. Co., 149 Ind. 174.

The statute construed.—The above and succeeding sections should be construed with *ante*, § 218, *et seq.* City of Terre Haute v. Evansville, etc., R. Co., 149 Ind. 174.

Statute construed—Amendatory and supplemental.—The act of March 17, 1875, in relation to laying out streets, etc., is amendatory and supplemental to the general law concerning cities, of March 14, 1867. Hays v. City of Vincennes, 82 Ind. 178.

Statute construed strictly.—The statute provides for the taking of private property for public use, and such statutes are to be strictly construed. City of Logansport v. Shirk, 129 Ind. 358; Town of Marion v. Skillman, 127 Ind. 130.

De facto officers—Injunction—Oath.—The requirements concerning the oath of the city commissioners is directory. If not sworn they are *de facto* officers, and the validity of their acts can not be questioned collaterally. Caskey v. City of Greensburg, 78 Ind. 234.

Regularity of appointment—Objections.—All questions as to the regularity of the appointment of the commissioners must be raised by verified answer. Bradley v. City of Frankfort, 99 Ind. 417.

Proceedings to open—When not void—Substantial compliance with the statute.—The law makes the opening of streets and alleys in cities and towns, in some measure, summary proceedings made in behalf of the general welfare of the inhabitants, and if there is a substantial compliance with the requirements of the statute, made in good faith, the proceedings will not be held void Graves v. Town of Middleton, 137 Ind. 400.

Appropriation of land for street.—Where a city desires to appropriate land for the purposes of a street, it must first comply with the provisions of the law as to the assessment and tendering of damages to the owner. City of Lafayette v. Bush, 19 Ind. 326; McKernan v. City of Indianapolis, 38 Ind. 223; City of New Albany v. White, 100 Ind. 206; Dantzer v. Indianapolis, etc., R. Co., 141 Ind. 604; City of New Albany v. Endres, 143 Ind. 192.

Land can not be appropriated for the purposes of a street unless compensation is first assessed and paid or tendered. Faust v. City of Huntington, 91 Ind. 493; Holden v. City of Crawfordsville, 143 Ind. 558; City of New Albany v. Endres, 143 Ind. 192; City of Terre Haute v. Blake, 9 App. 403; Elliott Roads and Streets, p. 178, *et seq.*

Constitution of 1816—Private property for public use.—Under the constitution of 1816, private property might be taken for, and applied to, a public use, before making compensation therefor. Under that constitution it was sufficient if provision was made for payment of compensation, and it was not necessary that the compensation should be assessed and paid or tendered before the taking for a public use. Prather v. Western etc., Co., 89 Ind. 501, 518; Rubottom v. McClure, 4 Blackf. 505; Prather v. Jeffersonville, etc., R. Co., 52 Ind. 16; Allen v. Jones, 47 Ind. 438; McCormick v. President, etc., 1 Ind. 48; Hankins v. Lawrence, 8 Blackf. 266.

Change of channel of stream.—Where a city attempts to change the channel of a stream of water flowing through a portion of a city, there must be a substantial compliance with the charter. McKernan v. City of Indianapolis, 38 Ind. 223.

Presumption of legal opening.—The presumption is that a street was legally laid out and opened, and that property owners damaged thereby claimed and received compensation. Sims v. City of Frankfort, 79 Ind. 446, 457.

Opening alley—Resolution of common council—Damages—Dismissal.—A provision in the resolution of a common council approving the final report of the city commissioners in a proceeding, under this and following sections (R. S. 1894, §§ 3629–3657), for the opening of an alley and appropriating the land, that the owner's damages shall not be paid until after the collection of assessments for benefits, does not warrant a dismissal of the proceedings, as the council is authorized to delay the opening until the benefits are collected. In the absence of such a provision delaying the payment of damages, the damages assessed are due and collectible from the city as soon as the appropriation of the land is made. Holden v. City of Crawfordsville, 143 Ind. 558; City of Terre Haute v. Blake, 136 Ind. 636; City of Terre Haute v. Blake, 9 App. 403.

Vacation—Obstruction of easement of access to property thereby—Damages—Recovery.—The obstruction of the easement of access need not always be upon the immediate front of the lot, the owner of which is affected, but if the obstruction, though remote, renders access to such lot impossible, or impairs it in a substantial manner at the point where it abuts upon the street, the property right of the property owner is invaded and he may recover. Dantzer v. Indianapolis, etc., R. Co., 141 Ind. 604; Pennsylvania Co. v. Stanley, 10 App. 421.

Recovery in such case is limited to injury different in kind, and not simply in degree from that suffered by the community in general. Dantzer v. Indianapolis, etc., R. Co., 141 Ind. 604; Decker v. Evansville, etc., R. Co., 133 Ind. 493.

Injury in common with community in general—Remote obstruction—Inconvenience of access.—Where a lot does not abut upon the street obstructed, and the owner is only affected by an inconvenience in traveling to and from his premises, the inconvenience is one suffered alike by all the community and no recovery therefor can be had. Dantzer v. Indianapolis, etc., R. Co., 141 Ind. 604.

Easement of access, light and air—Remote obstruction.—Easements of access, of light and air are all confined to the street in front of the lot, and if a remote obstruction does not affect these there is no legal injury, or tort, even though the access be rendered more inconvenient or a more circuitous route of access is necessitated. Dantzer v. Indianapolis, etc., R. Co., 141 Ind. 604.

Vacation—Right of recovery—Question of law and fact.—As to whether one whose access to his property has not been cut off by vacation of a part of a street may recover is a question of law. The degree of injury is a question of fact. Dantzer v. Indianapolis, etc., R. Co., 141 Ind. 604.

Vacation—Owner of abutting land.—The owner of lands outside of, but adjoining

the line of a city, and at which a street terminates, has no right to remonstrate against the vacation of such street. House v. City of Greensburgh, 93 Ind. 533, 538.

Objections by outside owner.—The fact, if it be a fact, that the owner of an adjacent lot objects to the vacation of the street, does not give the owner of land outside of the city boundaries a sufficient cause of action for enjoining the proceedings of the city in the proposed vacation of the street. House v. City of Greensburgh, 93 Ind. 533, 539.

Abandonment—Non-user—Vacation.—The failure of municipal authorities to keep a street in repair, or the mere non-user of a portion or all of such street by the public for a considerable time, will not authorize an inference of abandonment. The only way by which a street can be lawfully abandoned is by a proceeding to vacate the same. Cheek v. City of Aurora, 92 Ind. 107, 114; City of Lawrenceburgh v. Wesler, 10 App. 153, 163; Elliott Roads and Streets, p. 658.

Wrongful appropriation of land.—Where a city wrongfully takes possession of land and permanently appropriates and uses it for a street, it is liable as a tort-feasor for taking possession of private property without complying with the charter under which it is incorporated. City of Ft. Wayne v. Hamilton, 132 Ind. 487; City of Huntington v. Kenower, 12 App. 456.

Same—Damages—Estoppel.—In an action to enforce a lien for street improvements, an appeal having been taken from the improvement proceedings, and a judgment rendered on appeal declaring such proceedings null and void, the property owners are estopped to deny the city's right to the land appropriated for such street, and the resulting lien of the contractor, where, after such judgment annulling the improvement proceedings, they accepted damages of the city for the appropriation of the land as above mentioned. The rule is the same whether the land-owner accepts damages in proceedings under the writ of assessment or in a suit for damages. Morris v. Watson, 8 App. 1.

A recovery of damages for such wrongful appropriation of land for a street *ipso facto*, works a dedication thereof to the city. City of Huntington v. Kenower, 12 App. 456.

Loss of benefits—Wrongful appropriation.—Where a city wrongfully takes possession of land and permanently appropriates it for a street, the fact that the city loses the benefits to other land holders on account of the opening of the street which it might have assessed against them, is the result of its own failure to proceed according to law, and such loss is not chargeable to the owner of the land so wrongfully appropriated. City of Fort Wayne v. Hamilton, 132 Ind. 487.

Permanent injury—Measure of damages.—Where land is wrongfully appropriated by a city, and the injury complained of is permanent, and the complaint recognizes the right of the defendant to continue in the use of the property wrongfully appropriated, and to succeed to the plaintiff's title to the property, damages may be assessed upon the basis of its value. In such case, in arriving at the amount of damages, it was proper for the jury to deduct the value of the property with the improvement from its value without the improvement. City of Fort Wayne v. Hamilton, 132 Ind. 487; City of North Vernon v. Voegler, 103 Ind. 314; Ind., etc., R. Co. v. Eberle, 110 Ind. 542.

Purchaser's right to damages.—A purchaser, to whom city lots are conveyed by warranty deed while a proceeding to condemn a portion thereof for street purposes is pending, is entitled to recover from the grantor any damages that may be awarded in the latter's name, and paid to him by the city by reason of the condemnation, and the grantor will not be permitted to prove by parol that he reserved the damages at a date prior to the execution of the deed. Bailey v. Briant, 117 Ind. 362, 363.

If the owner of land dedicates a street to the city, and before the street is opened the land is conveyed to one with notice of the dedication, such grantee will not be entitled to damages. Parry v. City of Richmond, 27 Ind. 66.

Widening street—Resolution.—It is not necessary that a resolution of the common council of a city for the widening of an existing street shall describe the street by course

and distance, or shall state of what it consists, or from whom or whence taken; but it is enough if the location and extent of the proposed change be well stated. Hays v. City of Vincennes, 82 Ind. 178, 181.

Judgment and mortgage liens—Land condemned.—Land condemned and taken by a city for a street, upon which there is a judgment lien, is discharged from the lien of the judgment; the holder of a simple judgment lien thereon is not entitled to notice of the proceedings, and can not redeem therefrom; but a mortgage lien is not so discharged when the mortgagee is not a party to the proceedings. Gimbel v. Stolte, 59 Ind. 446; Sherwood v. City of Lafayette, 109 Ind. 411; Jenkins v. Newman, 122 Ind. 99; Elliott Roads and Streets, pp. 235, 237.

Mortgage—Eminent domain.—The mortgagee of land which is taken by a city for a public street is an owner within the meaning of the statute governing condemnation proceedings, and may recover from the city the damages awarded, notwithstanding the amount has already been paid to the mortgagor. Sherwood v. City of Lafayette, 109 Ind. 411.

Opening street—Injunction—Pleading.—In a suit to enjoin a city from opening a street through the plaintiff's land until the assessment of damages is paid, an answer alleging that the land described in the complaint was, at the time the proceedings to appropriate the same were commenced, an open and public street and highway of said city; that the only interest the plaintiff had in said land was the ownership of the fee, subject to a perpetual easement of a street and highway over said land; that the proceedings to appropriate said land were taken on behalf of the city by mistake and in ignorance of the fact that said land was already a part of said street, but not alleging facts showing that the ground appropriated was a street by user, by grant, by dedication or appropriation, or that it was established in any manner known to the law, is insufficient. City of Elkhart v. Simonton, 69 Ind. 196.

225. Proceedings in council.—26. Before any matter of the opening, laying out, or altering of any street, alley, highway, or watercourse, or of the vacation thereof, shall be referred to the city commissioners, the common council shall refer the matter to an appropriate committee, who shall examine the matter, and report at the next meeting of the common council upon the expediency of so referring; and if the common council shall determine, by a two-thirds vote, to submit the said matter to the commissioners, it shall be so ordered, and shall thereupon be referred to said commissioners, as hereinbefore provided; but no such matter shall be submitted unless so ordered by a two-thirds vote of such common council. In case any commissioner shall be interested, he shall be incompetent; and in case a number are interested, so great as not to leave a majority competent, the council may appoint, at any regular meeting, commissioners *pro tempore*. Any person interested in such proceedings, or whose property is affected, may present his objections, and if the commissioners be found interested, commissioners *pro tempore* shall be appointed. R. S. 1894, § 3630.

Reference to city commissioners.—When a city undertakes to lay out a new street or alley, or to alter an existing one, the matter must be referred to the city commissioners for the assessment of benefits and damages; and if it fails to do so, such city will be liable to persons whose property is injured for the damages sustained. City of Anderson v. Bain, 120 Ind. 254, 259.

Nunc pro tunc entry.—A *nunc pro tunc* entry upon the minutes of a common coun-

cil, to supply the omission of a former entry of the resolution submitting to the city commisioners the question of widening a street, to show that the resolution was adopted by a two-thirds vote, as required by the above section, is binding upon a purchaser of property in the interval between the original and the *nunc pro tunc* entry, where the original entry did not affirmatively show a non-compliance with the statute. City of New Albany v. Endres, 143 Ind. 192.

Commissioner's competency.—Persons financially interested in the opening of a street, or related to persons affected by such opening, are not qualified to act as commissioners to assess benefits and damages in opening such street. Bradley v. City of Frankfort, 99 Ind. 417, 418; Bass v. City of Ft. Wayne, 121 Ind. 389, 390.

Waiver of objections.—Persons notified of the meeting of the commissioners, and having knowledge of the disqualification of any commissioner, must make their objections before the commissioners, or the same will be waived. Bradley v. City of Frankfort, 99 Ind. 417, 421; Board, etc., v. Justice, 133 Ind. 89, 95.

Renewal of objections.—If his objection is overruled, or not reported to the common council, or disregarded by the common council, it may be renewed and tried on appeal in the circuit court. Bradley v. City of Frankfort, 99 Ind. 417, 423.

[Acts 1879 S., p. 96. In force March 31, 1879.]

226. Duty of commissioners.—2. Said commissioners shall meet upon the request of the common council, and it is made the duty of the city clerk to notify each of them of such request, and to designate therein the time and place of meeting, which notice shall be served by the city marshal at least fifteen days prior to the time designated, either by reading or by leaving a copy at the usual places of residence of said commissioners. They shall meet at the time and place designated, and examine the property sought to be appropriated, and shall also view and examine the real estate in the vicinity thereof to be benefited or injured by such proposed improvement. They shall, within ten days after they have concluded such examination, file in the office of the city clerk a written report describing the property to be appropriated, and the name of the owner, if it be known, (and if unknown a description of all real estate to be damaged thereby, if any there be). In cases when no part thereof is taken, and the name of the owner, if it be known, (and if unknown stating the owner's name is unknown), a description of all real estate beneficially affected by said change or improvement, stating the owner's name if known (and if unknown showing it to be unknown). And upon the filing of such report with such clerk, said commissioners shall also file with such clerk a notice of the time and place when they will meet to estimate the injuries and benefits to the property sought to be appropriated, and to estimate the benefits and damages to all real estate injuriously or beneficially affected by such change or improvement, which meeting shall be held not less than fifty nor more than sixty days from the time of the filing of such report and notice. And upon the filing of such report and notice, the clerk shall issue a written or printed notice to the person whose lands are proposed to be appropriated and to those whose property it is proposed to benefit or damage or against whom or in favor of whom any assessment is to be made. If such person reside in the county where said city is situated, notice shall be served upon him, either by reading or leaving a copy

thereof at his last and usual place of residence, at least ten days before the time designated for such meeting. In case the land-owner be unknown, or be not a resident of the county, or in case the residence of the land-owner be unknown, then notice shall be made by publication, once in each week, in a newspaper of general circulation published in said city, for three consecutive weeks. The last publication of notice must be at least fifteen days prior to the time designated for such meeting. It shall be the duty of the marshal to serve such notice, and make due return of service of such notice to the city clerk; and the city clerk shall obtain proof of publication as provided by law, and preserve such proof, as also the notice returned by the marshal. The notice to be issued by the clerk shall state, generally, the character of the proposed change, alteration, or improvement, but need not describe the proposed change or improvement particularly, and need not describe the property to be affected; but if it be sufficient to inform the person of the general nature or character of the change, or if the general direction and character of the proposed route or line of the proposed street, alley, highway, or water-course to be laid out, changed, or improved, and the time and place of such meeting, it shall be valid and effectual. If an interested person shall appear before the commissioners, he shall not thereafter be permitted to aver either a defect or want of notice. It shall be the duty of the marshal to serve all notices and subpenas issued by the city clerk or the commissioners. R. S. 1894, § 3631.

Notice of meeting of commissioners—Time and place—Adjournments.—The notice to parties interested of the meeting of commissioners must show the time and place of the meeting. A party having notice of the first meeting is bound to take notice of an adjournment. City of Logansport v. Pollard, 50 Ind. 151; Caskey v. City of Greensburgh, 78 Ind. 233.

Same—Notice—Jurisdiction.—Where the land-owners affected by such proceedings are notified of the time, place and purpose of the meeting of the city commissioners they are within the jurisdiction of the city authorities, and are charged with knowledge of every act done up to the confirmation of the report of the commissioners. Rissing v. City of Ft. Wayne, 137 Ind. 427.

Collateral attack.—The proceedings for the opening of a street are not subject to collateral attack by the property owner. Powell v. City of Greensburg, 150 Ind. 148.

Notice—Objection—Waiver.—If a person is served with notice of the second meeting of the commissioners, and before an assessment against his property has knowledge of the incompetency of any commissioner, he must make an objection then and there. If he does not, he will be deemed to have waived it. Bradley v. City of Frankfort, 99 Ind. 417; Washington Ice Co. v. Lay, 103 Ind. 48, 51; Carr v. Boone, 108 Ind. 241; Robinson v. Rippey, 111 Ind. 112.

If his objection is overruled, or not reported to the common council, or disregarded by the common council, it may be renewed, and tried on appeal in the circuit court. Bradley v. City of Frankfort, 99 Ind. 417.

Witnesses.—At the second meeting of the commissioners they may issue subpenas for witnesses and hear evidence upon the questions before them. Bradley v. City of Frankfort, 99 Ind. 417.

[Acts 1875 S., p. 17. In force March 17, 1875.]

227. Hearing and proceedings.—3. Said commissioners, or a majority of them, shall meet at the time and place designated, and shall proceed to hear and determine all matters concerning the laying out of the street, alley, highway, or water-course so mentioned in the notice issued to them. They shall have power to administer oaths, to hear evidence, to examine witnesses, and to adjourn from time to time. They shall also have power to issue subpenas for witnesses, and require the marshal to serve the same; and shall have power to require the city engineer to render them such assistance as they may require. A majority of such commissioners may act, determine, and make valid and effectual reports; and they shall have power to attach and punish, by fine, witnesses who fail to appear when properly subpenaed. R. S. 1894, § 3632.

228. Assessment of damages and benefits.—4. It shall be their duty to examine the property sought to be appropriated, and to estimate its value; and they shall also view the real estate in the vicinity thereof, and estimate both the injuries and benefits thereto. In assessing and awarding damages and benefits, they shall not be confined to real estate upon or along the line of the proposed change or improvement, but shall estimate benefits and damages to all real estate injuriously or beneficially affected. They shall also consider and determine what part, if any, of the expense of such change or improvement ought to be paid out of the general fund of the city. They shall assess upon each lot of land belonging to the same person the damages alone [done] thereto, and shall also assess all benefits which may accrue to real estate in the vicinity and which may be beneficially affected; and shall also assess the value of real estate actually appropriated, and the benefits resulting to the part, if any there be, of any lot or parcel of land not taken, as well as to the other real estate benefited but of which no part is taken. R. S. 1894, § 3633.

What damages assessable by commissioners—Street improvement.—The city commissioners may assess damages accruing from the laying out or the altering of a street, but they have no power to assess damages resulting from the manner in which the street may afterwards be graded, or otherwise improved, and for damages of the latter kind the city does not become liable on account of its failure to refer the matter of the improvement to the city commissioners. City of Anderson v. Bain, 120 Ind. 254.

Duty of commissioners.—The commissioners must estimate the value of the land or other property appropriated; the part thereof, if any, to be borne by the city; what real estate is benefited, specifying the same in parcels, with the name of the owner, if known, and the proportion of benefit or damage each would receive; and report upon each of the specifications. There must be a substantial compliance with the requirements of the statute. McKernan v. City of Indianapolis, 38 Ind. 223.

Railroad right of way—Damages.—In extending a street across the right of way of a railroad company the damages are not limited to the value of the real estate actually taken, but the statute authorizes the awarding of all damages and their prompt payment. City of Terre Haute v. Evansville, etc., R. Co., 149 Ind. 174. See *ante*, § 218 n., Eminent Domain—Streets.

Assessment of benefits—Vicinity—Law and facts.—Whether land situated 3,200 feet or more from a proposed street improvement would be specially benefited by the im-

provement, and whether the land was in the vicinity of such improvement, are proper questions to be submitted to the jury; the court can not say, as matter of law, that the distance given is too remote for the land to be specially benefited, or to be in the vicinity of the improvement. Mock v. City of Muncie, 9 App. 536.

Special benefits—Meaning of.—Property is specially benefited, within the meaning of the law, when the proposed improvements would increase the value of the land, relieve it from a burden, or make it specially adapted to a purpose which enhances its value. Lipes v. Hand, 104 Ind. 503.

Liability of city for damages—General fund.—While it is the duty of the city commissioners to consider and determine what part of the expense incurred in opening a street ought to be paid out of the general fund of the city, and to designate the same in their report, yet if the common council receives and approves the report, without such part being designated, and orders the taking of the property to be appropriated, the city thereby undertakes the payment of all damages and expenses in excess of the benefits assessed, and the land-owner is immediately entitled to the same. City of Terre Haute v. Blake, 9 App. 403.

Injunction—Irregularities.—Injunction will not lie against the opening of a street, if damages have been assessed and tendered; and until the contrary appears, it will be presumed that the damages were assessed and tendered. Caskey v. City of Greensburg, 78 Ind. 233.

Same—Damages—Tender.—Where a city is about to take land for a street wrongfully, under color of right, without assessment and tender of compensation, the owner may have an injunction. City of New Albany v. White, 100 Ind. 206; Town of Hardinsburg v. Cravens, 148 Ind. 1; Sidener v. Turnpike Co., 23 Ind. 623; Miller v. City of Indianapolis, 123 Ind. 196; Elliott Roads and Streets, pp. 295, 296.

Injunction—Pleading.—In a suit to enjoin a city from opening a street through plaintiff's land, until the assessment of damages is paid, if the city claims that the lands taken already constitute a public highway, the burden is upon the city to show how such highway was established. City of Elkhart v. Simonton, 69 Ind. 196.

Complaint—Injunction—Quieting title.—A complaint against a city and street contractors which alleges that the plaintiff is the owner of certain real estate, of which the defendants have unlawfully taken possession, and to which, without having condemned it, they are threatening to do irreparable damage by cutting down the trees and vines grown thereon by the plaintiff and by grading the land and making a street thereupon without leave or license from the plaintiff, with notice that she is the owner thereof, and which prays that her title be quieted to the same, and that the defendants be enjoined from further trespassing, is not a complaint to quiet title, but for injunction, and a trial by jury and a new trial as of right are properly refused. Miller v. City of Indianapolis, 123 Ind. 196.

Same.—Where by proceedings under §§ 3623, 3629, *et seq.*, R. S. 1894, a city has extended a street across a railroad's right of way, switch yards and tracks, but in such proceedings no notice was ever given to the railroad company, an injunction will lie to prevent the city from opening the street through such property. City of Fort Wayne v. Fort Wayne, etc., R. Co., 149 Ind. 25.

229. Report.—5. The said commissioners shall, within ten days after they have concluded their investigation, file in the office of the city clerk a written report, wherein they shall report upon the following matters, to wit:

First. The value of the property to be appropriated, describing it, and the name of the owner, if it be known, (and if unknown, stating that the owner's name is unknown).

Second. The damages to property, if any there be, in cases where no part thereof is taken.

Third. The benefits to real estate beneficially affected by said change or improvement, describing the real estate, stating the owner's name, if known, (and if unknown, showing it to be unknown).

Fourth. The general character and direction of the proposed improvement or change, as to length, direction and width.

Fifth. The amount, if any, to be paid by the city. R. S. 1894, § 3634.

Description of property—Names of owners.—The report of the city commissioners must be certain and definite in respect to the names of owners and value and description of property taken as well as in respect to that upon which damages or benefits have been assessed. For a description held sufficient see Hays v. City of Vincennes, 82 Ind. 178.

Effect of report—Commissioners not a court.—The report of the city commissioners has no binding force and none of the attributes of a judgment, until it has been acted upon by the common council in strict conformity with the requirements of the statute. Their powers and duties are *quasi judicial* and are similar to the powers and duties of an *ad quod damnum* jury. City of Elkhart v. Simonton, 71 Ind. 7; City of Terre Haute v. Blake, 9 App. 403, 406; City of Terre Haute v. Evansville, etc., R. Co., 149 Ind. 174.

230. Report.—6. The character of the change or improvement shall be stated with reasonable certainty; and the real estate for which damages are awarded, and that upon which benefits are assessed, shall be described with like certainty in the report of the commissioners. In cases where both benefits and damages shall be assessed upon the same real estate, or to the same person or persons, the benefits, if less than the damages, shall be deducted from the assessment of damages. In assessing benefits, the said commissioners shall consider, not only the real estate through which the proposed improvement is to pass, but shall consider all such as is benefited and which is in the vicinage. R. S. 1894, § 3635.

231. Report as to infants and insane.—7. In case any landowner interested in or affected by such proceedings shall be of unsound mind, or shall be an infant, the commissioners shall certify the same to the proper court; and said court shall, thereupon, appoint a guardian for such infant or person of unsound mind; and thereupon the commissioners shall cause five days' notice to be given each guardian, who shall, thereupon, appear and protect the interests of his ward. In case such infant or person of unsound mind have a guardian duly appointed and qualified, then notice may be served upon such guardian, as provided in the second section hereof [R. S. 1894, § 3631]; and such notice shall be valid and effectual. If there be a defect of notice or failure of notice as to one or more interested persons, such failure or defect shall not affect such proceedings, except in so far as they may touch the interests or property of such person or persons themselves, and shall not avail any other person concerned in such proceedings. Upon the application of persons whose lands or property shall have been assessed, but who have not had notice (which they

must affirmatively show), the city clerk shall notify said commissioners, who shall meet upon their own motion, hear and determine the claims of such persons (to whom five days' notice shall be given), and report to the council. In case they are entitled to damages which have not been assessed, the same shall be paid out of the city treasury; and in case the land shall have been assessed with benefits, and the commissioners deem the assessment just, the original assessment shall be deemed valid and effectual, and shall be enforced as originally made. R. S. 1894, § 3636.

232. Action of council on report.—8. If the common council, within twenty-eight days after the filing of said report, shall, by a vote of two-thirds of the members thereof, determine to make the appropriation of the real estate for such improvement, they shall enact a resolution accepting said report, and requiring the city clerk to deliver a certified copy of so much thereof as assesses benefits and damages upon real estate, and in which the real estate so assessed is described, to the city treasurer. The common council may refer back the matters reported upon to said commissioners, with such suggestions as they may deem proper; and the commissioners shall meet and proceed, as provided in section 23 of this act [R. S. 1894, § 3652]. R. S. 1894, § 3637.

Discontinuance of proceedings.—The right to discontinue the proceedings exists as long as the amount of the compensation to the land-owner remains undetermined, but when once the compensation has been determined, the proceedings can not be discontinued. The mere making of the estimate of the benefits and damages by the city commissioners and reporting the same to the common council, is not such a determination; but when their report is accepted and approved, by an order making the appropriation, the compensation is determined. City of Terre Haute v. Blake, 136 Ind. 636; City of Terre Haute v. Blake, 9 App. 403, 408; Elliott Roads and Streets, p. 209; 2 Dillon Munic. Corp., § 608. See Brokaw v. City of Terre Haute, 97 Ind. 451; City of Lafayette v. Shultz, 44 Ind. 97.

Damages—Liability of city for—When rights become vested.—After the council has accepted the report of the commissioners and made the proper order for the appropriation of the land necessary for the street, the right of the land-owner to the damages assessed becomes absolute. The council can not, therefore, set aside the assessment, nor, by refusing to open the street, avoid the payment of such damages. City of Lafayette v. Schultz, 44 Ind. 97. See Brokaw v. City of Terre Haute, 97 Ind. 451; City of Terre Haute v. Blake, 9 App. 403; City of Terre Haute v. Blake, 136 Ind. 636.

Vested rights—Damages—Effect of appeal.—The right of the property owner to the damages awarded becomes vested when the council has accepted the report of the commissioners and made the proper order for the appropriation of the land necessary for the street, but if the property owner institutes an appeal from such proceedings he thereby voluntarily abandons the right which had attached in his favor by virtue of the confirmation of the assessment. City of Terre Haute v. Blake, 136 Ind. 636; City of Terre Haute v. Blake, 9 App. 403.

Accepting report of commissioners—Conclusiveness of.—The adoption of a resolution by the common council accepting the report of the city commissioners, is conclusive as to the question of public utility. Holden v. City of Crawfordsville, 143 Ind. 558.

The mere acceptance of the report of the commissioners, without further action as prescribed by the above section, will not be a confirmation of the benefits or damages

assessed and will not make the action of the commissioners and common council final. City of Elkhart v. Simonton, 71 Ind. 7.

Referring back report to commissioners—What reference is for—Assessment of additional property invalid.—A reference of the report of the commissioners back to them by the common council is for the purpose of readjusting or changing the assessments, or amending or changing the report by the commissioners as to the persons, or property of the persons, previously notified of the proceedings, and it does not contemplate any action on the part of the commissioners which will affect other persons and property. An assessment of additional property by the commissioners upon such a reference is without authority of law, and void. City of Logansport v. Shirk, 129 Ind. 352.

233. Duty of clerk—Lien.—9. It shall be the duty of the city clerk to deliver a certified copy of said report, as provided in the preceding section, to the city treasurer, and to copy the entire report into the records of the common council, and to carefully file and preserve the original. The benefits assessed shall be a complete and valid lien upon the real estate described as assessed, from and after the time the aforesaid resolution is adopted accepting such report, and filing a copy thereof in the office of the recorder of the county; and such lien shall be valid and enforceable against subsequent purchasers, and shall have priority over all other liens, except those for state taxes. R. S. 1894, § 3638.

City treasurer—Notice—Estoppel.—Where the city treasurer, in giving notice of the "assessment, the date of filing and the amount assessed," states in such notice the time when the common council approved the report, he exceeds his duty, and the officer and the act both being public, and the notice being simply to require the land-owners to pay their assessments, the city is not estopped, upon appeal, from showing the true date of the approval of the report, the same not having been correctly given in the notice. Rissing v. City of Ft. Wayne, 137 Ind. 427.

234. Payment of damages.—10. The common council may determine to pay out of the general funds of the city the total amount of damages assessed, or any part thereof; and in case this shall be ordered and done, all benefits collected shall be paid into the treasury of the city, and shall belong to such city. In case the common council deem it proper to delay until such benefits are collected, they shall order the proceedings delayed until such benefits shall be collected: *Provided*, They shall not cause a delay beyond one year, except in cases where the delay is caused by appeal, injunction or other legal proceedings. R. S. 1894, § 3639.

Deferred payment—Dismissal of proceedings.—A provision of a resolution of the common council approving the final report of the city commissioners, that the owner's damages shall not be paid until after the collection of assessments for benefits, does not warrant a dismissal of the proceedings, as the council is authorized to delay the opening until the benefits are collected. In the absence of such provision the damages assessed are due and collectible from the city as soon as the appropriation of the land is made. Holden v. City of Crawfordsville, 143 Ind. 558; City of Terre Haute v. Blake, 136 Ind. 636; City of Terre Haute v. Blake, 9 App. 403.

Same.—If the proviso for delay in such case is sufficient under the statute, then the taking of the land would be postponed; while if the proviso was insufficient there would

be no delay, and appellant's damages would be at once due and payable. Holden v. City of Crawfordsville, 143 Ind. 558.

235. Collection of assessments.—11. Within ten days after the receipt of the certified copy of the report, as provided in sections 8 and 9 of this act [R. S. 1894, §§ 3637, 3638], the city treasurer shall, in cases where the owners of the lands assessed are residents of the city, make demands of them, personally, for the amount of the benefits assessed, or shall leave at their residence written notices specifying the date of the filing of the report and the amount of the benefits assessed, and demanding payment of the amounts assessed; but said notice need not describe the real estate assessed nor the character of the improvement or change, and shall be sufficient if it notify the person of the assessment, the date of filing, and the amount assessed. In case the person or persons owning the lands should be non-residents of the city or unknown, or their residence be unknown, then the treasurer shall publish, for three weeks consecutively, in a paper of general circulation, a notice, specifying therein the date of the filing of the report, the description of the real estate assessed, the amount assessed, the names of the owners, if known, (and, if unknown, stating them to be unknown). In case the persons notified personally, or by written notices left at their residences, shall fail to pay such assessments within three months thereafter, the treasurer shall proceed to collect such assessments as hereinafter provided; and if the persons notified by publication shall fail to pay such assessments within one month after the last publication, the city treasurer shall proceed to collect such assessment as herein provided. The said assessments shall be collected and enforced in the same manner as assessments for street improvements; and the provisions of the law in force at the time upon the subject of the collection of assessments for street improvements ordered by the common council shall govern the treasurer, and he shall proceed in accordance therewith; except in this, that no precept shall be required, and that he shall proceed upon the certified copy of the report of the commissioners; and with the further exception, that no other or further demand than that herein provided for shall be made. It is hereby made the duty of the treasurer to keep a proper record of all his proceedings. R. S. 1894, § 3640.

236. Report of collections.—12. It shall be the duty of the city treasurer to report to the common council the amount received by him upon such assessments at their regular meeting next after such receipt. He shall pay the damages only upon warrants ordered by the common council and drawn by the city clerk. R. S. 1894, § 3641.

237. Private corporations.—13. In case the common council propose to appropriate a highway, bridge, or other property owned by a private corporation, or to assess benefits or damages upon property so owned, the clerk shall give notice to such corporation; and the said notice shall be served upon any officer thereof residing in such city; and if there be no officer residing in the city, then upon any agent residing therein or doing business in such city for such corporation.

When a highway or bridge within a city, owned by a private corporation, is abandoned, or suffered to be out of repair so as to incommode or endanger travelers, the commissioners aforesaid are required to consider these facts in estimating the injury, if any, accruing from its use or appropriation for public purposes by the city, and may also estimate whatsoever it may cost such city to make the bridge or highway safe and free from damage. R. S. 1894, § 3642.

238. Appeal.—14. If any person having an interest in the lands affected by such proceedings shall deem himself aggrieved thereby, he may appeal to any court of general jurisdiction in the county, within thirty days after the confirmation of said report by the council. In such case, the person asking the appeal must designate the court to which he appeals, and file a bond within thirty days from the confirmation of said report, conditioned for the payment of all damages and costs which may accrue by reason of such appeal should he not prosecute such appeal to effect. Upon such appeal, the regularity of the proceedings of the commissioners, and the questions as to the amount of benefits or damages assessed may be tried; but such appeals shall not prevent such city from proceeding with the proposed appropriation, nor from making the proposed change or improvement. The city clerk shall, upon the filing of a bond with sufficient surety, conditioned as aforesaid, make a transcript of the proceedings of the council requesting the meeting of the commissioners, the notice to the person appealing, the proceedings and the report of the commissioners, and the action of the common council thereon, upon the second day of the term. After filing the said transcript (and of which filing the appellant shall notify the attorney of the city, in writing), the appellant shall, in writing, state specifically the grounds of his objection to the proceedings of the common council and commissioners; and [no] other questions shall be tried or heard, except such as are with certainty to a common intent presented by the aforesaid written statement filed by such appellant. If the transcript shall show that a majority of such commissioners were present at the meeting in which were had the proceedings appealed from, then no question shall be considered or tried concerning the request of the common council to the commissioners, nor as to the character of the notice or manner of serving it upon said commissioners. The transcript of the proceedings of the common council and commissioners shall be considered as the complaint; and the written statement, to be filed by the appellant as aforesaid, shall be in the nature of an answer or demurrer. Issues of law and of fact may be formed, tried and determined as in other actions at law. The question as to whether notice was given others, or as to whether proper assessments were made in favor of or against persons other than the appellant, shall not be tried; nor shall any question be tried which does not directly affect the property or right of the person or persons who take the appeal as aforesaid. No question shall be tried concerning the regularity of the appointment of the commissioners, their qualification or competency, unless the appel-

lant, by answer duly verified, shall put such matters in issue; but of their appointment, competency and qualification the records of the common council shall be prima facie evidence; and it shall only be necessary for the city clerk, in the transcript to be certified by him as aforesaid, to recite that the commissioners were duly appointed and qualified, without in any wise setting out their appointment, qualification or competency in such transcript. If, upon such appeal, the report of the commissioners as to the benefits or damages be greatly diminished or increased, the city may, upon payment of all costs, discontinue such proceedings. R. S. 1894, § 3643.

Practice on appeal.—This act is amendatory and supplemental to the general law concerning cities of March 14, 1867, and the practice on appeal in proceedings for the opening and widening of streets is regulated by said amendatory and supplemental act. Hays v. City of Vincennes, 82 Ind. 178.

Prior to the enactment of this statute, under § 66 of the general laws for the incorporation of cities, an appeal would lie to the circuit court from the common council on the assessment of damages in the location of streets. Hamilton v. City of Ft. Wayne, 73 Ind. 1.

Appeal—Dismissal.—An appeal from proceedings to widen a street must be taken within thirty days after the confirmation of the report of the city commissioners by the common council; and where the notice given by the city treasurer "of the assessment, the time of filing and the amount assessed," stated the report was filed November 10, 1891, and accepted by the common council November 14, 1891, when in fact the report was approved November 10, 1891, an appeal taken December 14, 1894, was not taken in the prescribed time, and was properly dismissed. Rissing v. City of Ft. Wayne, 137 Ind. 427.

Same—Estoppel—City.—The city treasurer, in stating in such notice the time when the common council approved the report, exceeded his duty, and the officer and the act both being public, and the notice being simply to require the land-owners affected by the proceedings to pay their assessments, the city was not estopped from showing the appeal came too late. Rissing v. City of Ft. Wayne, 137 Ind. 427.

Same.—The fact that the city authorities furnished the appellants with a transcript of the record for appeal, does not estop the city from showing that the appeal came too late. Rissing v. City of Ft. Wayne, 137 Ind. 427.

Same—Notice—Jurisdiction.—Where the land-owners affected by such proceedings were notified of the time, place and purpose of the meeting of the city commissioners, they were within the jurisdiction of the city authorities, and are charged with knowledge of every act done up to the confirmation of the report of the commissioners. Rissing v. City of Ft. Wayne, 137 Ind. 427.

Conclusiveness of action of council—Appeal.—The adoption of a resolution by the common council of a city, accepting the report of the city commissioners in a proceeding for the opening of a street or alley, is conclusive as to public utility under this section. Holden v. City of Crawfordsville, 143 Ind. 558.

Opening street—Improvement proceedings—Appeal from.—Where an appeal is taken from proceedings to improve a street, the city is not compelled to stop the work while the appeal is pending; and, in such case, if, on appeal, the city prevails, the work may be finished under the original proceedings, but if the property owner is successful, and the court decides that there is some irregularity in the proceedings, the city may correct the same or begin anew, according to the determination of the court on appeal. If, however, the court, on appeal, adjudges the entire proceedings void, and no appeal is taken from such judgment, and the city does not proceed anew under the statute, it amounts to an abandonment of the appropriation of the land, and the title to

the property reverts to the owner. Morris v. Watson, 8 App. 1; City of Lafayette v. Shultz, 44 Ind. 97.

Property owner's vested right—Effect of appeal.—By an appeal the property owner voluntarily abandons the right which had attached in his favor by virtue of the confirmation of the assessment, and the provision of the statute that the city, in case of appeal, if the benefits or damages assessed by the commissioners are greatly diminished or increased, may, upon payment of all costs, discontinue the proceedings, only secures to the city a like privilege to abandon the whole proceedings. City of Terre Haute v. Blake, 136 Ind. 636, 638.

Appeal—Jurisdiction.—The circuit courts of this state are courts of general jurisdiction, and, under § 66 of the general act for the incorporation of cities, an appeal would lie to the circuit court from a common council of a city on the assessment of damages in the location of streets. Hamilton v. City of Ft. Wayne, 73 Ind. 1.

Same—Objections—Regularity of appointment of commissioners, etc.—If a person is served with notice of the meeting of the commissioners, and at such meeting objects to the competency of a commissioner, and such objection is overruled, or not reported to the common council, or disregarded by the common council, it may be renewed, and tried on appeal in the circuit court. Bradley v. City of Frankfort, 99 Ind. 417.

Same.—No question can be made in the circuit court as to the regularity of appointment of commissioners, except by a verified answer. Bradley v. City of Frankfort, 99 Ind. 417.

Same.—If the incompetency of a commissioner is known at the hearing for the assessment of benefits and damages, objections to his acting must be then raised. Bradley v. City of Frankfort, 99 Ind. 417.

Same.—No objection can be raised on appeal on account of the commissioners not being sworn. Caskey v. City of Greensburg, 78 Ind. 233.

Transcript—Demurrer.—A demurrer to the transcript for want of sufficient facts is not permissible on appeal, but the specific grounds of objection, if apparent on the face of the record, must be stated in the demurrer, and matters of fact not so apparent must be pleaded. Hays v. City of Vincennes, 82 Ind. 178; Powell v. City of Greensburg, 150 Ind. 148.

A demurrer to the complaint on the ground that the court had not sufficient jurisdiction to try the cause is not sufficient. Powell v. City of Greensburg, *supra*.

Answer—Demurrer.—A statement filed for answer which is sufficient to present an issue in other actions at law is sufficient in proceedings under this section; and when it is stated in such answer that appellant is dissatisfied with the damages as assessed, and demands an increased amount of damages, the answer will be sufficient as against a demurrer. If a more specific answer is desired it should be sought by motion to make more specific. City of Decatur v. Grand Rapids, etc., Co., 146 Ind. 577.

Transcript—Complaint—Recitals in transcript—Inconclusiveness of.—Upon appeal the transcript constitutes the complaint, and the appellant must state specifically in writing the grounds of his objection to the proceedings of the common council and city commissioners, and no other question can be tried or heard, and issues of law and of fact may be found, tried and determined as in other actions at law. An issue of fact may be raised by an objection that the resolution to refer the matter of opening the street to the commissioners was not adopted by a two-thirds vote of the common council, as required by law. The recitals in the transcript to the contrary are not conclusive. City of Logansport v. Shirk, 129 Ind. 352; City of Decatur v. Grand Rapids, etc., Co., 146 Ind. 577.

Dismissal after appeal—Costs.—The city may, after an appeal, dismiss all proceedings on payment of costs, though the city may have taken possession of the real estate sought to be appropriated. Brokaw v. City of Terre Haute, 97 Ind. 451. See City of

Terre Haute v. Blake, 9 App. 403; City of Lafayette v. Schultz, 44 Ind. 97; Indiana, etc., R. Co. v. Allen, 113 Ind. 308.

Appeal—Damages—Costs.—Where on an appeal from a street assessment allowing damages, but assessing an equal amount of benefits, a land-owner had appealed to the circuit court, and on trial the damages and benefits were both increased in an equal amount, the appellant was not entitled to his costs in the circuit court. Lake Erie, etc., R. Co. v. City of Kokomo, 130 Ind. 224.

A property owner can not be heard upon appeal to complain that the commissioners have omitted to include and assess in their report property belonging to persons other than appellants. Powell v. City of Greensburg, 150 Ind. 148.

239. No injunction.—15. If the commissioners make a report to the common council, as herein provided, no injunction shall lie to restrain proceedings, unless the common council shall proceed to appropriate property upon which damages have been assessed, without first causing the same to be paid or tendered; but all other questions shall be raised and tried by appeal in cases where damages have been assessed, paid or tendered. R. S. 1894, § 3644.

Injunction against opening.—This section forbids an injunction against the opening of a street in a city if damages have been assessed and tendered. Caskey v. City of Greensburg, 78 Ind. 233, 236.

Prior to the enactment of this act, under the 86th section of the act of 1867 for the incorporation of cities, then in force, an injunction would lie to prevent the common council from enforcing an illegal order made by it for vacating a street. Spiegel v. Gansberg, 44 Ind. 418.

An injunction will not lie against the opening of a street for irregularities in the assessment of benefits and damages. Caskey v. City of Greensburg, 78 Ind. 233, 237.

A city may be enjoined from taking land for a street without payment or tender of damages. City of New Albany v. White, 100 Ind. 206, 209; City of New Albany v. Endres, 143 Ind. 192; City of Delphi v. Startzman, 104 Ind. 343; Elliott Roads and Streets, pp. 295, 297.

240. Payment of damages.—16. It shall be the duty of the city treasurer to pay or tender, or cause to be paid or tendered, the damages assessed to the persons to whom assessed. Should such damages be claimed by different persons, and the treasurer be duly notified thereof, he shall, in writing, certify that fact to the attorney of the city, and it shall be the duty of the attorney to file a bill of interpleader in a court of general jurisdiction of the county, making parties thereto such claimants; and he shall also pay into the hands of the county clerk the damages aforesaid, and upon the determination of the question the money shall be paid to the party entitled thereto; but the damages, so far as concerns such city, shall be deemed paid from the time of their payment into the hands of the county clerk. It shall be the duty of the attorney of the city to take a receipt from the county clerk for the money so paid, which shall be by him delivered to the city treasurer, who shall file and preserve the same. It shall be the duty of said county clerk to safely keep such moneys, and if he go out of office, to hand the same over to his successor. R. S. 1894, § 3645.

241. Tendering damages—Injunction.—17. When the owners of the property are residents of the city the treasurer shall tender damages to them at their places of business, or at their residences or domiciles, as he may elect. When such persons are unknown or are not residents of the city, or if the treasurer, upon diligent inquiry, can not ascertain the residence or place of business of a resident of the city, he shall publish in a daily newspaper, once in each week for two successive weeks, a notice specifying the amount in the treasury to be paid as damages, and stating the real estate upon which assessed and the readiness on his part to pay the same. Such notice, so published as aforesaid, if it state with reasonable certainty the amount of damages and so describe the real estate upon which assessed, shall constitute a valid and effectual tender. In case an injunction is obtained because damages assessed have not been paid or tendered, the defendant may, at any time before the determination of the suit, pay or tender the damages assessed, with interest from the time the property is entered upon, seized or appropriated, and all accrued costs, and thereupon the injunction shall be dissolved. It shall be the duty of the attorney of the city, when an injunction is obtained upon the grounds aforesaid,to notify the city treasurer to ascertain the amount of damages assessed, and interest thereon and costs accrued, and such amount shall be drawn from the treasury, and paid into the court from which such injunction issued. The said treasurer shall take from the clerk of the court in which such suit for injunction is pending, a receipt for the amount paid him, and from the time of such payment into court, as aforesaid, the city shall be absolved from liability, unless there are other valid grounds for an injunction. R. S. 1894, § 3646.

Appropriation of land—Damages—Payment or tender.—Land can not be appropriated for the purposes of a street unless compensation is first assessed and paid or tendered. City of New Albany v. Endres, 143 Ind. 193; Faust v. City of Huntington, 91 Ind. 493; Holden v. City of Crawfordsville, 143 Ind. 558.

Damages assessed—Tender—Payment—Appellate procedure.—A finding that damages assessed by city commissioners on account of the appropriation of land for the widening of a street have not been tendered to the owner will not be deemed, on appeal, to negative payment of such damages, as an offer of payment may have been made and accepted, which, if unaccepted, would not have been effectual as a tender, and such finding may have been intended merely to negative a tender, under the above section, which does not involve an actual offer of the money. City of New Albany v. Endres, 143 Ind. 192.

Burden of proof—Tender—Payment.—The burden of negativing tender or payment of damages assessed for land appropriated for widening a street, the failure to pay or tender which is essential to an action to enjoin the proceedings, is upon the plaintiff in such action. City of New Albany v. Endres, 143 Ind. 192.

242. Vacation of streets, etc.—18. The common council shall have power to vacate streets, alleys, water-courses, public highways or squares, or any part or parts of either, whenever they may deem it expedient for the public interest. Whenever a petition shall be presented by three reputable freeholders praying for any such vacation,

the common council shall refer the petition and matters appertaining thereto to the city commissioners. The persons praying for such vacation shall serve notice by personal service or by leaving copy at the residences of persons interested, or by publication, if such person be a non-resident or his residence is unknown, once in each week for three weeks in a newspaper of general circulation published in said city, and shall show, by affidavit, due service of such notice. The said petitioners shall accompany their petition with a map or plat of the street, alley, highway or square, or the part or parts thereof which they propose to have vacated; and shall, on said map or plat, show the surrounding locality and shall also state the reasons upon which they base their petition for vacation. All the expenses of such proceeding shall be paid by said petitioners, unless the common council shall otherwise direct. [As amended, Acts 1885, p. 234. In force April 13, 1885.] R. S. 1894, § 3647.

Vacation.—See notes to § 224, *ante*.

Expediency—Common council.—It is for the common council and not the courts to decide upon the expediency of vacating a street or alley of a city. Spiegel v. Gansberg, 44 Ind. 418; Holden v. City of Crawfordsville, 143 Ind. 558.

Injunction.—An injunction lies to prevent the common council from enforcing an illegal order made by it for vacating a street. Spiegel v. Gansberg, 44 Ind. 418.

243. Proceedings of commissioners.—19. The city commissioners shall meet pursuant to notice, and shall examine witnesses and hear evidence, and may administer oaths, and adjourn from time to time. They shall view the street, alley, highway, or square, or part thereof, proposed to be vacated, and shall determine what persons, if any, will be benefited thereby, and shall assess such benefits, if any: *Provided*, That only sufficient benefits shall be assessed to pay all the costs and expenses of such vacation proceedings. In case any property owner immediately upon the line of said street, alley, highway or square, or part thereof, sought to be vacated, who is directly interested therein, shall object to such vacation, the city commissioners shall report such fact to the common council. If the commissioners should consider that the necessary or proper parties have not been brought before them, they may require the petitioners to notify each person or persons as they may deem entitled to notice. [As amended, Acts 1895, p. 379. In force June 28, 1895.] Burns' Supp. 1897, § 3648.

Objections by outside owner.—The owner of land which is outside of, but abuts upon, the boundary line of such city, and upon the terminus of a street, is a stranger to the city and has no such interest in the street as makes him a competent objector to defeat the vacation thereof. House v. City of Greensburg, 93 Ind. 533.

Same—Objection of adjacent lot-owner—Injunction.—The fact that the owner of an adjacent lot objects to the vacation of the street, does not give the owner of land outside of the city boundaries a sufficient cause of action to enjoin the proceedings of the city in a proposed vacation of the street. House v. City of Greensburg, 93 Ind. 533.

244. Report.—20. Within ten days after their determination, such commissioners shall file in the office of the city clerk, who shall transmit the same to the common council, a report in writing, stating therein—

First. The length, width, and location of the street, alley, highway, or square proposed to be vacated.

Second. The value of the land upon which such street, alley, highway, or square is situated.

Third. The benefits to the persons desiring the vacation.

Fourth. The names of property owners or persons who may object to the vacation of such street, alley, highway, square, or park, and the nature of their interest therein. R. S. 1894, § 3649.

Essentials of report—Effect.—The report of the commissioners must be certain and definite in respect to the names of land-owners, the value and description of land, benefits, etc. The report has none of the attributes of a judgment until it has been acted upon by the common council in strict conformity with the requirements of the statute. Hays v. City of Vincennes, 82 Ind. 178; City of Elkhart v. Simonton, 71 Ind. 7; City of Terre Haute v. Blake, 9 App. 403.

245. Action on report.—21. The common council shall either refer the request back to the commissioners, or accept or reject the report within twenty-eight days after it is made to them. If they accept such report, they shall require the person against whom benefits are assessed to pay the same into the city treasury within twenty days thereafter. The common council shall have no power to order such vacation when objected to by property owners adjacent thereto. No person shall have any power or right to make any private use of any street, alley, highway or square, or part thereof, ordered to be vacated until the benefits assessed have been fully and entirely paid, and unless paid within the time limited, the proceedings shall be wholly void. [As amended, Acts 1885, p. 234. In force April 13, 1885.] R. S. 1894, § 3650.

246. Clerk's duty.—22. It shall be the duty of the city clerk to keep, in a separate book, a record of all proceedings of the common council and city commissioners concerning the opening, laying out, changing and vacation of streets, alleys and highways, and to carefully and accurately index the same: *Provided*, That the common council may furnish him with printed blanks. R. S. 1894, § 3651.

247. Reference of report and proceedings.—23. The common council, upon examination of any report of such city commissioners, may refer the same back to the said commissioners for further action; and when so referred, the common council shall designate at what time such commissioners shall meet to re-examine the matters; and the commissioners shall meet upon that day; and of the action of the common council, and of the time of meeting, the parties interested shall take notice without any notice whatever being served upon them. The common council shall have power to refer any report whatever, under any provision of this act, back to said commis-

sioners; and when so referred, the commissioners shall, within ten days after the conclusion of their examination upon such reference, make a report as hereinbefore provided; and the common council shall, within twenty-eight days after the same is made, either approve or disapprove the same. The proceedings upon such second report shall be the same as that provided where the first made is accepted and approved. When a second report is made, it shall be deemed final; and the common council must accept or reject the same within twenty-eight days after it is made to them. When any report is referred back to the commissioners, the common council may make such suggestions as they may deem proper, and may also call the attention of the commissioners to errors and defects, if any there be, in such report; but such suggestions shall not be binding upon said commissioners. Upon such reference, the commissioners shall meet as hereinbefore provided, and all persons shall take notice thereof as hereinbefore provided; and said commissioners may amend or alter their said report as they may deem proper and just and shall consider any and all suggestions made to them by the common council. R. S. 1894, § 3652.

Reference of report—Second report—Acceptance—Rejection.—The common council may, under this section, refer back to the city commissioners their first report, but is obliged to either accept or reject a second report by such commissioners within twenty-eight days after it is made, and such action is final; but the statute contains no such provision in relation to its action on the first report. City of Elkhart v. Simonton, 71 Ind. 7.

Same—What reference is for.—The reference back of the report to the commissioners is for the purpose of readjusting or changing the assessment, or amending or changing the report by the commissioners as to the persons, or property of persons, previously notified of the proceedings, and it does not contemplate any action on the part of the commissioners which will affect other persons or property. An assessment of additional property upon such a reference is without authority of law, and void. City of Logansport v. Shirk, 129 Ind. 352.

248. Change of street on petition of abutters.—24. Whenever a street, alley, highway, or water-course shall have been opened or laid out, the abutters thereon may, by mutual agreement, change the same so as to give it a proper vacation [location], width, or direction; provided, they shall first obtain the consent of the common council. Before any such change shall be made, the persons interested therein shall file with the city clerk a written agreement, and shall petition the common council to change or alter such street, and shall state in their petition the reasons for such change, and shall accompany the petition with a map or plat of the highway and the surrounding locality. R. S. 1894, § 3653.

249. Removal of obstructions, etc.—25. The common council shall have power to pass all ordinances necessary to more effectually carry into execution the powers herein granted, and which are not inconsistent with the laws of the state; and they may also cause to be opened streets, alleys, or highways which have been laid out or opened, but which have not been vacated; and they shall have power

to cause all obstructions to be removed from highways, streets, alleys, or water-courses, when necessary for the general welfare. The marshal of said city shall have full power to open any street, alley, or highway, when directed by the common council, and may remove any and all obstructions therein. When any person shall, after five days' notice, fail, neglect, or refuse to remove obstructions, the marshal shall cause the same to be done at the expense of such persons, and shall cause the city attorney to enter an action therefor; and in such action, judgment shall be rendered against such person for the reasonable expense and cost of such removal. R. S. 1894, § 3654.

Proceedings to remove obstructions—Specific performance of agreement.—A suit to compel specific performance of a written agreement between the owners of lots in an addition to a town to open a public street in such addition is not the proper proceeding to remove an obstruction in said street. Mather v. Simonton, 73 Ind. 595.

250. Plats.—27. When any street or alley shall have been opened or laid out, or whenever such street or alley shall be vacated, a proper plat thereof shall be filed in the recorder's office of the county in which such city is situated. In case of the opening or laying out of any street or alley, the plat shall be made by the city engineer and filed by the city clerk; and in case of a vacation of any street or alley, the persons desiring such vacation shall, at their own expense, cause such plat to be made out, filed and recorded; and no order of vacation shall be deemed of effect until such plat is filed in the office of the recorder, as aforesaid. R. S. 1894, § 3655.

251. Pending proceedings.—28. No proceedings now pending, nor any action pending or right of action, shall be extinguished or rendered invalid by the provisions hereof; nor shall anything herein contained be construed as abridging the powers of the incorporated cities of the state as conferred by the act of incorporation, except as herein expressly provided. R. S. 1894, § 3656.

252. Compensation and damages.—29. If any owner of real estate shall, after the service of notice and during the pendency of such proceedings, make any improvements of the real estate sought to be seized for the purpose of street, alley, highway or water-course, he shall not be entitled to any compensation whatever therefor; and if any land-owner shall, after service of notice and during the pending of such proceeding upon him, do any act which will render the opening or change of a street, alley, highway or water-course more expensive, the expenses thus caused shall be deducted from any charges awarded him on his real estate: *Provided,* That nothing herein contained [shall be construed] as preventing any such owner from receiving just compensation for such improvements as may have been commenced or contracted for prior to the service of such notice. It shall be the duty of all persons laying out or dedicating streets, alleys or highways to make the same conform in all respects to those of the city; and when they do not so conform to streets, alleys or highways already laid out, the existence thereof shall not be deemed to benefit

the real estate of such person: *Provided,* That nothing herein contained shall be considered as requiring such owner to grade or otherwise improve such highway, except as provided in the general law for the incorporation of cities. R. S. 1894, § 3657.

ARTICLE 6.—ANNEXATION OF TERRITORY.

SEC.
253. Extension over platted lots.
254. Extension over contiguous lands—Action of council.
255. Proceedings by county board.

[Acts 1867, p. 33. In force March 14, 1867.]

253. Extension over platted lots.—84. Whenever there shall be or may have been lots laid off and platted adjoining such city, and a record of the same is made in the recorder's office of the proper county, the common council may, by a resolution of the board, extend the boundary of such city so as to include such lots, and the lots thus annexed shall thereafter form a part of such city and be within the jurisdiction of the same. The common council shall immediately thereafter file a copy of such resolution, defining the metes and boundaries of such addition, in the office of the recorder aforesaid, which shall be recorded. R. S. 1894, § 3658.

See *post,* § 1017, *et seq.*

Jurisdiction—Platted and unplatted lands.—If the land is platted, and the plat is recorded by the owner, the law implies a consent on his part that the land may be taken into the city. If the land is not platted, or the plat not recorded, the owner may file his written consent with the city council agreeing that the land may be annexed. In either case the council has jurisdiction; but in case the property owner does not consent to annexation, that is, does not make and put on record a plat of his land, or does not file with the city his written agreement that the land may be annexed, then the county board of commissioners, upon proper petition, is the tribunal with jurisdiction to order annexation. Forsythe v. City of Hammond, 142 Ind. 505. See Mayor, etc., v. Weems, 5 Ind. 547.

Lands not platted.—The common council of a city has no authority to order the annexation of contiguous territory without the consent of the owners, unless it has been laid off into lots and platted, and an order annexing territory not platted, where the owner has not consented, is void. Strosser v. City of Ft. Wayne, 100 Ind. 443, 446; City of Indianapolis v. Patterson, 112 Ind. 344, 347; Chandler v. City of Kokomo, 137 Ind. 295; Forsythe v. City of Hammond, 142 Ind. 505; City of Delphi v. Startzman, 104 Ind. 343; Mayor, etc., v. Weems, 5 Ind. 547.

Lots—Meaning within statute.—When property is platted into lots and marked in such a way as to impress upon it the character of urban property as distinguished from rural use, the subdivisions are regarded as "lots" within the meaning of the statute authorizing the annexation of territory platted into lots. Glover v. City of Terre Haute, 129 Ind. 593, 594; City of Evansville v. Page, 23 Ind. 525; Collins v. City of New Albany, 59 Ind. 396.

Platted by non-owner.—A city has no jurisdiction to annex, by a resolution of its common council, lots laid off and platted by one who is not the owner of the land and who has no authority in the premises. City of Indianapolis v. Patterson, 112 Ind. 344, 347.

Unplatted land not contiguous.—In the annexation of contiguous territory, the

common council of an incorporated city is not authorized to extend the boundary of such city, by resolution, so as to include adjoining lands which have not been laid off in lots and platted, and a record made of such plat; and any such attempted annexation of unplatted lands is void for want of jurisdiction, and the levy and attempted collection of municipal taxes, on such lands so annexed, may be enjoined by the decree of the proper court. City of Logansport v. La Rose, 99 Ind. 117, 121.

Plat must be recorded.—Lands laid off and platted can be annexed to the city by the common council only when the plat has been legally recorded. Taylor v. City of Ft. Wayne, 47 Ind. 274; City of Logansport v. La Rose, 99 Ind. 117; Strosser v. City of Ft. Wayne, 100 Ind. 443; City of Indianapolis v. Patterson, 112 Ind. 344.

The laying out in lots and platting of land within a city does not take the same out of the city, nor exempt it from taxation for city purposes. City of Delphi v. Bowen, 61 Ind. 29.

Under the act of 1852, while in force, the common council of a city incorporated thereunder had the power by resolution to so extend its boundaries as to include adjoining land which had been laid off and platted, and a plat thereof duly recorded; and territory so included became liable to taxation for certain purposes. Collins v. City of New Albany, 59 Ind. 396.

Contiguous territory.—In order that any land, platted or unplatted, should be annexed to a city, it is necessary that the land to be annexed should be contiguous to the city limits, that is, that it should actually touch the existing territory of the city. Forsythe v. City of Hammond, 142 Ind. 505; City of Indianapolis v. McAvoy, 86 Ind. 587; City of Logansport v. La Rose, 99 Ind. 117.

Several pieces of platted territory may be annexed to the city at the same time, if they adjoin each other, although but one adjoins the city. City of Evansville v. Page, 23 Ind. 525; Catterlin v. City of Frankfort, 87 Ind. 45; Huff v. City of Lafayette, 108 Ind. 14.

Lands not adjacent.—A statute giving a city council jurisdiction to annex adjacent lands on the written consent of the owners, gives the council no jurisdiction to annex lands on the petition of owners whose lands are not adjacent. Forsythe v. City of Hammond, 142 Ind. 505.

Effect of non-navigable stream.—The existence of a non-navigable stream between the corporate boundary and territory sought to be annexed will not prevent the annexation. City of Delphi v. Startzman, 104 Ind. 343, 345.

Eminent domain—Constitution.—Annexation of territory to a city is not the exercise of eminent domain. Annexation does not deprive a person of property within the constitution of the United States, providing that no state shall deprive persons of property without due process of law. Taggart, etc., v. Claypool, 145 Ind. 590; Stilz v. City of Indianapolis, 55 Ind. 515; Kelly v. Pittsburgh, 104 U. S. 78; 1 Beach Pub. Corp., § 398, *et seq*,; 1 Dillon Munic. Corp., 4th ed. § 185.

Collateral attack.—Where the common council proceeds without jurisdiction, such proceedings are a nullity and may be attacked collaterally, except in cases of estoppel. Forsythe v. City of Hammond, 142 Ind. 505; City of Indianapolis v. McAvoy, 86 Ind. 587; Strosser v. City of Ft. Wayne, 100 Ind. 443; City of Delphi v. Startzman, 104 Ind. 343; City of Indianapolis v. Patterson, 112 Ind. 344.

Acquiescence—Laches and neglect—Equitable defense.—Where the annexation proceedings are of doubtful legality, or even clearly illegal, if the residents and property owners of the annexed territory are guilty of laches and neglect in asserting their legal rights, and acquiesce for a number of years in the validity of such annexation, during which time they voted for city officers, and were represented in the common council of the city by councilmen of their own selection, and by their action and the votes of their representatives large debts were contracted by the city for its improvement, in all the benefits of which they shared, such long continued acquiescence in such annexation constitutes a complete equitable defense to a suit to enjoin the collec-

tion of city taxes assessed against property so annexed. City of Logansport v. LaRose, 99 Ind. 117.

Injunction—Parties—Pleading.—One or more citizens of a territory sought to be annexed to a city may maintain a suit to prevent the consummation of an attempted illegal annexation. City of Delphi v. Startzman, 104 Ind. 343, 345.

Where there has been an attempted illegal annexation of territory to a city, and an attempt on the part of the city to interfere with property rights under such color of legal authority, injunction is the appropriate remedy. City of Delphi v. Startzman, 104 Ind. 343.

Where the complaint states facts sufficient to show a right to have a municipal corporation restrained from exercising corporate powers over a territory not legally annexed to the city, the pleading is not bad because it omits to aver that the treasurer had the tax duplicate in his hands. City of Delphi v. Startzman, 104 Ind. 343, 347.

Land-owner—When estopped.—Where public officers have no personal interest in the matter, and, acting in good faith, assume to make a change in the corporate boundaries of a city, and fail through mistake of fact to proceed in accordance with the statute, a property owner who resides in the territory sought to be annexed, and who sees the city spend large sums of money in making public improvements on the territory annexed, may be estopped, even though he did not know that the proceedings were void. Strosser v. City of Ft. Wayne, 100 Ind. 443, 448; 1 Beach Pub. Corp., § 421.

If the property owner for a considerable length of time acquiesces in the annexation proceedings, and, without objection, sees the city make improvements and expend large sums of money upon the faith of the validity of the proceedings, he will be estopped from impeaching the validity of the proceedings, although he may not have directly received any benefit from the improvements made by the city. Strosser v. City of Ft. Wayne, 100 Ind. 443, 450; City of Logansport v. LaRose, 99 Ind. 117.

A property owner does not estop himself from contesting the validity of proceedings ordering the annexation of territory to the corporation in cases where there is no jurisdiction to make the order, by voting at municipal elections and by offering himself as a candidate for office; nor does he estop himself by unsuccessfully petitioning the common council to improve the streets. Strosser v. City of Ft. Wayne, 100 Ind. 443, 445.

Married woman—Estoppel.—A wife, whose land has been platted without her knowledge or consent by her husband, is not estopped to dispute the validity of the plat, and the subsequent annexation of the land to a city, by paying city taxes and executing conveyances, without knowledge of the facts, and in the belief that such transactions relate to lots previously and legally platted by her, nor by a street improvement of which she had no knowledge and which was made at the expense of lot-owners. City of Indianapolis v. Patterson, 112 Ind. 344, 348.

Illegal annexation—Taxes—Injunction.—Where a city has assessed for taxation, property illegally annexed to such city, collection of taxes so assessed may be enjoined. City of Peru v. Bearss, 55 Ind. 576; Windman v. City of Vincennes, 58 Ind. 480; Stultz v. State, 65 Ind. 492, 503; 1 Beach Pub. Corp., § 413. See Mullikin v. City of Bloomington, 72 Ind. 161.

Taxes, recovery of—Limitation.—Where the plat and the annexation are void, taxes assessed and collected by the city are illegal, and may, there being no estoppel, be recovered back, unless barred by the six years statute of limitations, which begins to run with each payment. City of Indianapolis v. McAvoy, 86 Ind. 587, 589; Strosser v. City of Ft. Wayne, 100 Ind. 443, 444; McWhinney v. City of Indianapolis, 101 Ind. 150, 153; Newsom v. Board, etc., 103 Ind. 526, 528; City of Indianapolis v. Patterson, 112 Ind. 344, 350.

Motive for annexation—Injunction—Taxes.—The motive of a city in annexing territory can not be inquired into in a suit to enjoin the collection of taxes levied on the property by the city. Glover v. City of Terre Haute, 129 Ind. 593; City of Logansport v. Seybold, 59 Ind. 225; 1 Beach Pub. Corp., § 413.

Complaint.—An averment that certain lots alleged to have been illegally assessed were not taxable, not showing that they do not lie within the city territory, is insufficient. City of Delphi v. Bowen, 61 Ind. 29.

Curative statutes.—Curative statutes will not validate annexation proceedings that are void for want of jurisdiction. Strosser v. City of Ft. Wayne, 100 Ind. 443; Johnson v. Board, etc., 107 Ind. 15.

In the year 1856, the city council of Terre Haute passed a resolution extending the city limits, by annexing thereto certain contiguous territory. In a suit by the owners of the lots so annexed to enjoin the collection of taxes assessed by the city any defect in the proceedings of the council was cured by § 83, of the act of March 9, 1857, for the incorporation of cities. Edmunds, etc., v. Gookins, 24 Ind. 169; Edmunds, etc., v. Gookins, 20 Ind. 477.

Testing validity of annexation—Quo warranto.—The legality of the annexation of territory to a city can not be questioned by quo warranto proceedings. Stultz v. State, 65 Ind. 492; 2 Dillon Munic Corp., 4th ed., 897 n.

Annexation—Local concern—Effect of decisions of the highest court of the state.—Upon an appeal in annexation proceedings to the highest court of the state the judgment rendered by such court becomes *res adjudicata*. The annexation of territory to a municipal corporation is a matter of purely local concern and interest, and the construction placed by such court upon the constitution and statutes of the states relative to such proceedings is binding upon the federal courts. The case of Forsythe v. City of Hammond, 34 U. S. Ct. Ct. App. 552, reversed; Forsythe v. City of Hammond, 106 U. S. 506.

254. Extension over contiguous lands—Action of council.—85. The limits of any city may be extended over any lands or contiguous territory, by the consent of the owner thereof in writing, and a resolution of the common council, passed by a two-thirds vote, extending the limits of such city over such lands or territory; which written consent and resolution shall be entered at length in the records of such city; and the common council shall cause a certified copy of both to be recorded in the recorder's office of the proper county. If any city shall desire to annex contiguous territory not laid off in lots, and to the annexation of which the owner will not consent, the common council shall present to the board of county commissioners a petition setting forth the reasons for such annexation, and, at the same time, present to such board, an accurate description, by metes and bounds, accompanied with a plat of the land or territory proposed or desired to be annexed to such city. The common council shall give thirty days' notice, by publication in some newspaper of the city, of the intended petition, describing in such notice the territory sought to be annexed. R. S 1894, § 3659.

This section is constitutional.. Stilz v. City of Indianapolis, 55 Ind. 515. See Longworth, etc., Co. v. Common Council, etc., 32 Ind. 322.

Annexation—Eminent domain.—The authority conferred by this act upon the county board to annex territory to a city contiguous thereto is not founded upon the right of eminent domain. In the annexation of territory no property is taken from the owner. The act of annexation simply changes the property and its owner in their civil relation to certain public authority. Stilz v. City of Indianapolis, 55 Ind. 515; Taggart, etc., v. Claypool, 145 Ind. 590.

Annexation proceedings, statutory—Statute construed.—Proceedings for the an-

nexation of contiguous territory to incorporated cities are statutory proceedings; to make them operative and give them validity, it is essentially necessary that all the proceedings should be in strict conformity with the provisions and requirements of the statute. City of Peru v. Bearss, 55 Ind. 576; Windman v. City of Vincennes, 58 Ind. 480.

Same—Evidence.—Only when the proceedings in such case have strictly complied with the statute is the entry of such annexation, or an attested copy thereof, conclusive evidence of annexation. Windman v. City of Vincennes, 58 Ind. 480.

For construction of the statute for the incorporation of the city of Aurora, with reference to boundaries, see Green v. Cheek, 5 Ind. 105.

Platted and unplatted territory—Jurisdiction—Proof.—It must be alleged in the petition for annexation whether the territory sought to be annexed is platted or unplatted territory, in order to determine whether the board of county commissioners or city council have jurisdiction of the proceedings, and that fact must be proven on appeal to the circuit court, unless admitted. Chandler v. City of Kokomo, 137 Ind. 295.

In an action before the board of county commissioners for annexation, the contiguous territory sought to be annexed must be unplatted; or, at least, if platted, the plat must, as yet, be unrecorded; but should there be, within the limits of the territory to be annexed, certain tracts called "platted lots" not contiguous to the city limits, and hence not recorded, such circumstance would not defeat the jurisdiction of the county board to order the annexation. Forsythe v. City of Hammond, 142 Ind. 505. See City of Logansport v. La Rose, 99 Ind. 117.

County commissioners—Jurisdiction.—Where territory, not platted, is sought to be annexed to a city to which it lies adjacent, the board of county commissioners has exclusive original jurisdiction over the matter, and the city must by petition secure from that body the proper order. Strosser v. City of Ft. Wayne, 100 Ind. 443, 453; City of Delphi v. Startzman, 104 Ind. 343, 346; Chandler v. City of Kokomo, 137 Ind. 295; Forsythe v. City of Hammond, 142 Ind. 505.

Board of commissioners—Jurisdiction—Curative statutes.—Where the statute confers exclusive jurisdiction upon the board of commissioners to order lands annexed to a city, the power can not be exercised by the common council, and a statute attempting to legalize an order made in such a case by the common council is inoperative and void. Strosser v. City of Ft. Wayne, 100 Ind. 443; Johnson v. Board, etc., 107 Ind. 15, 19.

Filing petition—When—Notice of.—The statute authorizing the petition does not require that it shall be filed any specified period prior to the first day of the session of the county board at which it is intended to present it, but thirty days' notice of such intention must be given. Stilz v. City of Indianapolis, 55 Ind. 515.

Same—Plat—When filed.—The plat of the land proposed, in the petition therefor, to be annexed to a city, need not be filed at the time such petition is filed, but may be filed thereafter at any time before the county board has finally acted upon such petition, even over the objection of a remonstrant. Stilz v. City of Indianapolis, 55 Ind. 515.

Same—Survey.—If such petition contain a specific description of the premises asked to be annexed, and the plat filed therewith contain a copy of an actual established survey thereof, though theretofore made for another purpose, a survey for the purposes of such petition is unnecessary. Stilz v. City of Indianapolis, 55 Ind. 515.

The jurisdiction to annex lands to a city is in the county board, where contiguous lands are platted, but such plats are not properly acknowledged and recorded; or where lands platted into lots are not contiguous to the city, and the proceeding is to annex contiguous territory which includes such platted lots. Forsythe v. City of Hammond, 142 Ind. 505.

Same—Special session.—A board of county commissioners, convened in special ses-

sion, can not make a valid order for the annexation of contiguous territory to an incorporated city. City of Vincennes v. Windman, 72 Ind. 218.

Platting—Sufficiency.—Platting may consist alone in drawings and statements upon paper, and does not imply such markings and subdivisions upon the lands as to distinguish them from unplatted lands. Proof or admissions that lands are used for agricultural or horticultural purposes does not raise the inference that the lands are unplatted. Chandler v. City of Kokomo, 137 Ind. 295.

Petition—Reasons for annexation.—The statute for annexation of lands to a city does not prescribe the reasons which shall be sufficient for such annexation, but leaves that question to the sound discretion of the authority passing upon the petition for annexation; nor does the statute require that the petition shall state that the owners will not consent to the annexation. Chandler v. City of Kokomo, 137 Ind. 295. See Elston v. Board, etc., 20 Ind. 272.

Petition, when sufficient.—A petition for annexation is not faulty because it excepts from its prayer platted territory within the lines of the larger territory described, nor because the territory sought to be annexed is composed of separate tracts, some of which do not adjoin the existing city boundary, if they do adjoin each other. Catterlin v. City of Frankfort, 87 Ind. 45, 48.

Same—Signatures.—The petition is sufficient if signed by a number of the members of the council exceeding two thirds; it need not be unanimously signed. Stilz v. City of Indianapolis, 55 Ind. 515.

What unnecessary in petition.—It is not necessary that the petition for annexation should state that the land-owners will not consent to an annexation by the common council of the city. Huff v. City of Lafayette, 108 Ind. 14, 18.

Reasons for annexation.—The sufficiency of reasons for annexation stated in a petition must be left to the tribunal acting upon it, using a sound discretion. That the inhabitants enjoy the advantages of city government and institutions, and ought, therefore, to share its burdens; that the highways should be properly graded and improved; that drainage may be provided, and the like, are sufficient. Catterlin v. City of Frankfort, 87 Ind. 45, 52; Chandler v. City of Kokomo, 137 Ind. 295; Windfall, etc., Co. v. Emery, 142 Ind. 456.

Petition—Collateral attack.—If a petition purporting to be made by the mayor and council for the annexation of unplatted lands is signed only by the mayor and is acted on by the county board, the proceedings can not be collaterally attacked. Huff v. City of Lafayette, 108 Ind. 14, 15.

Jurisdiction—Collateral attack.—A complaint to enjoin a city from exercising jurisdiction over territory annexed claimed that the proceedings to annex were void: 1. Because the petition for annexation prayed for the annexation of other lands also, which the county board refused to annex. 2. Because no notice of the intention to present the petition was given by publication for thirty days. The complaint did not show that the board had not jurisdiction of the proceedings, and therefore the annexation could not be attacked collaterally. City of Terre Haute v. Beach, 96 Ind. 143, 144.

Notice of petition—Sufficiency—Names.—Notice of the presentation of a petition to the county commissioners is not insufficient because signed by the mayor only, and because it does not contain the name of one of the land-owners and particularly describe his land. If there is notice in the manner provided by the statute, it is sufficient as against a collateral attack. Catterlin v. City of Frankfort, 87 Ind. 45, 47; Huff v. City of Lafayette, 108 Ind. 14, 19. See Woodfill v. Town of Greensburg, 18 Ind. 203; Elston v. Board, etc., 20 Ind. 272.

Where there is some notice, of a legal form, and that notice is adjudged sufficient, the proceeding is not void, although the notice may be defective. City of Terre Haute v. Beach, 96 Ind. 143, 145; Powell v. City of Greensburg, 150 Ind. 148.

Description—Notice—Petition.—Such a notice gave a line of the territory to be annexed, from a certain point on a certain road, "with said road north twenty-four and one-half degrees west, twelve hundred and ninety-five feet to," etc.; the petition described the line in the same words save the course, which it gave as "north twenty-four and one-fourth degrees west." There was no variance, the monuments given in both fixing the course definitely. Catterlin v. City of Frankfort, 87 Ind. 45, 47.

Length of notice.—Notice of a petition to the county board for the annexation of unplatted territory to the city, under this section (R. S. 1894, § 3659), is sufficient if given thirty days, excluding the first day and counting the last one, and the signature of the city clerk, attested by the city attorney, is a sufficient signing, where it is also shown that the common council directed the notice to be given. Catterlin v. City of Frankfort, 87 Ind. 45, 47.

Description of territory.—Where the contiguous territory, which it is desired to annex to a city, is described in the petition by the divisions formed by the congressional surveys, and by subdivisions thereof, capable of being ascertained, such description is sufficient. Stilz v. City of Indianapolis, 55 Ind. 515; Powell v. City of Greensburg, 150 Ind. 148.

The proceedings for annexation will not be invalidated by a mistake in the notice giving wrong name of the owner of the land, the statute not requiring the name of the owner to be given. Powell v. City of Greensburg, 150 Ind. 148.

Boundaries—Legislative and judicial functions.—The creation, enlarging and contraction of boundaries of municipal corporations are legislative and not judicial functions, and may be exercised by the legislature without the consent and against the remonstrance of those interested. Woolverton v. Town of Albany, Ind. Sup. Ct., Jan. 5, 1899; Paul v. Town of Walkerton, 150 Ind. 565.

General laws providing conditions upon which cities and towns may be incorporated as municipal corporations, with or without the consent of those interested, and vesting the power in judicial bodies to determine whether such conditions exist, and, if so, to order such incorporation, are valid. Woolverton v. Town of Albany, Ind. Sup. Ct., Jan. 5, 1899; Paul v. Town of Walkerton, 150 Ind. 565; Forsythe v. City of Hammond, 142 Ind. 505, 516, 519; Forsythe v. Hammond, 68 Fed. Rep. 774.

In such case the creation of the corporation is not the act of the court or other body, but is the act of the law. If the facts exist under the law, the board of commissioners or the court of appeal has no discretion and can exercise none, but must order the incorporation of such town or city. Woolverton v. Town of Albany, Ind. Sup. Ct., Jan. 5, 1899; Forsythe v. City of Hammond, 142 Ind. 517, 518.

Annexation of territory—Legislative character—Judicial examination.—The legislative character of the function of annexation of territory to a city does not preclude judicial examination and decisions on questions as to the preliminary steps and the truth and sufficiency of the petition for annexation. Forsythe v. City of Hammond, 142 Ind. 505. See Forsythe v. City of Hammond, 68 Fed. Rep. 774; Forsythe v. City of Hammond, 166 U. S. 506. See 1 Dillon Munic. Corp., 4th ed., §§ 182, 183.

255. Proceedings by county board.—86. The board of county commissioners, upon the reception of such petition, shall consider the same, and shall hear the testimony offered for or against such annexation; and if, after inspection of the map and of the proceedings had in the case, such board is of the opinion that the prayer of the petition should be granted, it shall cause an entry to be made in the order-book, specifying the territory annexed, with the boundaries of the same according to the survey; and they shall cause an attested copy of the entry to be filed with the recorder of such county, which

shall be duly recorded in his office, and which shall be conclusive evidence of such annexation in all courts in this state. R. S. 1894, § 3660.

Disannexation, see *post*, § 1037, *et seq.*

Hearing—Evidence—What incompetent.—That some of the owners of the proposed territory, not remonstrants, had, four months before the presentation of the petition, given their written consent to the proposed annexation, was not material, nor was it proper evidence for the remonstrants, on the hearing of such a petition, when a number of other owners had refused. Catterlin v. City of Frankfort, 87 Ind. 45, 53.

Any evidence is proper, upon a hearing of the annexation proceedings, which tends to show the location of the city or town, its improvement, advantages and surroundings, its institutions, its advantage as a trading point, its railroad and gravel road facilities, the various kinds of industries and business carried on in the city or town and territory to be annexed, the business relations between the owners of the land in the territory to be annexed, and the mutual advantages or disadvantages that may result to the citizens of the corporation, and territory to be annexed, etc. Winfall, etc., Co. v. Emery, 142 Ind. 456.

Can not annex part only.—Where the common council of a city has filed its petition with the proper county board, asking that certain described lands, not platted, lying contiguous to such city, be annexed thereto, to which it is averred that the owner will not consent, such board has no power to order the annexation of a part, only, of such lands, but must grant or refuse the prayer of such petition as a whole. City of Peru v. Bearss, 55 Ind. 576.

Partial annexation void—Tax—Injunction.—An order of such county board, annexing to such city a part, only, of such lands, is inoperative and void; and where a city has assessed a tax for municipal purposes on lands so annexed, its collection may be enjoined and such assessment canceled, in an action therefor by the owner. City of Peru v. Bearss, 55 Ind. 576.

It was held in above case that the statute did not authorize an appeal from the decision of the county board, but see later cases following.

Appeal.—An appeal lies from an order of a county board annexing territory to a city. Forsythe v. City of Hammond, 142 Ind. 505; Grusenmeyer v. City of Logansport, 76 Ind. 549; City of Logansport v. LaRose, 99 Ind. 117; Wilcox v. City of Tipton, 143 Ind. 241, 246. See Windman v. City of Vincennes, 58 Ind. 480; City of Peru v. Bearss, 55 Ind. 576; City of Indianapolis v. Sturm, 39 Ind. 159; Trustees, etc., v. Manck, 35 Ind. 51; Church v. Town of Knightstown, 35 Ind. 177.

Upon appeal the petition for annexation may be amended so as to exclude certain territory originally included in the petition. Wilcox v. City of Tipton, 143 Ind. 241.

Collateral attack.—The proceedings of the county board can not be collaterally impeached or attacked. If there be errors in such proceedings, the remedy of the party aggrieved thereby is an appeal to the circuit court of the county, and not a suit for an injunction. City of Logansport v. LaRose, 99 Ind. 117; Grusenmeyer v. City of Logansport, 76 Ind. 549; Board, etc., v. Karp, 90 Ind. 236; Town of Cicero v. Williamson, 91 Ind. 541; Huff v. City of Lafayette, 108 Ind. 14.

Trial de novo.—Upon an appeal from the board of county commissioners to the circuit court the proceedings are tried *de novo*. Wilcox v. City of Tipton, 143 Ind. 241; Chandler v. City of Kokomo, 137 Ind. 295.

Injunction—Power of city to tax farm land.—The power of a city to tax for municipal purposes, a tract of farm or garden land, contiguous to such city, can not be called in question in an action by the owner thereof, against such city and a county board, to enjoin them from executing an order of such board, annexing such land to such city. Stilz v. City of Indianapolis, 55 Ind. 516.

Injunction—Appeal—Answer—Notice.—An answer in an action to enjoin the annexation of plaintiff's territory to defendant city need not allege notice to plaintiff of an appeal from an order of annexation by the commissioner's court to the circuit court, where the jurisdiction of the latter court over the plaintiff was not questioned by the complaint. Wilcox v. City of Tipton, 143 Ind. 241.

Injunction—Supreme court—Appeal.—Where citizens and property owners in the territory sought to be annexed, having appealed from the judgment in the annexation proceedings to the supreme court, petition the supreme court for an injunction restraining the consideration of the judgment appealed from in the elections, taxation and internal improvement of the city, none of the acts sought to be restrained being alleged to be imminent, except that of voting, the injunction will not be granted. Forsythe v. City of Hammond, 137 Ind. 426.

Under this section, as originally enacted, when a petition was presented to the common council for the vacation of a street or alley, or any part thereof, and a remonstrance was filed against such vacation, the council had no power to order the street or alley to be vacated, unless the remonstrance was withdrawn or two-thirds of all the owners of real estate of such city petitioned therefor. Spiegel v. Gansberg, 44 Ind. 418; Sims v. City of Frankfort, 79 Ind. 446, 455.

ARTICLE 7.—FIRE DEPARTMENT.

SEC.
256. Fire wardens.
257. Regulation to prevent fires.
258. Fire engines and houses.
259. Power of chief engineer and assistants.
260. Privileges of firemen.
261. Destruction of buildings.

[Acts 1867, p. 33. In force March 14, 1867.]

256. Fire wardens.—72. The councilmen, by virtue of their office, shall be fire wardens, or the common council may appoint one or more fire wardens; and all fire wardens shall have power, at all reasonable hours, to enter into and examine all dwellings, out-houses, lots, and yards in their respective wards or in said city, to inspect all places wherein fire is used, and to ascertain how ashes are kept and disposed of. R. S. 1894, § 3661.

257. Regulation to prevent fires.—73. The common council shall have power to regulate the construction of chimneys, hearths, ovens, the erection of stoves and stove-pipes, boilers and apparatus used in manufactories and in buildings, and cause the same to be removed or made secure when considered dangerous; to compel owners and occupants of houses and buildings to make scuttles in the roofs thereof, and stairs or ladders leading to the same. R. S. 1894, § 3662.

Protection against fire—Inherent power—Express power.—Cities in this state possess ample power to enact and enforce reasonable ordinances to secure protection against fire. In the absence of express statutory authority the enactment and enforcement of reasonable regulations of this character are recognized as a legitimate exercise of the police power necessary to the safety of the city. In addition to the power thus possessed, the statutes of this state confer express authority upon cities to establish fire limits and prevent the erection of wooden buildings in such parts of the city as the common council may determine. The statutory power thus conferred is not a limitation upon the common law power of the city in this particular. Koffman v. Stein, 138

Ind. 49; City of Rushville v. Rushville, etc., Co., 132 Ind. 575; First Nat. Bank v. Sarlls, 129 Ind. 201; Hasty v. City of Huntington, 105 Ind. 540; Clark v. City of South Bend, 85 Ind. 276; Baumgartner v. Hasty, 100 Ind. 575; Corporation of Bluffton v. Studabaker, 106 Ind. 129; Shea v. City of Muncie, 148 Ind. 14; 1 Dillon Munic. Corp., 4th ed., §§ 141, 143.

Ordinances—When invalid.—Municipal ordinances placing restrictions upon lawful conduct, or the lawful use of property, must, in order to be valid, specify the rules and conditions to be observed in such conduct or business; and must admit of the exercise of the privilege by all citizens alike who will comply with such rules and conditions; and must not admit of the exercise, or of an opportunity for the exercise, of any arbitrary discrimination by the municipal authorities, between citizens who will so comply. City of Richmond v. Dudley, 129 Ind. 112; City of Plymouth v. Schultheis, 135 Ind. 339.

Repairs of buildings.—A municipal ordinance is invalid which arbitrarily attempts to take from the owner of a frame or wooden building all power to make repairs necessary for its preservation or necessary for its enjoyment, regardless of the effect which such repairs may have upon the public and upon adjacent property, or upon the rights of others; but if the owner proposes to make repairs or additions of such material, or in such manner as to clearly menace the public safety or to greatly endanger adjacent property, the city authorities have ample power to interfere and prevent the making of such repairs or additions. First National Bank, etc., v. Sarlls, 129 Ind. 201; 1 Beach Pub. Corp., § 578.

Failure to exercise powers—Negligence of firemen—City not liable.—Cities are not liable for property destroyed by fire because they do not exercise the powers conferred by law in regard to providing protection from fire; nor are they liable for the negligence of the fire department. Brinkmeyer v. City of Evansville, 29 Ind. 187; Robinson v. City of Evansville, 87 Ind. 334; City of Lafayette v. Timberlake, 88 Ind. 330; Faulkner v. City of Aurora, 85 Ind. 130; Kistner, etc., v. City of Indianapolis, 100 Ind. 210; City of Anderson v. East, 117 Ind. 126; 1 Beach Pub. Corp., § 744; 2 Dillon Munic. Corp., § 976.

258. Fire engines and houses.—74. The common council may procure fire engines and all other apparatus necessary for the extinguishment of fires, and have the charge and control of the same, and shall provide engine and other houses for their preservation and security; shall organize, from reputable citizens, fire and hook and ladder companies and companies auxiliary thereto, and make rules for their government and regulation, with such penalties for neglect and misconduct as shall be deemed proper. They may remove members of such companies, and appoint others in their stead. R. S. 1894, § 3663.

259. Power of chief engineer and assistants.—75. The chief engineer shall have the superintendence of the fire department. He shall see that all apparatus for the extinguishment of fires, belonging to the city, is kept in proper order, and, from time to time, report to the common council the condition of the same, and the repairs or additions thereto to render the department efficient. He shall appoint a first and second assistant engineer, with the advice and consent of the common council, who shall act under his directions. Said engineer and assistants, when clothed with their proper badges, shall have authority to require any person present, and not attached to any fire company, to work in extinguishing the fire, or in aiding to save

property from destruction or injury, in such places and in such manner as the said engineer or assistant shall direct; and to order all bystanders who are unemployed, or whose assistance is useless, to remove to such distance as the said engineer or assistants may prescribe. Said engineer and assistants shall have all the power of police officers, during the continuance of a fire, to suppress disturbances, and to arrest any person who may commit any breach of the peace, or any depredation or injury to the property of another, or who shall refuse to obey any order or direction lawfully given by said engineer or his assistants, and to conduct the offender before the mayor, or other proper magistrate, or, if necessary, to commit him to the county prison or jail until a hearing can be had. R. S. 1894, § 3664.

Chief engineer—Fire board unauthorized.—The common council of a city, incorporated under the general law of the state for the incorporation of cities, is not authorized to pass ordinances which contravene the express provisions and the clear implications of the statute under which the city is incorporated. The creation of a fire board is unauthorized and is impliedly forbidden by the statute; and an attempt by ordinance to invest such fire board with powers and duties which the statute imposed upon the common council, or upon the chief engineer of the fire department, and which could not be delegated, was a palpable violation of the statute, and, therefore, invalid and void. Benjamin v. Webster, 100 Ind. 15, 19. See *post*, § 296, *et seq.*

260. Privileges of firemen.—76. The engineer and assistants of the fire departments, fire wardens and firemen, and members of all other auxiliary companies to the fire department established by the common council, shall have their names registered with the clerk of the city, and his certificate of such registry shall exempt such persons, for the current year, from serving on juries in all courts, and in the militia, except in case of war, invasion or insurrection. R. S. 1894, § 3665.

See *post*, §§ 1150, *et seq.*, and 1312, *et seq.*

Firemen—Municipal servants.—Firemen are not servants of the state, nor of the county in which they live, but are creatures and servants of the municipality. Henderson, etc., v. The London, etc., Co., 135 Ind. 23.

261. Destruction of buildings.—77. When any building in the city is on fire, or any building adjacent thereto is liable to take and convey fire to other buildings, to the great destruction of property, it shall be lawful for the chief engineer, or engineer acting as such, with the concurrence of the mayor or any five councilmen, to take down, blow up, or destroy the same. And no action shall be maintained against any person therefor; but the person owning or having an interest in such building may, within three months thereafter, apply, in writing, to the common council to assess the damages sustained thereby, and the common council shall appoint three reputable freeholders to determine the amount of damages done to the property of the complainant by the destruction of such building. Such assessment shall be made under oath, and subscribed by the persons making the same, and filed with the clerk of the city within ten days from

the date of their appointment; but the complainant or corporation may, within twenty days thereafter, appeal therefrom to the circuit court of the proper county. The damages awarded by the common council, or by the judgment of such court, shall be added to the next annual levy and collected with the general tax, and paid over to such claimant. R. S. 1894, § 3666.

Destruction of buildings lawful—Not a forfeiture.—It is lawful to destroy buildings in case of fire when there is reasonable ground to believe that it is necessary. Such destruction of the property is not a forfeiture. Conwell v. Emrie, 2 Ind. 35; Baumgartner v. Hasty, 100 Ind. 575; Bowditch v. Boston, 101 U. S. 16; 1 Beach Pub. Corp., § 748; 2 Dillon Munic. Corp., §§ 955-958.

ARTICLE 8.—CITY COURT.

SEC.		SEC.	
262.	Election of judge.	271.	Change of venue.
263.	Commission—Oath—Bond.	272.	Trial.
264.	Style and jurisdiction.	273.	New trials.
265.	Civil causes, when for trial.	274.	Appeals.
266.	Seal.	275.	Execution.
267.	Court of record—Effect of judgment.	276.	Marshal's and constable's duties—Fees.
268.	Process and service.	277.	Judge's fees.
269.	Rules—Powers of judge.	278.	Judge *pro tempore*.
270.	Sittings of court—Records—Transcript.	279.	Judge may practice law.

[Acts 1875, p. 49. In force August 24, 1875.]

262. Election of judge.—1. The legal voters of any city having a population of over five thousand inhabitants may at any regular or special election elect a city judge, if the common council, by proper order duly entered of record, shall have so directed. Such judge shall have the qualifications required of the judge of the circuit court, and shall hold his office for the term of four years and until his successor shall be elected and qualified. [As amended, Acts 1891, p. 24. In force February 20, 1891.] R. S. 1894, § 3667.

City court—How established—Tenure of judge—Elections.—A resolution of the common council which directs the election of a city judge according to this section, brings the city under this act, and the judge so elected holds office until his successor is elected and qualified, and no further order is required directing future elections. Oppenheim v. Pittsburg, etc., R. Co., 85 Ind. 471.

263. Commission—Oath—Bond.—2. When the mayor of such city shall certify to the governor that said city has a population of over six thousand inhabitants, and that a person (naming him) has been duly elected to the office of city judge, the governor shall issue his commission to such judge, as in like cases. But before such judge shall enter upon the discharge of his duties, he shall take and subscribe to the oath of office as required by judges of the circuit courts, and shall execute his bond, with two or more responsible freehold sureties, payable to the state of Indiana, in the penal sum of five thousand dollars, conditioned that he will faithfully, and to the best

of his ability, perform the duties of his said office, and that he will pay over to the persons entitled thereto all moneys that may come into his hands by virtue of his office; which bond shall be filed in the office of the clerk of the circuit court of such county. R. S. 1894, § 3668.

264. Style and jurisdiction.—3. The style of such court shall be, the court of the city of ———, according to the name of the city, and shall have original concurrent jurisdiction with justices of the peace and with city mayors in all matters criminal and civil of which justices of the peace or mayors have or may hereafter have jurisdiction. And shall also have original concurrent jurisdiction with the circuit court in civil causes where the amount in controversy does not exceed five hundred dollars, except in actions for slander, libel, foreclosure of mortgages on real estate or where the title of real estate is in issue, excepting all matters relating to the settlement of decedents' estates, appointment of guardians and all matters connected therewith. Such court shall be governed, so far as may be, by the laws, rules, practice and pleadings governing proceedings in the circuit courts of the state, except as in this act is otherwise provided. [As amended, Acts 1891, p. 24. In force February 20, 1891.] R. S. 1894, § 3669.

Jurisdiction.—Under this section a city court has concurrent jurisdiction with the circuit court of an action for the rescission of a parol contract for the sale of real estate. Dotson v. Bailey, 76 Ind. 434.

Prior to the act of 1875, under the general act for the incorporation of cities of March 14, 1867, the mayor of a city had exclusive jurisdiction of cases for the violation of city ordinances; and a city judge, elected in pursuance of an ordinance providing that he shall possess the judicial power and perform the judicial duties possessed and performed by the mayor, had no jurisdiction to arraign, try and commit a person to jail for the violation of city ordinances. McNulty v. Connew, 50 Ind. 569.

265. Civil causes, when for trial.—5. All civil causes triable in the city courts shall stand for issue and trial when summons shall have been served on the defendant three days or publication had thirty days. But the defendant may appear without process and confess a judgment for any sum not exceeding one thousand dollars. [As amended, Acts 1891, p. 24. In force February 20, 1891.] R. S. 1894, § 3670.

266. Seal.—6. Such judge shall provide a seal for such court, which shall contain on the face, the words "city court of ———, Indiana" (filling the blank with the name of the city and county). A description of such seal, together with an impression thereof, shall be spread on the records of said court. R. S. 1894, § 3671.

267. Court of record—Effect of judgment.—7. City courts shall be courts of record whose jurisdiction in criminal cases shall extend throughout the limits of the county wherein they are situated, and in civil cases throughout the limits of the township or townships wherein such city is situated. And all its judgments, decrees, orders and proceedings shall have the same force and effect as those of the circuit

court, except that the same shall not be a lien on real estate otherwise than is provided by taking transcript, and the same shall be enforced in the same manner as liens by transcript from justices of the peace in similar cases. [As amended, Acts 1891, p. 24. In force February 20, 1891.] R. S. 1894, § 3672.

268. Process and service.—8. The process of said court shall be issued by the judge, and shall have the seal affixed and be attested, directed to the sheriff or any constable, or to the marshal of such city, served and returned, and be in form as is or may be provided for process issuing from the circuit court. R. S. 1894, § 3673.

Collateral attack—Jurisdiction—Notice.—A judgment of the city court can not be collaterally attacked, when there is some notice, although it is defective. The decision of such court upon a notice before it is the determination of a jurisdictional question. Oppenheim v. Pittsburgh, etc., R. Co., 85 Ind. 471.

269. Rules—Powers of judge.—9. Such judge shall have full power and authority to make and adopt rules and regulations for conducting the business of said court not repugnant to the laws of this state; and shall have all the powers incident to a court of record in relation to attendance of witnesses, the punishment of contempts, and enforcing its orders, and to issue commissions for taking of depositions in cases pending in said court. Such judge shall have full authority to administer oaths, to take and certify acknowledgments of deeds and other instruments, to solemnize marriage, and to give all necessary certificates for the authentication of the records and proceedings in said court. R. S. 1894, § 3674.

270. Sittings of court—Records—Transcript.—10. Such court shall be held in such city, at such place as shall be provided therefor; and shall, at all usual business hours, be deemed open for the transaction of any business that may be [brought] before it. Such judge shall be his own clerk, issue all process, and shall keep a true and correct record of all proceedings had before him. The common council of such city shall provide, for the use of said court, well-bound order-books, judgment-dockets, and fee-books, in which said judge shall record all orders, judgments, and decrees, and sign the same, and enter a minute of all judgments and decrees in the judgment-docket, and shall keep a true record of all fees in the proper fee-book in the same manner as such records are kept by clerks of the circuit courts. Such judgments may only become a lien upon real estate, by filing in the office of the clerk of the circuit court a transcript of such judgment; and upon the recording of such transcript in the order-book of said circuit court, such judgment shall become a lien, the same as judgments rendered by such circuit court; and execution may issue on such record of such transcript, in the same manner and for the same reasons as executions are issued on transcripts from the dockets of the justices of the peace; and no real estate, or any interest therein, shall be sold on any writ issued from said city court. R. S. 1894, § 3675.

City judge.—A city judge, as a city officer, can not make a valid contract with the city

for the use of his office as a city court room. McGregor v. City of Logansport, 79 Ind. 166.

271. Change of venue.—11. Changes of venue may be taken from such court, for such causes and in such manner and upon such terms as are provided for changes of venue in causes before justices of the peace; and in causes of which justices of the peace have jurisdiction, the same shall be sent to some justice of the peace competent to try the same; but in cases of changes of venue of all other cases, the same shall be sent to the circuit court of the county, where the same shall be entered upon the docket of such court, and shall be there tried as if originally instituted in said court. R. S. 1894, § 3676.

272. Trial.—12. All issues of fact pending in such city court shall be tried by the judge, unless either party demand a jury; which jury shall consist of six qualified voters of the county (unless the party calling for the jury demand twelve jurors), to be summoned by any constable, sheriff, or city marshal, by venire issued by the judge. R. S. 1894, § 3677.

273. New trials.—13. New trials may be granted by such judge at any time within ten days after rendering judgment, according to the usages in the circuit court, notice of the motion therefor having been given to the opposite party, unless such motion be made in his presence or in the presence of the agent or attorney who conducted his suit; and when a new trial is granted, the judge shall set a day therefor, and shall cause at least three days' notice to be given to the party against whom such new trial has been granted. R. S. 1894, § 3678.

The parties may waive the provisions of this section as to time of filing a motion for new trial and notice of the motion. Hill v. Hazen, 93 Ind. 109.

274. Appeals.—14. Any party may appeal from any final judgment or decree of such city court to the circuit court of such county, within thirty days from the rendition thereof, in the same manner in which appeals are taken from the judgment of justices of the peace; and such appeal shall be deemed to be properly taken if the same would be good if taken from a justice of the peace: *Provided, however*, That when a party shall have acquired any lien by virtue of any transcript filed and recorded, as herein provided, from which an appeal is taken, such lien shall be deemed as continued in force until such cause shall be tried and entered of record in the circuit court. R. S. 1894, § 3679.

Appeal—Costs.—On appeal from city courts, in cases in which jurisdiction is given them greater than that of justices of the peace, the party recovering judgment is entitled to recover costs. Dotson v. Bailey, 76 Ind. 434.

275. Execution.—15. Such judge shall issue executions and orders of sale on all final judgments and decrees as follows: On judgments and decrees by confession within four days from the rendition

thereof; on all other judgments and decrees, at the expiration of ten days from the rendition thereof, unless the same be stayed as provided by law; and in such cases he shall issue such executions or orders of sale at the expiration of such stay, unless the judgment-plaintiff or his attorney shall otherwise direct. All orders of sale and all executions, when the amount exceeds three hundred dollars, shall be directed to the sheriff of the county, and all other executions may be directed to any constable of the county or marshal of such city. R. S. 1894, § 3680.

276. Marshal's and constable's duties—Fees.—16. Such judge may require the marshal of such city or his deputy or any constable to attend his court during the progress of any trial, to preserve order, to serve process, and to perform the general duties of bailiff to his court. In all cases of which justices of the peace would have jurisdiction, such marshal or constable shall be allowed such fees as are allowed by law in such cases in justices' courts; in all other cases they shall receive such fees as are allowed by law to the sheriff for like services in the circuit court, to be collected as other costs of suit. R. S. 1894, § 3681.

See § 93, *ante*.

277. Judge's fees.—17. In all cases of which justices would have jurisdiction, such judge shall be entitled to and receive the same fees as are allowed by law to justices of the peace; in all other cases he shall be allowed one dollar for trial, and a docket-fee of one dollar and fifty cents in each case, and also such fees as are allowed to the clerks of the circuit court for like services; and in cases of jury trials he shall receive two dollars, and if such trials shall last more than one day he shall have two dollars per day during the continuance of such trial, after the first day, to be collected as other costs of suit in the courts of this state; and for any other official services such judge may perform he shall receive such compensation as is usually allowed by law in such cases. R. S. 1894, § 3682.

278. Judge pro tempore.—18. If such judge shall desire to be absent from such city for more than twenty days, he may appoint any attorney-at-law of said county as a judge *pro tempore*, which appointment shall be in writing, and spread on the records of said court. Such judge *pro tempore* having first taken the proper oath, and said oath being properly recorded, may, during the absence of said judge, perform all the duties of such judge, and be entitled to the fees that the judge would be entitled to. Such judge shall be responsible, on his bond, for all the acts of such judge *pro tempore: Provided*, That such appointment shall be valid for sixty days only, and no longer. R. S. 1894, § 3683.

279. Judge may practice law.—19. There being no stated salary provided for such judge, he may be permitted to practice law in such cases as can not come before him. R. S. 1894, § 3684.

ARTICLE 9.—BOARD OF PUBLIC WORKS.

SEC.
280. Board of public works in cities of fifty thousand.
281. Bonds of members.
282. Duties—Salary.
283. Repair of streets.
284. Control of street improvements.
285. Recommending street improvements.
286. Meetings—Quorum—Record.
287. Record of proceedings.
288. Employment of laborers.
289. Estimates of cost.
290. Power to create liability.
291. Payment on contracts—Statement.
292. President and clerk.
293. Preservation of property—Office—Records—Expenses.
294. Appointment of officers.
295. Interfering with board—Penalty.

[Acts 1891, p. 474. In force March 10, 1891.]

280. Board of public works in cities of fifty thousand.—1. That in all cities of this state containing more than fifty thousand and less than one hundred thousand inhabitants according to the United States census of eighteen hundred and ninety, there shall be established within and for said cities a board of public works to consist of three members, who shall be elected at the first regular city election held after the passage of this act, one of whom shall hold for a term of one year from the date of his election and until his successor is elected and qualified, one of whom shall hold for the term of two years from the date of his election and until his successor is elected and qualified, and one of whom shall hold for the term of three years from the date of his election and until his successor is elected and qualified. That at the second and each succeeding regular election held after the passage of this act, there shall be elected one member of this board who shall hold his office for the term of three years and until his successor is elected and qualified. All vacancies occurring by death, resignation, removal, or otherwise in the membership of the board before the expiration of the term for which said member has been elected, the common council of the city where such vacancy occurs shall choose some person to fill said vacancy until the next regular city election, at which time some person shall be elected to fill the unexpired part of said vacancy, if any there be: *Provided,* That no person shall be eligible to a membership on said board who is connected in any official capacity with or employed by any corporation or company interested in any contract or operating under any franchise granted by any such city. The members of such board of public works shall, before entering upon their duties, make and subscribe an affidavit before, and which shall be filed with and kept by the city clerk and recorded on the city records in the office of the city clerk of such city, to support the constitution of the state of Indiana, to obey the laws, and in all their official actions and judgments to aim only to secure and maintain an honest and efficient administration of public works. R. S. 1894, § 3685.

Note—Repeal.—There has been no express repeal of this act, nor decision of court holding that it has been repealed by implication, but see general act applicable to cities of more than 50,000 and less than 100,000, *post*, § 541, *et seq.*

Legislative interference—Invalid act.—The act of March 8, 1889 (Acts of 1889, p.

247), assuming to give the exclusive control of streets, alleys, sewers, lights, water supply, etc., in cities of more than 50,000 inhabitants, to boards of public works, to be chosen by the legislature from residents of the cities affected, was held unconstitutional and void as denying the right of local self-government, and is omitted. State v. Denny, 118 Ind. 382.

281. Bonds of members.—2. Each member shall give a bond, with at least three sureties, in the sum of five thousand ($5,000) dollars, conditioned for the faithful performance of his duties, which surety shall each be required to take an oath that he is worth the amount of the bond above all liabilities, and such bond shall be approved by the council of the city for which such board shall have been elected. R. S. 1894, § 3686.

See *post*, § 597.

282. Duties—Salary.—3. The members of the board shall devote their entire time and attention to the duties of the office as it requires, and shall each receive as compensation a salary of fifteen hundred dollars per annum, payable monthly out of the funds of the treasury of such city. R. S. 1894, § 3687.

283. Repair of streets.—4. The board of public works herein provided for shall perform all of the duties heretofore required of the street commissioners, which office is hereby abolished, and shall have the exclusive power and it shall be its duty to repair and keep in repair all streets, avenues, alleys, wharves, sewers, ditches, drains, parks, bridges, and culverts, and to build and construct all bridges, culverts, ditches, and drains, and to have full charge and control of the cleaning of streets, alleys, sewers, gutters, wharves and parks. R. S. 1894, § 3688.

284. Control of street improvements.—5. That whenever the common council shall order the improvement of any street, avenue, alley, wharf, or the construction of any sewer, it shall designate the character and size of such improvement, and thereupon the board of public works shall take full and exclusive control of said improvement, and cause the same to be constructed and completed in all its parts, and for the purpose of executing the same, the said board shall have full and exclusive power to make all the proper and necessary contracts for the construction and completion of said improvements; the board shall let all contracts of more than one hundred dollars to the lowest responsible bidder. R. S. 1894, § 3689.

285. Recommending street improvements.—6. It shall be the duty of the board of public works, whenever in their judgment there exists a necessity for the improvement of any street, avenue or alley or for the building of any sewer, to recommend the same in writing to the common council, and it shall be the duty of the common council to consider and act upon said recommendation and either approve or reject it. R. S. 1894, § 3690.

286. Meetings—Quorum—Record.—7. The said board of public works shall hold regular meetings at least once in every week, and as

much oftener as the business entrusted to its care shall require, and two members of any such board shall constitute a quorum for the transaction of any business, and the ayes and noes shall be called and entered upon the journal upon the passage of every resolution or order of every kind, and no resolution or order shall be adopted unless two votes are cast in its favor. Said meetings shall be held at stated times and no called meeting shall be held until notice in writing of the called meeting, signed by the clerk of the board, has been given to each member of any such board about to hold a called meeting, and no business shall be done at any such called meeting unless such notice in writing has been given. R. S. 1894, § 3691.

287. Record of proceedings.—8. That such boards shall keep a complete record of all their proceedings, and a copy from the records certified by the clerk of any such board shall be competent evidence in all courts of this state. R. S. 1894, § 3692.

288. Employment of laborers.—9. That such board shall have exclusive power to employ such laborers or other persons as any such board may deem necessary for the execution of its business, and fix their salaries and compensation, and any such employes may be discharged for cause at any time by the board of public works, at their discretion. Such board of public works shall not elect, employ, appoint or contract with any one who is related to any member of such board, or the mayor, or any councilman, within the fourth degree of consanguinity or affinity under the civil law. R. S. 1894, § 3693.

289. Estimates of costs.—10. That when the board shall deem it advisable to make a contract for the execution of any work or purchase of any material for matters under its charge a careful estimate shall be made of the cost of such work or material. R. S. 1894, § 3694.

290. Power to create liability.—11. That no member of any such board or any other person, whether in the employ of such board or otherwise, shall have power to create any liability on account of the board, or the funds under its control, except by express authority of the board conferred at a meeting duly called and convened. R. S. 1894, § 3695.

291. Payment on contracts—Statement.—12. That no money shall be paid at any time to any person claiming under a contract with any such board until such person shall have first filed with such board his statement under oath disclosing the names of all persons directly or indirectly interested in the contract or the proceeds or profits thereof, declaring that no person other than those named are interested, and that no person related within the fourth degree of consanguinity or affinity under the civil law to the mayor or any councilman, or member of such board of such city, has any interest in the same. R. S. 1894, § 3696.

292. President and clerk.—13. That such board shall select one of their number to act as president. The city clerks of such cities shall be the clerks of such boards for their respective cities. Such

boards shall, as soon as they shall have been elected and qualified, assume and exercise the entire control over the streets, alleys, avenues, sewers and wharves of such cities. R. S. 1894, § 3697.

293. Preservation of property—Office—Records—Expenses.—14. It shall be the duty of the common council of such city to provide at the expense of such city all necessary accommodation within such city limits for the proper care and maintenance of all property coming under the control of the board hereby created, and to provide for the payment monthly of all officers, members and employes of such board. Also for such office expenditures, record books, stationery, telegraphing, printing, advertising, furniture for rooms and for the preservation, repairing and cleaning of the building and rooms occupied and used by such board, for fuel and light, it being the intention and meaning of this section that the necessary expenses incurred in the execution of the duties imposed upon such boards, and the maintenance of all departments and property hereby placed under the control of such board within such city, shall be a charge upon such city. All necessary and proper expenditures of whatever character, including the pay of all officers, members and employes of such board, shall be audited by such board and a record of the same kept by the clerk, and the original bills, vouchers and pay-rolls shall be certified to as correct by the president and clerk of such board at the close of each month, and the clerk shall lay the same before the common council at the first meeting in each month, and the common council of such city shall monthly appropriate money for the payment of all sums certified by the president and clerk of said board: *Provided*, That the said board may in its discretion cause all expenditures for labor to be audited and certified at the close of each week and by the clerk laid before the common council at the first meeting in each week for allowance. R. S. 1894, § 3698.

294. Appointment of officers.—15. The board of public works shall have full power and authority to appoint such officials and employes as shall be necessary for the managing and maintaining of the streets, avenues, alleys, wharves, sewers, and parks which come under its control, and shall define and prescribe the duties of each and every officer or employe so appointed by such board. The city surveyor shall be the civil engineer of such board and the city attorney shall be their legal adviser. R. S. 1894, § 3699.

295. Interfering with board—Penalty.—16. Any person or persons, or corporations or common council, or other municipal, township or county or state officer or officers, who shall in any manner interfere with or interrupt the board of public works of such city or any appointee or employe of theirs in any act while in the legal discharge of their duties as provided in this act, or shall prevent such board or appointee or employe from discharging their duties as defined in this act, shall, upon conviction before the mayor or city judge, or before the circuit or criminal judge of said county, be fined not less than one hundred dollars nor more than one thousand dollars, to which may

be added imprisonment for not less than ten days nor more than one year for each separate offense. R. S. 1894, § 3700.

ARTICLE 10.—METROPOLITAN POLICE AND FIRE DEPARTMENT.

SEC.
296. Boards of metropolitan police and fire departments in cities of fifty thousand.
297. President, secretary, bond, salary.
298. Appointment of officers and employes —Salaries.
299. Control of police and fire departments.
300. Appointment of officers of fire department.
301. Expenses of department—Payment.
302. Rules to be made.
303. Powers of police officers.
304. Service of process—Office of marshal abolished.
305. No fees or rewards to be received.
306. Interference with board—Penalty.
307. Additional patrolmen.
308. Political work prohibited.
309. Bonds of officers.
310. Fees taxed and collected.
311. Laws repealed.
312. Police commissioners in cities of twenty-nine thousand.
313. Officers and patrolmen—Compensation—Removal.
314. Officers — President — Secretary — Clerk.
315. Rules and regulations.
316. Power and authority.
317. Powers of officers and members.
318. Expenses—How and by whom paid.
319. Municipal process, how served—Office of marshal abolished.
320. Fees—Compensation.
321. Interfering with commissioners and force—Penalty.
322. Additional patrolmen.
323. Duties as to elections—Penalty.
324. Bonds of officers.
325. Marshal's fees.
326. Metropolitan police boards—Oaths—Bonds.
327. Appointees of board—Compensation.
328. Officers of board—Pay of clerk.
329. Rules and regulations.
330. Abolition of existing boards and officers.
331. Powers of policemen.
332. Station houses—Expenses of department.
333. Duties of policemen—Marshal's office abolished.
334. Fees and rewards.
335. Interfering with board—Penalty.
336. Merchant police—Special policemen.
337. Political work prohibited.
338. Bonds of officers.
339. Fees, taxation and payment.
340. Repeal.

[Acts 1891, p. 467. In force March 10, 1891.]

296. Boards of metropolitan police and fire department in cities of fifty thousand.—1. That in all cities of this state of fifty thousand or more, and less than one hundred thousand inhabitants, according to the United States census of eighteen hundred and ninety, there shall be established within and for such cities a board of metropolitan police and fire department, to consist of three commissioners. The members of the first board or boards under this act shall be elected by the common council of such cities upon the taking effect of this act, one of whom shall be of opposite politics to the other two commissioners; one of said commissioners to serve until the second Monday in April, 1892, one to serve until the second Monday in April, 1893, and one to serve until the second Monday in April, 1894. At the expira-

tion of the term for which said commissioners are elected their successors and succeeding members of the board shall be elected by the common council of said cities, and the terms of those thus elected shall be three years, their terms always commencing on the second Monday in April. In making said elections the common council shall always make said board to consist of one commissioner of opposite politics to the other two commissioners. All vacancies occurring on said board shall be filled by an election by the common council of said city, and the commissioner appointed to fill said vacancy shall fill the unexpired term of the commissioner in whose place he is elected. The mayor shall furnish a certificate to each commissioner so elected, and this certificate shall be his authority to act as a member of the board of metropolitan police and fire department for the city for which he has been so elected by the common council. The said commissioners shall be qualified voters in such cities at the time of their election. Before entering upon their duties they shall each take and subscribe an oath of office before the clerk of the city, and shall also take and subscribe before such clerk the further oath or affirmation that in any and every appointment or removal to be by them made to or from the police force, or to or from the fire department, created and to be organized by them under this act, they will in no case and under no pretext appoint or remove any policeman or officer of police, or any fireman or officer of the fire department, or other person, because of any political opinion held by any such policeman, member of the fire department, officer, or other person, or for any other cause or reason than fitness or unfitness of such person in the best judgment of said commissioners, for the place to which he shall be appointed, or from which he shall be removed, and the said oath shall be recorded and placed among the records of said city. The said commissioners shall each give bond in the penal sum of five thousand dollars, payable to the state of Indiana, conditioned for the faithful and honest discharge of their duties, subject to the approval of the council. The salary of commissioner shall be four hundred dollars per annum, payable monthly out of the treasury of such city. Any two of said commissioners for said [city] shall constitute a quorum for the transaction of business. R. S. 1894, § 3701.

See *post* § 326, *et seq.*

Repeal.—It is the opinion of the compiler that this act (*post*, §§ 296–311) has been impliedly repealed by the act concerning cities of more than fifty thousand and less than one hundred thousand (*post*, §§ 541–690), but as there has been no express repeal thereof, nor holding of the court to that effect, the same is set forth.

The metropolitan police and fire department act of March 7, 1889, p. 222, was held unconstitutional and void, and is omitted. State v. Denny, 118 Ind. 449; City of Evansville v. State, 118 Ind. 426; State v. Blend, 121 Ind. 514.

297. President, secretary, bond, salary.—2. The said commissioners shall elect one of their number to act as president, who shall be *ex officio* a member of the board of health of such city, and they shall appoint some person not a member of the board to act as secre-

tary and property clerk, who shall give bond to said board in any amount, and with sureties, to be approved by said board conditioned for the safe keeping by, and his rendition upon, the order of the board, of all money and other property which shall come into his hands by virtue of his office, and he shall receive such compensation annually as may be determined by said board, not to exceed three hundred and fifty dollars per annum, and hold his office at the pleasure of said board. R. S. 1894, § 3702.

298. Appointment of officers and employes—Salaries.—3. The said board of metropolitan police and fire department shall have power to select a superintendent of police, captains and sergeants, detectives and such other officers and patrolmen as the board may deem advisable. Said captains, sergeants, detectives and other officers and patrolmen to be so selected that not more than one-half of their number shall belong to the same political party. Said board shall not have power to appoint more than one patrolman for each ten hundred inhabitants of said city. Such superintendent, captains, officers and patrolmen shall receive such compensation as the board shall determine: *Provided*, That the compensation for a superintendent shall not be less than one thousand dollars nor more than two thousand dollars per annum; that the compensation for a captain shall not be less than seven hundred dollars nor more than twelve hundred dollars per annum; that the compensation for a sergeant shall not be less than six hundred dollars per annum nor more than one thousand dollars per annum; that the compensation for patrolmen shall not be less than five hundred and fifty dollars per annum nor more than eight hundred dollars per annum. The compensation for all other officers and employes shall be fixed and determined by the board, as, in the judgment of the board, will be reasonable, and to promote good government in such cities: *Provided*, That no employe, except as herein provided, shall receive more than one thousand dollars per annum. All persons so appointed shall serve during good behavior, and be able to speak the English language. Said board shall have power, for cause, to remove or suspend from office, at any time, the superintendent, captains, sergeants, detectives and such other officers and patrolmen of such police force whenever, in the judgment of the board, it is deemed that such removal or suspension would promote the efficiency of said police force. Said board shall have power to make general and special rules and regulations for the government and discipline of said force, and to make and promulgate general and special orders to said force, through the superintendent of police, who shall be the executive head of the force. R. S. 1894, § 3703.

299. Control of police and fire departments.—4. Said commissioners shall, immediately after their organization, assume and exercise the entire control of the police force and fire department of such city, and shall possess full, exclusive power and authority over the police organization, government, appointment and discipline within the city, and over the fire department, its organization, government,

appointment and discipline within the city. The said board shall have the custody and control of all public property, including station-houses and city prisons, patrol wagons, books, records and equipments, belonging to the police department. All engine-houses, engines, ladders, hose-reels, horses, wagons, books, records and equipments, and property of every description belonging to the fire department of such city. All existing police and fire boards, police officers, police forces, chief fire engineers, firemen and employes of the fire department created, maintained and employed by the ordinances, or resolutions of the common council of such city, or under any law of the state of Indiana, are hereby abolished and made unlawful, the same to take effect upon the organization of the board of metropolitan police and fire department for such city created by this act. R. S. 1894, § 3704.

Police property—Injunction.—Where it is sought to take possession of the police property of the city, without authority of law, those in possession may protect their rights and the rights of the city by injunction. City of Huntington v. Cast, 149 Ind. 255.

300. Appointment of officers of fire department.—5. The said board of metropolitan police and fire department shall, immediately after the organization, assume and exercise the entire control of the fire department of said city. It shall appoint a chief fire engineer, at a salary not exceeding two thousand dollars; appoint firemen and all necessary employes of the fire department and fix their compensation. Said firemen and employes to be so selected that not more than one-half of their number shall belong to the same political party. All persons so appointed shall serve during good behavior, and shall be of good moral character. Said board shall have power, for cause, to remove or suspend from office the chief fire engineer, firemen or other employes whenever it is deemed by said board that such removal or suspension would promote the efficiency of said fire department. Said board shall have power to make general and special rules and regulations for the government and discipline of said fire department, and to make and promulgate general and special orders to said fire department, through the chief fire engineer, who shall be the executive head of the department. R. S. 1894, § 3705.

301. Expenses of department—Payment.—6. It shall be the duty of the common council of such city to provide at the expense of such city, all necessary accommodations within such city limits, for station-houses, engine houses, hook and ladder houses, to furnish the same, to warm and light the same by day and night, and provide food for persons detained in the station-house, to provide at the expense of the city for the expense of the fire department incurred in purchase of engines, ladders, hose, horses or other necessary equipments ordered by the said board, and for all the expenses incurred by said board in administering the fire department of said city. Also for such office expenditures, records, books, stationery, printing, furniture, and for the

preservation, repair and cleaning of all buildings belonging to or in any way connected with the police and fire department of said city, it being the intention and meaning of this section that all the necessary expenses of executing the duties imposed upon said boards and the maintenance of all departments herein created and placed under the control of such boards shall be a charge upon the city, and the board alone shall be authorized to incur expenditures for said department of police and fire. All expenditures of whatever character, including the pay of all officers, members, employes of the police and fire departments, shall be audited by the said board, and a record of the same kept by the secretary, and the original bills, vouchers and pay rolls shall be certified to as correct by the president and secretary of said board at the close of each week and deposited with the city clerk, who shall lay the same before the common council at the first meeting in each week, and the common council of such city shall weekly appropriate money for the payment of all sums certified by the president and secretary of said board. R. S. 1894, § 3706.

302. Rules to be made.—7. The qualifications, enumeration and distribution of duties, and mode of trial and removal from office of each officer and member of the police force and fire department, shall be particularly defined and prescribed by rules and regulations of the board. R. S. 1894, § 3707.

303. Powers of police officers.—8. The officers and members of such metropolitan police force shall possess all the common law and statutory powers of constables, except for the service of process. R. S. 1894, § 3708.

See *ante*, § 95.

Police officer—Arrest without warrant.—A police officer may make an arrest upon view without a warrant where he has seen the agent of a brewing company at his place of business make a gift of a bottle of beer to a third person on the day of a general state election. Weser v. Welty, 18 App. 664.

A police officer, after making an arrest at a time of day so early that the mayor of the city is not at his office, and no other magistrate can be found, may incarcerate the prisoner in a jail for a brief period until he can be brought before a magistrate to answer to the charge. Weser v. Welty, 18 App. 664.

304. Service of process—Office of marshal abolished.—9. The members of the metropolitan police force shall have the exclusive power and it shall be their duty, to serve all process within such city issuing from the mayor or city judge's court of such city, and all the duties performed by the city marshal, or his deputy, in serving writs, executing orders of said court, attending said court, conveying prisoners to and from the county jail or station-house of such city for arraignment on trial before said court, or conveying prisoners to the house of correction or work-house, or county jail, or other places of punishment and imprisonment under the judgment, sentence, or order of process of said court, shall be performed by members of said metropolitan police force, and the office of city marshal of such city is hereby abolished; and the duties of such office shall hereafter be

performed by the superintendent of the metropolitan police force of such city, and by the captains or sergeant of police, under his direction. R. S. 1894, § 3709.

305. No fees or rewards to be received.—10. No officer or member of the metropolitan force shall receive for any service rendered by him in the discharge of any police duty, or as witness in any case before the mayor or city judge, for any duty performed as bailiff of such court, any fee or compensation whatever, except the regular fixed per diem or yearly allowance made for his services as officer or member of such police force. Any rewards received by any officer or member of such police force shall be turned over to the secretary of said board for the support of the metropolitan police. R. S. 1894, § 3710.

306. Interference with board—Penalty.—11. Any person or persons, or corporation or common council, or other municipal, township, county or state officer or officers, who shall in any manner interfere with or interrupt the board of metropolitan police and fire department of such city in any act of theirs, while in the legal discharge of their duties, as provided in this act, or of the police force or fire department force herein authorized to be created, or shall prevent such board or forces from discharging their duties as defined in this act, shall, upon conviction before the mayor or city judge, or before the circuit or criminal court of the county in which such city is situated, be fined not less than one hundred dollars nor more than one thousand dollars, to which may be added imprisonment for not less than ten days nor more than ninety days, for each separate offense. R. S. 1894, § 3711.

307. Additional patrolmen.—12. The board, whenever it shall seem to the board discreet, may, on the application of any person or persons, showing the necessity thereof, appoint and swear in any number of additional patrolmen to do duty at any place within said city, at the charge and expense of the person or persons by whom the application shall be made; and the patrolmen so appointed shall perform duty only at the place designated by said board. They shall continue in office, at the pleasure of the board for a term not exceeding one year, shall be subject to and obey the orders, rules and regulations of said board, and conform to the general discipline of the police force of such city, and to such special regulations as may be made by such board for their government. The board may, upon emergencies, with the written consent of the mayor of such city, appoint such number of special patrolmen as they may deem advisable, but such special patrolmen shall serve for not exceeding seven consecutive days, unless their employment for a longer period shall be approved by the board of metropolitan police and fire department of such city; and special patrolmen shall be paid in the same manner and at the same rate as herein provided for the regular police force. R. S. 1894, § 3712.

308. Political work prohibited.—13. It shall be unlawful for any patrolman or other member of said police force, or of any fireman,

employe or member of the fire department while on duty to solicit any person to vote at a general or special election, for any candidate or candidates for office, or to challenge any votes, or in any manner attempt to influence any elector at such election, or to be a delegate or candidate to any political convention. And any patrolmen or other member of the police force, any fireman, member or employe of the fire department so offending shall be fined in any sum not less than ten dollars nor more than fifty dollars, and be dismissed from service. R. S. 1894, § 3713.

309. Bonds of officers.—14. The superintendent, captains, and other officers of the police force, and the chief fire engineer shall each give bond in the penal sum of one thousand to three thousand dollars, to be determined by the board, conditioned for the faithful discharge of their several duties. R. S. 1894, § 3714.

310. Fees taxed and collected.—15. The fees taxed and allowed to city marshals shall be taxed and allowed in all cases where the arrests are made, or process served by any of the police force of said cities in favor of said city, shall be collected and shall be paid into the city treasury of said city by the officers, or party, or person collecting the same, every three months. R. S. 1894, § 3715.

311. Laws repealed.—16. All laws, and parts of laws coming in conflict with this act, be and the same are hereby repealed, especially an act providing for a metropolitan police in cities of twenty-nine thousand inhabitants, and reconsidered March 5, 1883, and again passed, notwithstanding the objections of the governor, Acts 1883, page 89, so far as the same affects or applies to cities containing more than fifty thousand and less than one hundred thousand inhabitants, according to the United States census of eighteen hundred and ninety. R. S. 1894, § 3716.

[Acts 1883, p. 89. In force March 5, 1883.]

312. Police commissioners in cities of ten thousand to thirty-five thousand.—1. That in all cities of this state of ten thousand inhabitants, according to the United States census of 1890, or according to a census taken under the authority of the mayor of said city, and not exceeding thirty-five thousand inhabitants, according to the United States census of 1890, there shall be established within and for said cities a board of metropolitan police, to consist of three commissioners, to be appointed by the governor. The said commissioners to be so appointed shall be of a good moral character, sober and discreet, who are citizens of the state of Indiana, and shall have resided in said city at least five years next preceding their appointment, no more than two of whom shall be of the same political party; one of said commissioners to serve until the first Tuesday of January, 1894; one to serve until the first Tuesday of January, 1895, and one to serve until the first Tuesday of January, 1896, and the term of their successors to be for three years, and each of said commissioners shall be subject to removal by the governor. Before

entering upon their duties they shall each take and subscribe an oath of office before the clerk of the circuit court of the county within which such city is located, and shall also take and subscribe before such clerk the further oath or affirmation that, in any and every appointment or removal to be by them made to or from the police force created and to be organized by them under this act, they shall in no case and under no pretext appoint or remove any policeman, officer of police or other person because of any political feeling held by such policeman, officer or other person, or for any cause or reason than fitness or unfitness of such person, in the best judgment of said commissioners, for the place to which he shall be appointed or from which he may be removed, and the said oath shall be recorded and placed among the records of said court. Said commissioners shall each give bond in the penal sum of five thousand dollars, payable to the state of Indiana, conditioned for the faithful and honest discharge of their duties, which bond shall be approved by the governor. The salary of the board of metropolitan commissioners of such city shall be fixed by the governor, which salary shall not exceed six hundred dollars each per annum, payable monthly out of the treasury of such cities. [As amended, Acts 1893, p. 284. In force March 3, 1893.] R. S. 1894, § 3717.

Note.—As to cities of more than 35,000 and less than 49,000 see later legislation, *post*, § 691, *et seq.*; Department of Public Safety, *post*, §§ 787–800. As to cities of more than 23,000 and less than 35,000 see later legislation, *post*, § 828, *et seq.*; Department of Public Safety, *post*, §§ 934–948.

Repeal.—It is the opinion of the compiler that this entire act (§§ 312–325) was impliedly repealed by the act of February 28, 1897 (*post*, §§ 326–340), but as it was not expressly repealed, and has not been held to have been repealed, it is here set forth.

Amendments—Repeal.—Section 1 of the act of 1883 was amended by the act of March 4, 1891, making it applicable to cities having 14,000 school children, and such amendment was held valid. State v. Kolsem, 130 Ind. 434.

The act of March 7, 1889, Acts 1889, p. 222, providing for the appointment of police commissioners in cities of 29,000 inhabitants being unconstitutional, such act did not repeal the act of March 5, 1883, which is herein set forth as amended. City of Evansville v. State, 118 Ind. 426; State v. Denny, 118 Ind. 449; State v. Blend, 121 Ind. 514.

The act of March 5, 1883, was held constitutional and capable of enforcement, except in so far as it made, by § 1, a residence of three years in the city in which he is appointed next preceding his appointment a condition of a police commissioner's eligibility, and provides for the appointment of the officers named in § 2 equally from the two leading political parties. State v. Blend, 121 Ind. 514; State v. Denny, 118 Ind. 449; City of Indianapolis v. Huegele, 115 Ind. 581.

313. Officers and patrolmen—Compensation—Removal.—2. The said board of metropolitan police commissioners shall have power to appoint a superintendent of police, captains, sergeants, detectives and such other officers and patrolmen as they may deem advisable, said captains, sergeants, detectives and such other officers and patrolmen, to be appointed equally between the two leading political parties of said city. Said commissioners shall not have power to appoint more than one patrolman for each ten hundred inhabitants in such city.

Such superintendent, captain, officers and patrolmen shall receive such compensation as the commissioners shall determine: *Provided*, That the compensation for a superintendent shall not be less than one thousand dollars nor more than fifteen hundred dollars per annum; that the compensation for a captain shall not be less than seven hundred dollars nor more than one thousand dollars per annum; that the compensation for a sergeant shall not be less than six hundred dollars nor more than eight hundred dollars per annum; that the compensation for patrolmen shall not be less than five hundred and fifty dollars nor more than seven hundred and thirty dollars per annum. The compensation of all other officers and employes shall be fixed and determined by the commissioners, as in their judgment will be reasonable, and to promote good government in such cities. All persons so appointed shall serve during good behavior, and shall be of good moral character, and be able to speak the English language. Such commissioners shall have power, for cause assigned on a public hearing, and on due notice, according to rules to be promulgated by them, to remove or suspend from office, or for a definite period deprive of pay, any officer or member of such police force (except that detectives may be dismissed at any time by said commissioners); and they shall have power to make general and special rules and regulations for the government and discipline of said force, and to make and promulgate general and special orders to said force, through the superintendent of police, who shall be the executive head of the force. R. S. 1894, § 3718.

The provision of this section requiring officers and patrolmen to be appointed from different political parties is unconstitutional. State v. Denny, 118 Ind. 449; State v. Blend, 121 Ind. 514; City of Evansville v. State, 118 Ind. 426.

314. Officers—President—Secretary—Clerk.—3. The said commissioners shall appoint one of their number to act as president, who shall be *ex officio* a member of the board of health of such city, and they shall appoint some person not a member of the board to act as secretary and property clerk, who shall give bond to said commissioners in an amount and with sureties to be approved by said commissioners, conditioned for the safe keeping by, and his rendition upon, the order of the commissioners, of all money and other property which shall come into his hands by virtue of his office, and he shall receive such compensation annually as may be determined by said commissioners, not to exceed one thousand dollars per annum, and hold his office at the pleasure of the commissioners. R. S. 1894, § 3719.

315. Rules and regulations.—4. The qualifications, enumeration and distribution of duties, and mode of trial and removal from office of each officer and member of said police force, shall be particularly defined and prescribed by rules and regulations of the commissioners of police. R. S. 1894, § 3720.

316. Power and authority.—5. Said commissioners shall, as soon as they shall have been appointed and qualified, assume and exercise the entire control of the police force of such city, and shall possess

full and exclusive power and authority over the police organization, government, appointment and discipline within the city. It shall have the custody and control of all public property, including station-houses and city prisons, patrol wagons, books, records, and equipments belonging to the police department. All existing police boards, police officers, police forces, created and maintained by the ordinances or resolutions of the board of aldermen or common council of such city, are hereby abolished, to take effect upon the organization of the board of metropolitan police commissioners of such city. R. S. 1894, § 3721.

317. Powers of officers and members.—6. The officers and members of such metropolitan police force shall possess all the common law and statutory powers of constable, except for the service of civil process. R. S. 1894, § 3722.

318. Expenses—How and by whom paid.—7. It shall be the duty of the board of aldermen and board of common council of such city as shall have two such boards, and of the common council of such city where but one of such boards exist, to provide, at the expense of such city, all necessary accommodations within such city limits, for station-houses, to furnish the same, to warm and light the same by day and night, and to provide food for person or persons detained in any of said station-houses, when such food is deemed necessary for such person or persons by the officer in charge. Also to provide for payment, monthly, of the pay-rolls of the officers, members, and employes of such board of metropolitan police commissioners, upon the certificate of the president and secretary of such board as to the correctness of the same; also for such necessary office expenses, record-books, stationery, printing, telegraphing, badges, clubs, furniture for rooms, and for the preservation, repair, and cleaning of the buildings and rooms used by the commissioners, for advertising, fuel, light, board of prisoners, it being the intention and meaning of this section that the necessary expenses incurred in the execution of criminal process for offenses charged to have been committed in such city, by the board of metropolitan police commissioners, and the maintenance of the police department hereby created within such city, shall be a charge to such city. R. S. 1894, § 3723.

319. Municipal process, how served—Office of marshal abolished.—8. The members of the metropolitan police force shall have the exclusive power, and it shall be their duty, to serve all process within such city issuing from the mayor or city judge's court of such city, and all the duties now performed by the city marshal or his deputy in serving writs, executing orders of said court, attending said court, conveying prisoners to and from the county jail or station-houses of such city, for arraignment on trial before said court, or conveying prisoners to the house of correction or work house, reform school, or county jail, or other place of punishment and imprisonment, under the judgment, sentence, or order of process of said court, shall be performed by members of said metropolitan police force; and the office of

city marshal of such city is hereby abolished; and the duties of such office shall hereafter be performed by the superintendent of the metropolitan police force of such city, or by the captains or sergeants of police, under his direction. R. S. 1894, § 3724.

320. Fees—Compensation.—9. No officer or member of such metropolitan police force shall receive, for any service rendered by him in discharge of any police duty, or as witness in any case before the mayor or city judge for any duty performed as bailiff of such court, any fee or compensation whatever, except the regular fixed per diem yearly allowance made for his services as officer or member of such police force. Any rewards received by any officer or member of such police force shall be turned over to the secretary of said board of commissioners for the support of the metropolitan police, as in this act provided. R. S. 1894, § 3725.

321. Interfering with commissioners and force—Penalty.—10. Any person or persons, or corporation, or common council, or other municipal, township, county or state officer or officers, who shall in any manner interfere with or interrupt the board of metropolitan police commissioners of such city in any act of theirs while in the legal discharge of their duties, as provided in this act, or of the police force herein authorized to be created, or shall prevent such board or force from discharging their duties, as defined in this act, shall, upon conviction before the mayor or city judge, or before the circuit or criminal court of said county, be fined not less than one hundred dollars nor more than one thousand dollars, to which may be added imprisonment for not less than ten days nor more than ninety days, for each separate offense. R. S. 1894, § 3726.

This section is constitutional, and a city ordinance covering the same ground is invalid. City of Indianapolis v. Huegele, 115 Ind. 581.

322. Additional patrolmen.—11. The commissioners, whenever it shall seem to them discreet, may, on the application of any person or persons showing the necessity thereof, appoint and swear in any number of additional patrolmen to do duty at any place within said city, at the charge and expense of the person or persons by whom the application may be made, and the patrolmen so appointed shall perform duty only at the place designated by said commissioners. They shall continue in office at the pleasure of said commissioners for a term not exceeding one year, shall be subject to and obey the orders, rules and regulations of said commissioners, and conform to the general discipline of the police force of such city, and to such special regulations as may be made by such commissioners for their government. And the persons so appointed may be removed at any time by the commissioners. The commissioners may upon emergency, with the written consent of the governor, secretary, treasurer and auditor of state, or a majority of them, and the mayor of said city, appoint such number of special patrolmen as they may deem advisable, but such special patrolmen shall serve for not exceeding seven consecutive days, unless their

employment for a longer period shall be approved of by the board of police commissioners of such city. And the said special patrolmen shall be paid in the same manner as hereinbefore provided for the regular force. [As amended, Acts 1891, p. 90. In force March 4, 1891.] R. S. 1894, § 3727.

323. Duties as to elections—Penalty.—12. It shall be unlawful for any patrolman or other member of said force, while on duty, to solicit any person to vote at any general or special election, for any candidate or candidates for office, or to challenge any voter, or in any manner attempt to influence any elector at such election, or to be a delegate or candidate to any political convention, or to solicit votes for any candidate for any delegate to any such convention. And any patrolman or other member of said force so offending shall be fined in any sum not less than ten dollars nor more than fifty dollars, and be dismissed from the service. R. S. 1894, § 3728.

324. Bonds of officers.—13. The superintendent, captains and other officers of said force shall each give bond in the penal sum of from one thousand dollars to three thousand dollars, to be determined by the commissioners, conditioned for the faithful discharge of their several duties. R. S. 1894, § 3729.

325. Marshal's fees.—14. The fees fixed and allowed to city marshals shall be taxed and allowed, in all cases where the arrests are made or process served by any of the police force of said cities, in favor of said city, and shall be collected in the same manner as other costs are collected, and shall be paid into the city treasury of said city by the officers or party, or person collecting the same, every three months. R. S. 1894, § 3730.

See *ante*, § 95.

[Acts 1897, p. 90. In force February 28, 1897.]

326. Metropolitan police boards—Oaths—Bonds.—1. That in all cities of this state of ten thousand inhabitants, according to the United States census of 1890, or according to a census taken under the authority of the mayor of said city, and not exceeding thirty-five thousand inhabitants, according to the United States census of 1890, there shall be established within and for said cities a board of metropolitan police commissioners, to consist of three members to be appointed by the governor. The said commissioners to be so appointed shall be of good moral character, sober and discreet, who are citizens of the state of Indiana, and bona fide residents of the city for which they are appointed, no more than two of whom shall be of the same political party; one of said commissioners to serve until the first Tuesday of January, 1898; one to serve until the first Tuesday of January, 1899; and one to serve until the first Tuesday of January, 1900, and the term of their successors to be for three years, and each of said commissioners shall be subject to removal by the governor for any cause which he may deem sufficient. Before entering upon their duties they shall each take and subscribe an oath of office before the clerk of the circuit

court of the county within which such city is located, and shall also take and subscribe before such clerk, the further oath or affirmation that, in any and every appointment or removal to be by them made, to or from the police force created and to be organized by them under this act, they shall in no case and under no pretext appoint or remove any policeman, officer of police or other person because of any political feeling held by such policeman, officer or other person, or for any cause or reason other than that of fitness or unfitness of such person, in the best judgment of said commissioners, for the place to which he shall be appointed or from which he may be removed, and the said oath or affirmation shall be recorded and placed among the records of said court. Said commissioners shall each give bond in the penal sum of five thousand dollars, payable to the state of Indiana, conditioned for the faithful and honest discharge of their duties, which bond shall be approved by the governor. The salary of the board of metropolitan police commissioners shall be fixed by the governor, which shall not exceed six hundred dollars each per annum, payable monthly out of the treasury of such cities. Burns' Supp. 1897, § 3730*a*.

See *ante*, § 296, *et seq.*

Repeal.—It is the opinion of the compiler that this act (§§ 326-340) is not now in force except as to cities of not less than 10,000 nor more than 23,000. See acts concerning cities of more than 23,000 and less than 35,000, *post*, § 828, *et seq.*

Census.—A census taken by the mayor under this section must be an official enrollment of the people of the city, and must be a public document preserved in the archives of the city subject to the inspection of all those interested. City of Huntington v. Cast, 149 Ind. 255.

Census—Judicial notice.—Courts will take judicial notice of a census or other enumeration made under the authority of the state, or of the United States. City of Huntington v. Cast, 149 Ind. 255; Denny v. State, 144 Ind. 503.

Appointment of commissioners by governor—Validity of.—Under this section, the governor's right to appoint is determined by the statement as to population certified to him by the mayor; but if the mayor's certificate is not based upon a census, such as is contemplated by the statute, the appointments have no validity. City of Huntington v. Cast, 149 Ind. 255; Board, etc., v. State, 61 Ind. 379; State v. Harrison, 113 Ind. 434.

327. Appointees of board—Compensation.—2. The said board of metropolitan police commissioners shall have the power to appoint a superintendent of police, captains, sergeants, detectives and such other officers and patrolmen as they may deem advisable. Not more than one each of said captains, sergeants, detectives and other officers shall belong to the same political party, and not more than one-half of the total number of such officers and patrolmen, excluding the superintendent of police, shall belong to the same political party. Said commissioners shall not have the power to appoint more than one patrolman for each ten hundred inhabitants in such city, and shall not have power to appoint more than one officer, excluding the superintendent of police, for each five thousand inhabitants in such city Such superintendent, captains, officers and patrolmen shall receive such com-

pensation as the commissioners shall determine: *Provided,* That the compensation for a superintendent shall not be less than nine hundred dollars nor more than twelve hundred dollars per annum; that the compensation for a captain shall not be less than seven hundred dollars nor more than nine hundred dollars per annum; that the compensation for a sergeant shall not be less than six hundred dollars nor more than eight hundred and forty dollars per annum; that the compensation for patrolmen shall not be less than five hundred and fifty dollars nor more than seven hundred and thirty dollars per annum. The compensation of all other officers and employes shall be fixed and determined by the commissioners, as in their judgment will be reasonable, and to promote good government in such cities. All persons so appointed shall serve during good behavior, and shall be of good moral character and be able to speak and write the English language. Such commissioners shall have power, for cause assigned on a public hearing, and on due notice according to rules to be promulgated by them, to remove or suspend from office, or for a definite period deprive of pay, any officer or member of such police force, except that detectives may be dismissed at any time by said commissioners; and they shall have power to make general and special rules and regulations for the government and discipline of said force, and to make and promulgate general and special orders to said force, through the superintendent of police, who shall be the executive head of the force. Burns' Supp. 1897, § 3730*b*.

328. Officers of board—Pay of clerk.—3. The said commissioners shall appoint one of their number to act as president, who shall be *ex officio* a member of the board of health of such city, and they shall appoint some officer or member of the police force, not a member of the board, to act as secretary and property clerk, who shall give bond to said commissioners in an amount and with sureties to be approved by said commissioners, conditioned for the safe keeping by, and his rendition, upon the order of the commissioners, of all money and other property which shall come into his hands by virtue of his office, and he shall receive such compensation annually, not exceeding the pay of a captain, as may be determined by said commissioners, and hold his office at the pleasure of the commissioners, and said secretary and property clerk, in addition to the duties herein designated, shall perform such other duties as an officer of police or patrolman as the commissioners shall order through the superintendent of police, and for such additional services said secretary and property clerk shall receive no additional pay. Burns' Supp. 1897, § 3730*c*.

329. Rules and regulations.—4. The qualifications, enumerations and distribution of duties, and mode of trial and removal from office of each officer and member of said police force, shall be particularly defined and prescribed by rules and regulations of the commissioners of police. Burns' Supp. 1897, § 3730*d*.

330. Abolition of existing boards and officers.—5. Said commissioners shall, as soon as they shall have been appointed and qualified,

assume and exercise the entire control of the police force of such city, and shall possess full and exclusive power and authority over the police organization, government, appointment and discipline within the city. It shall have the custody and control of all public property, including station-houses and city prisons, patrol wagons, books, records and equipments belonging to the police department. All existing boards of police commissioners, police officers, police forces, created and maintained by the ordinances or resolutions of the board of aldermen or common council of any such city, or by the provisions of any statute of this state, are hereby abolished to take effect upon the organization of the board of metropolitan police commissioners of such city, hereby created. Burns' Supp. 1897, § 3730*e*.

331. Powers of policeman.—6. The officers and members of such metropolitan police force shall possess all the common law and statutory powers of constable, except for the service of civil process. Burns' Supp. 1897, § 3730*f*.

See *ante*, § 95.

332. Station-houses—Expenses of department.—7. It shall be the duty of the board of aldermen and board of common council of such city as shall have two such boards, and of the common council of such city where but one of such boards exist[s], to provide, at the expense of such city, all necessary accommodations within such city limits, for station-houses, to furnish the same, to warm and light the same by day and night, and to provide food for any person or persons detained in any of said station-houses, when such food is deemed necessary for such person or persons by the officer in charge. Also, to provide for payment, monthly, of the pay-rolls of the officers, members, and employes of such board of metropolitan police commissioners, upon the certificate of the president and secretary of such board as to the correctness of the same; also, for such necessary office expenses, record-books, stationery, printing, telegraphing, badges, clubs, furniture for rooms, and for the preservation, repair, and cleaning of the buildings and rooms used by the commissioners, for advertising, fuel, light and board of prisoners, it being the intention and meaning of this section that the necessary expenses incurred in the execution of criminal process for offenses charged by the board of metropolitan police commissioners, to have been committed in such city, and the maintenance of the police department hereby created within such city, shall be a charge to such city: *Provided*, That the total annual charge to such city for the maintenance of the board of metropolitan police commissioners, and police department, hereby created, shall not, exclusive of the erection and maintenance of station-houses, city prisons, and other permanent buildings, the furnishing of the same, the warming and lighting of the same by day and night, and providing the food for any person or persons detained in the same, or the rental of any building to be used for any of the said purposes, exceed the sum of one thousand dollars for each ten hun-

dred inhabitants of such city, unless the board of aldermen and board of common council of such city as shall have two such boards, or the common council of such city where but one of such boards exist[s], shall appropriate an additional sum upon the petition of the board of metropolitan police commissioners, and no permanent building shall be erected for use as a station-house, city prison, or other similar purposes, unless the board of aldermen and board of common council, of such city where two such boards exist, or the common council, where but one such board exists, shall appropriate the necessary funds therefor. Burns' Supp. 1897, § 3730*g*.

333. Duties of policeman—Marshal's office abolished.—8. The members of the metropolitan police force shall have the exclusive power, and it shall be their duty, to serve all process within such city issuing from the mayor or city judge's court of such city, and all the duties now performed by the city marshal or his deputy in serving writs, executing orders of said court, attending said court, conveying prisoners to and from the county jail or station-houses of such city, for arraignment on [or] trial before said court, or conveying prisoners to the house of correction or work-house, reform school or county jail, or other place of punishment and imprisonment, under the judgment, sentence, or order of process of said court, shall be performed by members of said metropolitan police force; and the office of city marshal of such city is hereby abolished; and the duties of such office shall hereafter be performed by the superintendent of the metropolitan police force of such city, or by the captains or sergeants of police, under his direction. It shall be the duty of the police force hereby created when directed by the mayor of such city, to carry out all orders and resolutions of the board of aldermen and common council of such city as shall have two such boards, and of the common council of such city when but one of such boards exists, which pertain to the enforcement of the ordinances of such city, and shall serve all notices, issuing from the office of the city clerk, and other city officers, and shall report, through the superintendent of police, all street obstructions and dangerous excavations and other defects in the streets, and shall make all such other reports and carry out all such other orders, pertaining to the enforcement of the city ordinances as shall be directed by the board of aldermen, and common council of such city, when two such boards exist, and of the common council of such city when but one such board exists.

Any failure to carry out any of the provisions of this section, shall be, as against any officer or member of the police force hereby created, good cause for removal. Burns' Supp. 1897, § 3730*h*.

334. Fees and rewards.—9. No officer or member of such metropolitan police force shall receive, for any service rendered by him in discharge of any police duty, or as witness in any case before the mayor or city judge for any duty performed as bailiff of such court, any fee or compensation whatever, except the regular fixed per diem or yearly allowance made for his services as officer or member of such

police force. Any rewards received by any officer or member of such police force shall be turned over to the secretary of said board of commissioners, and by him paid into the city treasury every three months, for the support of the metropolitan police, as in this act provided. Burns' Supp. 1897, § 3730*i*.

335. Interfering with board—Penalty.—10. Any person or persons, or corporation, or common council, or other municipal, township, county or state officer or officers, who shall in any manner interfere with or interrupt the board of metropolitan police commissioners of such city in any act of theirs while in the legal discharge of their duties, as provided in this act, or of the police force herein authorized to be created, or shall prevent such board or force from discharging their duties, as defined in this act, shall, upon conviction before the mayor or city judge, or before the circuit or criminal court of said county, be fined not less than one hundred dollars or more than one thousand dollars to which may be added imprisonment for not less than ten days nor more than ninety days for each separate offense. Burns' Supp. 1897, § 3730*j*.

336. Merchant police—Special policemen.—11. The commissioners, whenever it shall seem to them discreet, may, on the application of any person or persons showing the necessity thereof, appoint and swear in any number of additional patrolmen to do duty at any place within said city, at the charge and expense of the person or persons by whom the application may be made, and the patrolman so appointed shall perform duty only at the place designated by said commissioners. They shall continue in office at the pleasure of said commissioners for a term not exceeding one year, shall be subject to and obey the orders, rules and regulations of said commissioners, and conform to the general discipline of the police force of such city, and to such special regulations as may be made by such commissioners for their government. And the person so appointed may be removed at any time by the commissioners. The commissioners may, upon emergency, with the written consent of the governor, and the mayor of said city, appoint such number of special patrolmen as they may deem advisable, but such special patrolmen shall serve for not exceeding seven consecutive days, unless their employment for a longer period shall be approved of by the board of police commissioners, and the mayor of such city. And the said special patrolmen shall be paid in the same manner as hereinbefore provided for the regular force. Burns' Supp. 1897, § 3730*k*.

337. Political work prohibited.—12. It shall be unlawful for any patrolman, or other member of said force, while on duty, to solicit any person to vote at any general or special election, for any candidate or candidates for office, or to challenge any voter, or in any manner attempt to influence any elector at any such election, or to be a delegate or candidate to any political convention. And any patrolman or other member of said force so offending shall be fined in any sum

not less than ten dollars, nor more than fifty dollars, and be dismissed from the service. Burns' Supp. 1897, § 3730*l*.

338. Bonds of officers.—13. The superintendent, captain and other officers of said force shall each give bond in the penal sum of from one thousand dollars to three thousand dollars, to be determined by the commissioners, conditioned for the faithful discharge of their several duties. Burns' Supp. 1897, § 3730*m*.

339. Fees, taxation and payment.—14. The fees fixed and allowed to city marshals shall be taxed and allowed in all cases where the arrests are made or process served by any of the police force of said cities, in favor of said city, and shall be collected in the same manner as other costs are collected, and shall be paid into the city treasury of said city by the officers or party, or person collecting the same, every three months. Burns' Supp. 1897, § 3730*n*.

See *ante*, § 95.

340. Repeal.—15. That all laws and parts of laws in conflict with this act be and the same are hereby repealed. Burns' Supp. 1897, § 3730*o*.

ARTICLE 11.—HUMANE INSPECTOR.

SEC.
341. Humane inspector—Appointment and salary.
342. Petition of humane society—Appointment.
343. Duty of inspector.
344. Pay.
345. Powers.
346. Affidavit—Prosecution of offenders.

[Acts 1889, p. 135. In force March 5, 1889.]

341. Humane inspector—Appointment and salary.—1. That in all cities having a population of twenty-nine thousand inhabitants, according to the United States census of 1880, and having boards of police commissioners in charge and in control of the police departments of said city, there shall be appointed by the said boards of police commissioners, as other officers of said police force are appointed, an inspector, who shall be known as the humane inspector of said police force. Said inspector shall be appointed as other members of said force are appointed, at a salary of not less than the salary paid the sergeant of said police force, and said appointment shall be made by the board of police commissioners as other appointments by them are made, in accordance with section 2 of this act. R. S. 1894, § 3731.

342. Petition of humane society—Appointment.—2. Whenever, in any city having the control of its police department under a metropolitan board of police commissioners, there shall be any regularly incorporated society or organization for the enforcement of the humane laws of the state, and whenever such society, through its authorized president and board of directors, shall, in writing, demand the appointment of such humane inspector, as provided for in the first section of this act, then it shall be the duty of said police commis-

sioners, within thirty days after the receipt of the petition of the president and directors of said humane society, to appoint, in accordance with their rules and in conformity with this act, said inspector. R. S. 1894, § 3732.

343. Duty of inspector.—3. It shall be the duty of said inspector, after his appointment, to attend exclusively to the detection and arrest of persons violating the humane statutes of the state, providing, however, he shall be under the control and discipline of said board of police commissioners and its officers, as other officers and patrolmen of said police department. R. S. 1894, § 3733.

344. Pay.—4. The pay of said humane inspector shall be provided as the pay of other members of the metropolitan police department is provided. R. S. 1894, § 3734.

345. Powers.—5. Said humane inspector shall have the same power, and be under the same restrictions, as other peace officers of the state. R. S. 1894, § 3735.

346. Affidavit—Prosecution of offenders.—6. Whenever any violation of the humane statute, or any other statute, shall come to the knowledge of said inspector, he shall at once, under the direction of the president of the humane society, if said society be duly and regularly incorporated, file an affidavit before the nearest magistrate charging the person so violating said statutes with said violation. R. S. 1894, § 3736.

ARTICLE 12.–PARK COMMISSIONERS.

SEC.		SEC.	
347.	Park commissioners—Appointment—Term.	350.	Taxes—Assessment—Application.
348.	Oath and bonds of officers.	351.	Duties—Compensation.
349.	Donations—Acceptance.	352.	Accounts—Reports.
		353.	Rules for government.

[Acts 1891, p. 479. In force June 3, 1891.]

347. Park commissioners—Appointment—Term.—1. That the common council of any incorporated city of this state of a population of over ten thousand and under one hundred thousand inhabitants shall be and is hereby authorized and empowered at its first regular meeting in June of any year after the passage of this act to select three park commissioners, who shall constitute and be designated a board of park commissioners, and who shall hold their office for one, two and three years respectively (as said commissioners shall determine by lot at the time of their organization), and that annually thereafter said common council shall elect one park commissioner, who shall hold his office for three years, or until his successor is elected and qualified. R. S. 1894, § 3737.

See *post*, § 1142, *et seq.*

Parks—Dedication—Corporation trustee for public.—An irrevocable dedication of land is effected by designating certain lands on a map filed in the county recorder's office as a "park," and by selling lots with reference to the map. Rhodes v. Town of Brightwood, 145 Ind. 21; Bennett v. Seibert, 10 App. 369.

A municipal corporation is not estopped to assert a dedication of land, by the unauthorized taxation thereof to the original owner, after dedication. Rhodes v. Town of Brightwood, 145 Ind. 21.

Where there has been laid out and filed a plat of land as an addition to a city, upon which plat a portion of the land is designated as a "park," and there has been a sale of lots in reference to the plat, the dedication of the part thus affected is to the public, and may be asserted by a town subsequently incorporated which annexes such addition to its corporate limits, for a change of trustees does not defeat the dedication. Rhodes v. Town of Brightwood, 145 Ind. 21.

Where there is a dedication and an acceptance of a street with a park in the center and a roadway upon each side, the park becomes public ground for park purposes, under the control and qualified ownership of a city, and where an ordinance for the improvement of the street recognizes the character of the ground, and orders the improvement accordingly, the city is liable for its proportion of the improvement bordering upon the park ground. Bennett, etc., v. Seibert, 10 App. 369.

The principles governing the dedication of highways are equally applicable to parks and other public grounds. Bennett, etc., v. Seibert, 10 App. 369; Doe v. President, etc., 7 Ind. 641; City of Logansport v. Dunn, 8 Ind. 378.

348. Oath and bonds of officers.—2. Before entering upon the duties of their office, said park commissioners shall take an oath of office faithfully to perform the duties of the same. They shall meet within five days after their election and organize by electing a president, secretary and treasurer. The treasurer shall give bond, with at least two sufficient freehold sureties, in a sum not less than double the amount that may come into his hands in any one year by virtue of his office, to be fixed and approved by the finance committee of the common council. The president and secretary shall each give bond with like sureties in a sum to be fixed by the finance committee, and all of said bond shall be approved by the common council of said city. R. S. 1894, § 3738.

See *post*, § 1142.

349. Donations—Acceptance.—3. Such board of park commissioners shall be and is hereby authorized and empowered to accept and receive any bequests, donations or other gifts, of money or property made or given for the benefit of any public park under the supervision or control of the board, and to invest or apply the same in the manner designated by the donor: *Provided*, That the board are of the opinion that such bequest, donation or gift would be beneficial to said park. R. S. 1894, § 3739.

350. Taxes—Assessment—Application.—4. The common council of any such city shall have power to annually assess and collect as other city taxes are assessed and collected, a special park tax to be fixed by the common council not exceeding five cents on each one hundred dollars of taxable property real and personal within the city, which special park tax shall be paid to the treasurer of said board upon the warrant of the president, countersigned by the secretary thereof; and such tax shall be applied exclusively to the maintenance and improvement of the public parks of the city under the control and supervision of the board. R. S. 1894, § 3740.

351. Duties—Compensation.—5. The park commissioners shall have charge of all parks belonging to the city and open to the use of the general public, together with the approaches thereto. They shall employ competent help, have power to make and enforce police regulations within and about the parks, and shall have care, management and improvement of all said park property of the city and all personal property used therein or connected therewith. Such park commissioners shall receive for their services such compensation as the common council of the city may deem just, which compensation shall be paid from the special park fund. R. S. 1894, § 3741.

352. Accounts—Reports.—6. Such park board shall keep an accurate account of their receipts and expenditures of such revenues, and shall render to the common council annually, on the first Monday in January (and oftener if required by such common council), a report in writing of such receipts and expenditures and their doings as such board. And for any failure of any of said park commissioners to faithfully discharge his duty or properly account for or deliver over to his successor any of the money or property in his possession such park commissioner shall be liable on his bond. R. S. 1894, § 3742.

353. Rules for government.—7. The common council may make any further regulation for the government of said board and the furtherance of the purpose of this act not inconsistent therewith. R. S. 1894, § 3743.

ARTICLE 13.—CITIES OF SEVENTY THOUSAND.

SEC.
354. Assessor and treasurer—Offices abolished.
355. County treasurer—Duties.
356. City treasurer to make settlement.
357. City treasurer's settlement with city clerk—Procedure.
358. License or special tax, how collected.
359. Sheriff to collect all assessments.
360. Assessment and appraisement—Basis of levy.
361. Auditor of county to deliver aggregate assessments.
362. Levy, how and by whom made—Limit.
363. Tax levies, how certified.
364. County treasurer to give notice.
365. Delinquent taxes—Penalty.
366. Sale of personal property.
SEC.
367. Settlement with county auditor.
368. Payments to school commissioners.
369. Monthly settlements with commissioners.
370. Credit for school taxes.
371. Collecting delinquent tax.
372. When settlement to be made.
373. Paying delinquent tax.
374. Returns of delinquent lands.
375. Payment enforced by sale—Notice.
376. Payment of bids, how enforced—Guaranty.
377. Certificate of purchase—Title.
378. Compensation of auditor and treasurer.
379. Expense to county, how determined and paid.
380. Plats—City commissioners to approve.
381. Approval—Costs.

[Acts 1885, p. 13. In force July 18, 1885.]

354. Assessor and treasurer—Offices abolished.—1. That on and after the expiration of the terms of the incumbents at the taking effect of this act, of the offices of city assessor and city treasurer in all cities containing a population of over seventy thousand, as shown by the

last census of the United States, the said offices shall be abolished, and the records, books and papers thereof, except as otherwise herein provided, shall be turned over to and preserved by such other offices of said city as the board of aldermen and common council of such city shall designate. R. S. 1894, § 3744.

See Cities of One Hundred Thousand, *post*, § 382, *et seq.*

Note.—The statutes compiled under this article, except the last two sections thereof, concern taxation for city and school purposes, and applied only to the city of Indianapolis. Their compilation should not be taken as indicating to what extent they are now in force. The laws for the government of cities of one hundred thousand, the school laws applicable in such cities and the general tax law should be considered in connection with said statutes.

355. County treasurer—Duties.—2. The treasurer of the county in which any such city is situated shall thereafter perform all the duties which, by law or the ordinances of such city, were required to be performed by the treasurer thereof, except as herein otherwise provided, in the same manner and with like effect as such duties were required to be performed by such city treasurer. He shall immediately, upon succeeding to the discharge of such duties and before entering upon the same, take an oath to honestly discharge such duties, and execute a bond payable to the state of Indiana with at least four freehold sureties, to the approval of the board of aldermen and common council of such city, in a penalty to be prescribed by them, not less than the estimated amount of all taxes, including delinquent, to be levied and collected for municipal purposes in such city for the current year, conditioned that he will honestly and faithfully discharge the duties of his office so far as they relate to or affect such city, and safely keep and properly account for and pay over to the proper person or authority all moneys and property of such city which may come into his hands, which bond shall be filed with and preserved by the city clerk. He shall, also, at the same time execute a separate bond, payable to the state of Indiana, with at least four freehold sureties, to the approval of the board of school commissioners of such city, in a penalty to be prescribed by such board, not less than the estimated amount of all taxes, including delinquent, to be levied and collected for school purposes in such city for the current year, conditioned that he will honestly and faithfully discharge the duties of his office, so far as they relate to or affect such school city, and safely keep and properly account for and pay over to the proper person or authority all moneys of such school city that may come into his hands, which bond shall be filed with and preserved by the secretary of such board of school commissioners. R. S. 1894, § 3745.

Statute construed—Duties of county treasurer.—Under this act it is the duty of the county treasurer, acting as city treasurer, to make and furnish the monthly statement of all his receipts and disbursements on account of the city during the month, as required of city treasurers generally. Miller, etc., v. State, 106 Ind. 415.

356. City treasurer to make settlement.—3. The city treasurer of

any such city in office at the taking effect of this act, upon the expiration of his term, shall make settlement with the city clerk for all moneys collected and disbursed by him, and thereupon a statement shall be prepared, which shall be signed by him and attested by such clerk, in which shall be shown the amount of moneys in his hands belonging to the general fund and each other fund of which separate account is required to be kept by law or the ordinances of such city, and the total amount of all such funds. A particular description shall also be given of all bonds and other securities and property in the hands of said treasurer belonging to said city. Said treasurer shall present such statement to the county treasurer, and forthwith pay over to him all the funds of such city in his hands as shown therein, and also deliver to him all the bonds, securities and other property described in such statement, and said county treasurer shall give a receipt therefor, showing the amount of money received on account of each fund, and the total amount received, and describing the bonds, securities and other property received, which receipts said city treasurer shall deliver to the city clerk, who shall issue a quietus therefor. At the time of making such settlement with the city clerk a like statement shall be prepared showing the amount of moneys in the hands of such city treasurer belonging to the school city, which statement said treasurer shall present to the treasurer of the board of school commissioners of such city, and pay over to him the amount of moneys in his hands shown by such statement, taking a receipt therefor, which he shall present to the secretary of the board, who shall give him a quietus. R. S. 1894, § 3746.

357. City treasurer's settlement with city clerk—Procedure.—4. Said city treasurer shall also, at the expiration of his term, make a settlement with the city clerk on account of the tax duplicate and delinquent list which may then be in his hands for collection. He shall enter upon said duplicate and list opposite the name of each person from whom he has collected any taxes a statement of the fact showing the amount collected, and at the end of such duplicate and list the aggregate amount of all taxes of each kind collected by him shall be deducted from the aggregate amount of each kind of tax shown in said duplicate and said list, and the remainder of each kind of tax uncollected shall be stated, and the same shall be signed by said treasurer and attested by the clerk. Said tax duplicate and delinquent list shall then be delivered by said treasurer to the county treasurer, who shall give him a receipt therefor, stating therein the amount of each kind of tax therein remaining uncollected and the aggregate of all such taxes, which receipt shall be filed with the city clerk. Said county treasurer shall thereupon proceed to collect the taxes contained in said duplicate and list in the same manner as he is required by law to collect taxes for state, county, township, road and other purposes upon the county tax duplicate and delinquent list, and shall make settlement on account thereof with the county auditor at the same time and in the same manner as he is required by law to make his

settlements on account of the county tax duplicate. R. S. 1894, § 3747.

This and subsequent sections did not repeal R. S. 1894, § 3618, providing for a board of equalization in cities, fixing their powers and duties, and providing for the repayment of taxes erroneously assessed and collected, so as to affect the remedy given by said section. Leonard v. City of Indianapolis, 9 App. 262.

358. License or special tax, how collected.—5. Whenever by law, or the ordinance of any such city, a license or special tax, or sum of money, other than taxes contained upon the tax duplicate, shall be required to be paid by any person into the treasury of such city, such person shall obtain from the city clerk a statement showing the amount to be paid, and on what account, and present the same to the county treasurer, whose duty it shall be to receive and collect said amount, and give to the person paying the same a receipt showing the amount paid, and on what account, which receipt such person shall deliver to the city clerk, who shall thereupon issue to such person a license or quietus, as may be proper. R. S. 1894, § 3748.

359. Sheriff to collect all assessments.—6. The city treasurer of any such city, at the expiration of his term of office, as herein provided, shall deliver to the sheriff of the county all precepts for the collection of street, sewer, drain and other assessments of like character, which may be in his hands unexecuted, and thereafter all such precepts shall be directed and issued to such sheriff, who shall execute the same and make conveyances in execution of sales made by the city treasurer, the same in all respects as such precepts are required to be executed and conveyances made by such city treasurer, for which services such sheriff shall receive the same fees as are allowed by law to the city treasurer, to be paid in the same manner. R. S. 1894, § 3749.

360. Assessment and appraisement—Basis of levy.—7. Beginning with the year 1886, and thereafter, the assessment and appraisement for taxation for state and county purposes of all real and personal property and polls, subject to taxation within any city containing a population of over seventy thousand, as shown by the last census of the United States, made pursuant to the provisions of the act of the general assembly of the state of Indiana, entitled "An act concerning taxation," approved March 29, 1881, and of the acts amendatory thereof and supplemental thereto, as the same shall have been equalized by the county and state boards of equalization, including all additions made thereto by said boards, or either of them, and all assessments and appraisements made by the auditor and treasurer of the county in which such city is situated, shall be the basis upon which the board of aldermen and common council and board of school commissioners of any such city shall levy and assess the taxes for city, school and library purposes, which they respectively shall deem it necessary to levy, within the limitation hereinafter prescribed, and the taxes so levied shall become and continue liens upon the property upon

which they are levied at the time, and in the manner, and to the extent that taxes levied for state, county and other purposes become and continue liens upon such property by virtue of the provisions of the acts herein referred to. R. S. 1894, § 3750.

361. Auditor of county to deliver aggregate assessments.—8. It shall be the duty of the auditor of the county in which any such city is situated, to make out and deliver severally to the city clerk of said city and the secretary of the board of school commissioners thereof, in each year, beginning with the year 1886, a certificate, under the seal of the board of commissioners of such county, showing the aggregate assessment and valuation for taxation for state and county purposes, for the year in which such certificate is made, of all taxable real and personal and railroad property in such city, and the number of taxable polls therein, as the same shall have been returned by the assessor of the township in which such city is situated and as equalized by the county and state boards of equalization, which certificate shall be so made and delivered by said auditor immediately after the assessment and valuation of such property and polls has been completed and returned to his office. R. S. 1894, § 3751.

362. Levy, how and by whom made—Limit.—9. Such city clerk and secretary of the board of school commissioners shall lay such certificate before the board of aldermen and common council and board of school commissioners of such city, respectively, at their regular sitting next held after such certificates are received, and thereupon such board of aldermen and common council and board of school commissioners, respectively, shall proceed, in the manner now prescribed by law, to levy such tax upon the amount of property and polls shown in such certificate as may be deemed necessary by them, respectively, to supply the needs of such city during the ensuing year for city, school and other purposes for which taxes may be properly levied: *Provided, however*, That it shall be unlawful for such board of aldermen and common council to levy a tax or taxes for any one year exceeding in the aggregate ninety cents upon the hundred dollars of the assessed and appraised value of the property subject to taxation in such city for the year in which the levy is made, as shown by the assessment returned to and on file in the office of the county auditor, and by his certificate herein mentioned. It shall also be unlawful for such board of school commissioners to levy a tax or taxes for any one year exceeding in the aggregate for all purposes for which they are authorized to levy taxes, twenty-two cents upon the hundred dollars of the assessed and appraised value of the property subject to taxation by them for the year in which the levy is made, as shown by the assessment returned to and on file in the office of the county auditor, and such auditor's certificate thereof as aforesaid; and so much of any law as requires the levy by the board of aldermen and common council of such city, of a tax to create a sinking fund, is hereby repealed so far as it applies to such city, and any moneys on hand belonging to such sinking fund may be appropriated by the board of aldermen and common council to general city purposes. R. S. 1894, § 3752.

363. Tax levies, how certified.—10. The levies of taxes made, as provided in the last section, shall be certified by the city clerk, under the seal of such city, and by the secretary of the board of school commissioners, respectively, without delay, to the county auditor, and such auditor shall thereupon proceed to estimate, as he is now required to do in reference to state, county, township, road and other taxes, the amount of tax chargeable, according to the rate prescribed by such levies to each person who is listed for any taxable property or poll in such city upon the assessment and appraisement of property and polls therein made for the year in which such tax is levied and returned by the assessor of the township in which such city is situated, and equalized by the county and state boards of equalization. He shall enter the amount of the tax, including delinquent tax chargeable to each such person, against the name of such person as it appears upon the tax duplicate of the county for such city for the current year, in the columns in which are entered the current and delinquent state, county, township, road and other taxes with which such person is charged. The aggregate of all taxes with which such person is chargeable, including state, county, township, road and other taxes, shall be carried out and set down opposite the name of such person in a column of totals. And in the recapitulation of the duplicate now required by law to be made by him, he shall set down the aggregate of all taxes contained in the duplicate for such city. Said duplicate shall thereupon be delivered to the treasurer of the county as now provided by law. R. S. 1894, § 3753.

364. County treasurer to give notice.—11. The county treasurer shall include in the notice, now required by law to be given by him of the receipt of the tax duplicate for collection, a statement of the amount of tax charged in such city for city and school purposes upon each one hundred dollars valuation of the taxable property, and also for such purposes upon each taxable poll, and such notice shall be the only notice required to be given of the fact of such taxes being in his hands for collection. R. S. 1894, § 3754.

365. Delinquent taxes—Penalty.—12. It shall be the duty of the county treasurer to receive and collect all taxes shown upon the duplicate of such city, for city and school purposes, the same as he is required by law to receive and collect the taxes shown thereon for state, county, township, road and other purposes. If one-half of the amount of such city and school taxes for the current year charged to any person, and the entire amount of delinquent school and city taxes, penalty, interest and costs charged to such person and unpaid, be paid on or before the third Monday of April, the payment of the other half of such taxes for the current year may be postponed to the first Monday of November following. But, if on or before the third Monday of April payment be not made of that portion of the above specified, the entire amount of unpaid city and school taxes, charged upon the duplicate to such person, shall become due and be returned delinquent, and collected as such, with like penalty, interest and

costs, as is provided where the first installment of state, county, township and road taxes are not paid by the time prescribed. If such taxes remain delinquent after the first Monday of November following, there shall be an additional penalty of six per centum added to all such taxes that become delinquent at the preceding April and November settlements, but a penalty of ten per centum only shall be added to the current delinquency occurring on the first Monday of November. After payment by any person of taxes charged to him, the treasurer shall give to such person a receipt in the form prescribed by law, which shall include all taxes paid by him, the city and school, as well as other taxes. Any partial payment of either current or delinquent taxes shall be prorated among the different taxes charged to the person paying in proportion to the amount of such taxes respectively. R. S. 1894, § 3755.

366. Sale of personal property.—13. If either installment, or any part thereof, of such taxes for city and school purposes remains unpaid after expiration of the time limited for payment thereof, the county treasurer shall have the same power and be under a like duty to collect the entire amount of such taxes remaining unpaid by levy and sale of personal property, and by suit, as is granted to and imposed upon him for the collection of delinquent state, county, township, road and other taxes. R. S. 1894, § 3756.

367. Settlement with county auditor.—14. The county treasurer shall, at the time of making his annual settlement with the county auditor, on the third Monday of April, as now required by law, make settlement with said auditor for the amount with which said treasurer is to stand charged on account of city and school taxes, in the manner prescribed for his settlement for state, county, township, road and other taxes, and for all of such city and school taxes appearing upon the tax duplicate, and not shown upon such settlement to be uncollected, said treasurer shall be held liable as having been collected and received by him. Immediately upon such settlement being made, the auditor shall make out statements in duplicate, showing in one the aggregate amounts separately of all current and delinquent taxes for city purposes, including with the delinquent taxes the penalties and interest thereon, which appear upon the tax duplicate for said city, the amount of each class of such taxes, penalty and interest that remains uncollected at the time of such settlement, and the amount of each class, including penalty and interest, that has been collected by such treasurer. In the other statement shall be shown, in the same manner, the aggregate amounts of current and delinquent taxes, including penalty and interest, for school purposes, that appear upon the duplicate for such city; the amount thereof that remains uncollected at the time of such settlement, and the amount thereof that has been collected by such treasurer. Said statements shall be signed and sworn to by said treasurer, and certified by the county auditor, under the seal of the board of commissioners, to be correct abstracts of the treasurer's settlement on account of such city and school taxes.

One copy of the first mentioned statement shall be delivered by the county auditor to the city clerk of such city, who shall thereupon charge the amount shown thereby to have been collected to such county treasurer as cash in his hands. One copy of such other statement shall in like manner be delivered to the secretary of the board of school commissioners, who shall charge the county treasurer upon the books of the board with the amount shown to be collected as so much cash. R. S 1894, § 3757.

368. Payments to school commissioners.—15. The county treasurer, immediately upon such settlement being made, shall pay over to the treasurer of the board of school commissioners of such city the full amount for which he is liable as shown by such settlement on account of school taxes, interest and penalty collected by him, for which he shall take a receipt from such treasurer, which receipt he shall deliver to the secretary of said board of school commissioners, who shall give him a quietus therefor and credit him with the amount therefor, and charge such amount to the treasurer of the board. R. S. 1894, § 3758.

[Acts 1891, p. 38. In force February 26, 1891.]

369. Monthly settlements with commissioners.—2. That in all cities in the state of Indiana where boards of school commissioners have been elected and are managing the school affairs of said city under and by virtue of said act of the general assembly of the state of Indiana, approved March 3, 1871, and in which the office of city treasurer has been or may hereafter be abolished under and by virtue of said act of the general assembly of the state of Indiana, approved February 21, 1885, as mentioned and described in the first section of this act, it shall be the duty of the county treasurer on and after making his settlement with the county auditor on the third Monday of April, 1891, and the payment to the board of school commissioners of the amount by such settlement found to be due to it, as required by section 13 of the last above named act, at the close of each calendar month to make report duly verified by his oath, to said board of school commissioners of all taxes and delinquent taxes collected within said month, and thereafter, upon demand of the treasurer of said board of school commissioners to pay to him for the use of said board of school commissioners the full amount of said taxes and delinquent taxes shown by said report to have been collected. Upon such payment being made, the treasurer of the board of school commissioners shall execute to said county treasurer his receipt for the amount of money so paid, which receipt the latter shall deliver to the secretary of the board of school commissioners, who shall give him a quietus therefor, and credit said county treasurer with the amount thereof and charge such amount to the treasurer of said board of school commissioners. R. S. 1894, § 3759.

370. Credit for school taxes.—3. Said county treasurer shall thereafter in his settlement with the county auditor, made as required

by law, on the third Monday of April, and the first Monday of November in each year, present such quietuses to the county auditor, who shall give such county treasurer credit therefor as against the sums with which he is chargeable upon account of the collection of such school taxes. R. S. 1894, § 3760.

[Acts 1885, p. 13. In force July 18, 1885.]

371. Collecting delinquent tax.—16. The county auditor shall include in the delinquent list, required by law to be made by him after the annual settlement with the treasurer on the third Monday of April, the amount of all city and school taxes shown by such settlement to be uncollected, and carry the same out and include it in the total of all taxes due from the person liable therefor as shown in said list, and such list, when delivered to the county treasurer, shall empower him, and it shall be his duty, to collect all delinquent city and school taxes embraced therein, in the same manner, and with the same penalty and interest, as the state, county, township, road and other taxes contained therein. R. S. 1894, § 3761.

372. When settlement to be made.—17. On the first Monday of November in each year the county treasurer shall make settlement with the county auditor for the amount of delinquent city and school taxes, penalty and interest shown upon said delinquent list in the same manner as he is now required by law to make such settlement for delinquent state, county, township, road and other taxes collected by him, and upon such settlement, statements signed, sworn and certified to by said treasurer and auditor, in the manner prescribed in section 14 of this act, shall be prepared in duplicate showing in one the aggregate amount of city delinquent taxes, penalty, and interest which had been contained in such delinquent list, the amount thereof collected, and the amount still remaining uncollected; and in the other, the same showings shall be made with the reference to the delinquent school tax, interest and penalty, one copy of which statement shall be transmitted to the city clerk and secretary of the board of school commissioners, respectively, as required with reference to the statements mentioned in section 14. R. S. 1894, § 3762.

373. Paying delinquent tax.—18. The county treasurer shall immediately thereafter pay to the treasurer of the board of school commissioners of such city the full amount of delinquent school taxes, interest and penalty, shown by such statement to have been collected, and shall take a receipt therefor, which he shall deliver to the secretary of the board of school commissioners, who shall give him a quietus therefor, and thereupon charge the treasurer of the board with the amount shown by such receipt to have been received by him. R. S. 1894, § 3763.

374. Returns of delinquent lands.—19. The county auditor, in making out the list of lands and lots in such city returned and remaining delinquent for state, county, township, road and other taxes which he is required by law to make between the first Monday in No-

vember and the first day of January in each year, shall enter therein against the name of each person remaining delinquent on account of state, county, township, road and other taxes, the amount of all delinquent taxes for city and school purposes, for which said lands and lots are liable, including taxes on poll and personalty and adding interest and a penalty of ten per centum thereon, and also the amount of all taxes for city and school purposes assessed for the current year, for which said lands and lots are liable, including taxes on poll and personalty, which said taxes shall be carried out with the taxes for state, county, township, road and other purposes into one total. R. S. 1894, § 3764.

375. Payment enforced by sale—Notice.—20. Payment of such delinquent and current city and school taxes, with interest, penalty and costs, shall be enforced by sale of the lands and lots liable therefor, or so much thereof as may be necessary, which sale shall be made by the county treasurer in the same manner, at the same time and place, and upon the same notice as is prescribed by law for the sale of lands and lots for the payment of delinquent state, county, township, road and other taxes, the property to be offered for sale and sold for the payment of all the taxes of every kind for which the same is liable, with interest, penalty and costs thereon, as one entire sum, and not separately, for said city and school taxes. Nor shall notice of the sale be given separately for the city and school taxes, but it shall be stated in the notice required to be given of the sale of the lands and lots for state, county, township, road and other taxes, that the sale thereof will also be for the payment of the city and school taxes, which shall be the only notice required to be given. R. S. 1894, § 3765.

376. Payment of bids, how enforced—Guaranty.—21. Payment of the bid, upon the sale of any such lands and lots, shall be enforced, so far as it relates to city and school taxes, by the same officer, and in the same manner, and with the same penalty and costs as is provided by law for the enforcement of the payment of a bid made upon the sale of lands and lots for state, county, township, road and other taxes alone. The guaranty required by law to be indorsed by the county treasurer upon each certificate given by him upon a purchase of lands and lots for state, county, township, road and other taxes shall, in every case where such sale is made for city and school taxes, also apply to and embrace the amount of city and school taxes for which sale was made, and the holder of such certificate shall have the same remedy upon such guaranty, as to the city and school taxes embraced therein, that he has as to the state, county, township, road and other taxes to which the same relates. R. S. 1894, § 3766.

377. Certificate of purchase—Title.—22. All provisions of law in reference to the certificate to be issued to a purchaser of lands and lots upon sale for state, county, township, road and other taxes, the effect of such sale and the rights of the purchaser, redemption therefrom, the making of deeds upon failure of redemption, and as to the force and effect of such deeds, for the quieting of titles acquired thereunder,

for transferring to the purchaser the original lien for the taxes for which the sale was made and subsequent taxes paid, and for the enforcement of such lien by judicial proceedings when the purchaser fails to acquire a valid title by virtue of the purchase, and as to the interest and penalties to be collected upon redemption from such sales before deed is made, or upon judicial proceedings to quiet the title or enforce the lien of the purchaser, and all other provisions of law relating to the levying, assessing, collecting and accounting for state, county, township, road and other taxes shall, so far as the same are applicable, apply with like force and effect in case of city and school taxes in cities of the class referred to in this act. R. S. 1894, § 3767.

378. Compensation of auditor and treasurer.—23. The county auditor, for all services required to be performed by him under this act, shall receive an annual salary of one thousand dollars, to be paid quarterly out of the funds of the city, upon allowance by the board of aldermen and common council thereof. The county treasurer, for all services required to be performed by him under this act, shall receive an annual salary of two thousand dollars, to be paid quarterly out of the funds of the city upon allowance by the board of aldermen and common council thereof. He shall receive no percentage for receiving, collecting or disbursing any of the funds of such city, whether derived from taxes current or delinquent, or from special assessments, taxes, licenses or other sources. R. S. 1894, § 3768.

379. Expense to county, how determined and paid.—24. The expense to the county of the office of township assessor for the township in which any city of the class herein referred to is situated, including the salaries of the assessor and his deputies, and other legitimate expenses, shall be apportioned by the county auditor at the end of each fiscal year, beginning with the year 1886, between the county and such city, and such city shall pay to the county one-half of an amount bearing the same ratio to the total expense of such office as the total assessment and valuation of property subject to taxation in such city for the current year bears to the total assessment and valuation of property subject to taxation in the entire township in which such city is situated, for the current year, including such city and all other towns and cities therein, and all parts of the township not included in cities and towns. The auditor shall certify such apportionment to the board of aldermen and common council of such city, and the same shall thereupon be allowed by such board of aldermen and common council, and paid to the county out of the funds of such city in the hands of the county treasurer. Such city shall not be subject to any other expense on account of said township assessor's office than such as is apportioned to it as herein provided. R. S. 1894, § 3769.

[Acts 1889, p. 263. In force March 9, 1889.]

380. Plats—City commissioners to approve.—1. That hereafter, whenever any lands are platted for the purpose of being attached to

any city as an addition thereto, or whenever any grounds therein, or within the bounds of any such city, shall be subdivided, a plat of such addition or subdivision shall be submitted to the city commissioners of such city before the same is placed on or filed for record, and such city commissioners may require that the streets and alleys of such addition or subdivision shall be made to correspond in width, and be co-terminous with the streets and alleys of that part of the city which it adjoins. R. S. 1894, § 3770.

381. Approval—Costs.—2. When any such plat is submitted as provided in section 1 of this act, the city commissioners or a majority of them, after view of the ground shall, if they approve thereof, indorse upon such plat their approval and sign their names thereto: *Provided, however*, That the whole cost and expense occasioned by said platting shall be paid by the owner of said platted lands: *Provided*, That the provisions of this act shall apply only to cities having a population of seventy thousand or more inhabitants. R. S. 1894, § 3771.

See *post*, § 1040, *et seq.*
See Towns, *post*, § 1266, *et seq.*, and notes.

CHAPTER 2.

CITIES OF MORE THAN ONE HUNDRED THOUSAND.

ART.

1. Incorporation and officers.
2. Legislative—Common council.
3. Executive officers and departments.
4. Police court.
5. Cemeteries.

ARTICLE 1.—INCORPORATION AND OFFICERS.

SEC.

382. What cities governed by this act.
383. Officers—Election—Contests.
384. Powers and duties of old officers.
385. Vacancies—Election.
386. Officers to qualify.
387. Oaths and bonds.
388. Contracts with officers prohibited—Penalty.
389. Officers not to purchase claims.

[Acts 1891, p. 137. In force March 6, 1891.]

382. What cities governed by this act.—1. That all cities of this state which had a population of more than one hundred thousand inhabitants, as shown by the last preceding United States census, shall hereafter be governed by the provisions of this act. Any city falling within the scope of this act shall be, and continue to be the same legal corporation as heretofore, subject to the same liabilities heretofore incurred, and possessing the same rights which have heretofore accrued. All by-laws, ordinances and regulations, not inconsistent with this act, shall remain and continue in full force until altered or repealed by the common council and board of aldermen in conformity with the provisions of this act, but all by-laws, ordinances and regulations inconsistent with the act are hereby abolished. R. S. 1894, § 3772.

Charter—Rules of construction.—The charter or statute by which a municipal corporation is created or governed is its organic law, and the rules applicable to the interpretation of constitutions may be used in the construction thereof. Newcomb v. City of Indianapolis, 141 Ind. 451.

Rules of construction, see *ante*, § 45, general notes.

Incorporation and organization.—For decisions relating to incorporation and organization under the general law of 1867, see *ante*, § 46, notes.

Organization of municipal corporation—Validity of tested by quo warranto.—See *ante*, § 46, notes.

Incorporation—Presumption as to—Prescription—Judicial notice of.—See *ante*, § 46, notes.

Amendments—Repeal, etc.—The charter of a municipal corporation may be amended or repealed at the pleasure of the legislature. Special charters may be amended by either general or special act. See *ante*, § 46, notes and cases.

Municipal powers—Sovereign—Legislative—Judicial—Not liable for exercise or non-exercise of.—See *ante*, § 46, notes.

Municipal corporation defined.—See *ante*, § 46, notes.

General law.—A law which applies to cities having a population of one hundred thousand or more, when there is but one such city, but is so framed as to operate on all other cities in the state as they acquire the necessary population, is a general law within the meaning of the constitution, because it operates upon all cities alike, under the same circumstances. City of Indianapolis v. Navin, 151 Ind. 139; Pennsylvania Co. v. State, 142 Ind. 428. See Central Trust Co. of New York v. Citizens' Street R. Co., 82 Fed. Rep. 1.

When a statute provides that all cities or towns of a named population "according to the United States census" or "according to the last preceding United States census," shall be governed by the provisions of the act, then all cities and towns, as they acquire the requisite population as shown by any census thereafter taken, will be governed by the act, the same as if they had the required population as shown by the last preceding census when the law was enacted. The case of Mode v. Beasley, 143 Ind. 306, explained and distinguished. City of Indianapolis v. Navin, 151 Ind. 139.

383. Officers—Election—Contests.—2. The elective officers of such city shall be a mayor, city clerk, police judge and councilmen as hereinafter provided. There shall be held a city election in such city on the second Tuesday of October of every alternate year, commencing with the year 1891, and next thereafter in the year 1893, and so on continuously for the choice of such mayor, clerk, judge and councilmen. Such election shall be held in conformity to and in accordance with the general election laws of this state, and with the laws for the making out of certificates and memoranda of the result, the delivery of the list of voters and the tally papers, the assemblage of inspectors or judges of elections as a board of canvassers, and the duties of such board in reference to state elections: *Provided*, That such board in city elections shall assemble in the room of the council of such city on the day following such election at 10 o'clock A. M. The duties of the county clerk in reference to such state elections shall be performed by the clerk of such city. All special elections in such city shall be governed by the same provisions. The laws of this state in reference to contests after state elections and all other matters shall be applicable to such city elections as far as they are adapted to the same. R. S. 1894, § 3773.

City officers—Legislature can not appoint.—See *ante*, § 59, note.

Nature of office—Salaries—Allowances, etc.—See *ante*, § 59, note.

Officers—Duties—Liabilities.—See *ante*, § 59, note.

Election of officers—Validity of—Quo warranto.—See *ante*, § 59, note.

Officers—Jurisdiction of—Injunction—Mandamus.—See *ante*, § 59, note.

Removal of officers.—See *ante*, § 59, note.

Mayor—Under general law.—See *ante*, § 80, note.

Councilman—And other officers, under general law, see *ante*, §§ 59-68, and notes.

Municipal elections.—See *ante*, § 61, *et seq.*, notes.

A municipal corporation is bound by the declarations of its officers, where such declarations accompany, and are explanatory of, an act done by the officer in the scope of his authority. Los Angeles, etc., Co. v. City of Los Angeles, 88 Fed. Rep. 720; 1 Dillon Munic. Corp. (4th ed.), § 237, n., p. 321.

384. Powers and duties of old officers.—3. On the taking effect of this act, the present common council, mayor, city clerk and all other city officers and employes, shall possess the powers conferred by this act and no other. All offices of such city created by the statutes of the state or ordinances of the city in conflict with the provisions of this act are hereby abolished, but all officers elected by the common council and board of aldermen in joint convention held in November, 1890, except members of the board of health, and now serving as such, and all officers now serving who have been elected by the people, except members of the board of aldermen, shall continue until the expiration of the respective terms for which they were elected, and at salaries now fixed for such officers respectively: *Provided, however,* They shall not be removed from office except by impeachment, as provided herein: *And provided, further,* That upon the taking effect of this act the mayor shall assign such officers to appropriate departments, and they shall perform such duties and render such services as may be required of them by the respective departments. On the taking effect of this act the mayor may temporarily appoint a police judge, who shall serve until noon on the Thursday following the first general election, and shall possess all the powers of a police judge, as provided in this act. In case such city, prior to the passage of this act, shall have commenced, by its proper officers, any proceedings or undertakings of a public nature which was lawfully commenced or undertaken, the same shall not be interrupted by the passage of this act, but it shall be taken up and carried forward by the proper officer or department as prescribed by this act, except that in case of public improvements of any sort, whether of sewers, streets, alleys, levees, public buildings, or any other matter of an executive nature, in which a contract has not at the time of the passage of this act been actually let and entered into, the executive department having charge of such matter shall not be bound, unless it so elects by the previous proceedings, but may review the whole subject and modify, change or rescind all orders previously made in that behalf. The present officers of such city shall surrender the custody of all property, records, documents of every nature whatsoever, to the appropriate officer or department entitled to the possession of the same under this act. R. S. 1894, § 3774.

See notes to § 59, *et seq.*, *ante.*

385. Vacancies—Election.—4. In the event of a vacancy occurring in any elective office of such city from death, resignation or other cause, except city clerk, police judge and councilmen at large, it shall be the official duty of the acting mayor to take notice thereof, and within ten (10) days from the time when such vacancy begins to exist, to issue his proclamation for a special election to be held on a day therein named, not more than forty (40) days nor earlier than twenty-five (25) days from the date of such proclamation, in the city or ward, as the case may be, to fill the vacant office for the unexpired term.

[As amended, Acts 1893, p. 56. In force February 22, 1893.] R. S. 1894, § 3775.

386. Officers to qualify.—5. The city clerk shall forthwith, after the execution of the certificate of election by the board of inspectors of elections of said office, as hereinbefore provided for, notify every person so elected of the time when he must qualify, either by personal service or leaving copy at his usual place of residence, and shall make return of such service and file the same in his office. R. S. 1894, § 3776.

387. Oaths and bonds.—6. Every elective officer of such city shall, before entering upon the duties of his office, take and subscribe an oath, to be indorsed on the back of his certificate of election, and every appointive officer shall likewise take such oath, to be indorsed upon the back of his certificate of appointment, before some officer authorized to administer the same, to support the constitution of the United States and the constitution of the state of Indiana, and to faithfully and honestly discharge all his official duties, such oaths to be filed with the city clerk. Each of said officers, except the mayor and members of the common council, shall likewise execute a bond with surety, to be approved by the mayor, payable to such city in such penal sum as said council may enact by ordinance covering such cases, conditioned for the faithful performance of the duties of his office, and the payment of all moneys received by him as such officer to the proper person, such bond to be filed with the head of the department of finance. Any person who shall not file his oath, or oath and bond as the case may be, with the proper officer, within ten days after the beginning of the term for which he is elected or appointed, shall be deemed to have refused to serve, and shall forfeit to the city the sum of ten dollars ($10), recoverable in a civil action, and the office shall be deemed to be vacant: *Provided*, That in case of such default a member-elect of the council may, within thirty days from the date of his election, present his excuse therefor in writing to the body to which he is elected, and any other officer may, within the same time, present his excuse in writing to the council, and if such excuse is accepted, may be relieved from such penalty, and on taking such oath and giving such bond may assume the duties of his office. R. S. 1894, § 3777.

See note, *ante*, § 113.

388. Contracts with officers prohibited—Penalty.—7. No member of the council, nor any other officer, clerk or deputy, or employe of such city shall, either directly or indirectly, be a party to, or in any manner interested in any contract or agreement, either with such city, for any matter, cause or thing, or by which any liability or indebtedness is in any way or manner created or passed upon, authorized or approved by said council, or either of them, or by any officer, board, clerk, deputy or employe of such city. Any contract in contravention of the foregoing provisions shall be absolutely void. Whoever shall

knowingly violate the provisions of this section shall be fined not more than one thousand dollars ($1,000), to which may be added imprisonment for any period not exceeding one year. R. S. 1894, § 3778.

See *ante*, § 122, *post*, § 1420, and notes.

389. Officers not to purchase claims.—8. No councilman, or other officer, clerk, deputy or employe of such city shall purchase, either directly or indirectly, any bond, order, claim or demand whatever against such city, during his continuance in office or employment for any less sum than the amount specified therein; and any bond, order, claim or demand so purchased by any such person, in contravention of the foregoing provision, shall be forfeited to such city, and no action shall ever be maintained thereon. Gifts and the acquirement of equitable interests shall be deemed to be within the meaning and scope of the provisions of this section. R. S. 1894, § 3779.

ARTICLE 2.—LEGISLATIVE—COMMON COUNCIL.

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LEGISLATIVE.

A. ORGANIZATION.

390. Common council.—9. The legislative authority of the city shall be vested in a common council. R. S. 1894, § 3780.

For decisions and interpretation of statutes relating to the powers of the common council under the general law of 1867, see notes to *ante*, §§ 114-211.

391. Wards.—10. Such city shall be divided by the common council, by ordinance, into fifteen wards, of as nearly equal population, and of as compact and contiguous territory as practicable. It is

made the duty of the present council of such city to readjust the ward, or common council boundaries in such city, and every sixth (6th) year after the year 1891 a new readjustment shall be made, but no oftener, unless the same is made necessary by the annexation of new territory, in which case the same may be done at any time by an ordinance passed by a two-thirds vote of the council. R. S. 1894, § 3781.

Creation of wards—Judicial notice of existing wards.—See *ante*, § 53.

392. Election of councilmen.—11. Each ward shall elect one councilman at the city election hereinbefore provided for, and the whole city shall elect six councilmen at large, whose terms of office shall commence at 12 o'clock, noon, on the Thursday following such election, and shall continue until the same hour of the same day, week and month of the second year thereafter: *Provided*, That all officers chosen at the first general election after the taking effect of this act shall commence their official terms at the expiration of the terms of their respective predecessors as hereinbefore provided. R. S. 1894, § 3782.

393. Qualification of councilmen—Vacancy—Filling of.—12. No person shall hold the office of councilman from any ward, unless he is at the time of his election a resident and voter thereof; a removal of residence from such ward shall vacate his office. No person shall hold the office of councilman at large unless he is a resident and voter of such city. In the event of a vacancy in the office of councilman at large, from death, resignation or other cause, the common council shall within thirty (30) days from the time when such vacancy begins to exist, fill the vacant office for the unexpired term. The election therefor shall be held at a special meeting of the common council on the call of the mayor. Ten (10) days' notice of such meeting shall be given by the city clerk to the members of said common council, and also by one publication in a daily newspaper of general circulation published in such city, five (5) days prior to such meeting. The person receiving a majority of the votes cast at such meeting shall be declared elected such councilman at large. [As amended Acts 1893, p. 56. In force February 22, 1893.] R. S. 1894, § 3783.

394. Expulsion of councilmen.—13. The council shall have the power to expel any of its own members for violation of official duty and to declare the seat of any member vacant, by reason of his disability to perform the duties of his office. The council may adopt its own rules to govern such cases, but a two-thirds vote shall be required to expel a member or vacate his seat under this section. R. S. 1894, § 3784.

See note, *ante*, § 119.

395. Meetings of council.—14. The members elect of the council shall hold their first regular meeting on the first Thursday after the day of their election at 7:30 P. M., in the council chamber. The council shall thereafter meet not less than once a month, and as much of-

tener as their rules may require. Special meetings may be held on the call of the mayor, or on such other call as may be provided for by rules. Eleven members shall constitute a quorum. It shall require a majority vote of all the members elect to pass an ordinance. Wherever it is provided in this act that an ordinance shall be passed by a two-thirds vote, the same shall be construed to mean two-thirds of all the members elect: *Provided,* That the first meeting of the members of the first council elect after the taking effect of this act shall be held on the first Thursday in January, 1892, at 7:30 P. M. R. S. 1894, § 3785.

See note, *ante*, § 114.

396. Presiding officers.—15. The council shall at its first meeting provided for in the last section choose from its number a presiding officer, and also a presiding officer *pro tem.*, who shall serve until noon of the first Thursday after the second Tuesday of October in the second succeeding year. R. S. 1894, § 3786.

397. Meetings public.—16. All meetings of the council shall be public. R. S. 1894, § 3787.

398. Clerk of council.—17. The city clerk shall be the clerk of the common council. It shall be his duty to keep the files and papers thereof, to make and keep an accurate minute and journal of the proceedings, enter the ayes and noes on the passage of every ordinance and resolution in full, and on all other votes whenever requested to do so by two members. R. S. 1894, § 3788.

See *post*, § 428.

Duties of clerk under general law of 1867, see *ante*, §§ 86, 87 and notes.

399. Ordinances—Passage—Signing.—18. All ordinances, orders, resolutions and motions for the government or regulation of such city, and all ordinances for the appropriation of money, shall originate in the common council. No appropriation shall be made for the payment of money, otherwise than by ordinance, specifying by items the amount thereof and the department for which such appropriation shall be made. The council may prescribe its own rules. No ordinance, order or resolution shall become law, or operative, until it has been passed, enrolled and attested by the clerk, and signed by the presiding officer thereof, and approved in writing by the mayor, or passed over his veto, as provided in the next section, and whenever the same may be necessary, promulgated according to law. R. S. 1894, § 3789.

See notes, *ante*, §§ 117, 117*a*, 118, 124 and notes.

400. When ordinances may be passed.—19. No ordinance shall be passed on the same day, or the same meeting, that it is introduced except by unanimous consent. R. S. 1894, § 3790.

401. Penal ordinances—Publication.—20. Every ordinance imposing a penalty or forfeiture for the violation thereof, shall, before the same shall take effect, be published once each week for two weeks

consecutively in some newspaper printed in the city: *Provided,* That in case of insurrection, riot, pestilence, conflagration or other public necessity requiring immediate operation of such ordinance, it shall take effect as soon as proclamation is made thereof by the mayor, and posted in five public places in each of the wards of such city: *Provided, further,* The common council shall have discretionary power to direct the publication of any ordinance in a daily newspaper, and the publication thereof for one day each in any two consecutive weeks in any daily paper shall be deemed sufficient to allow the same to take effect: *Provided,* That when no paper is published in such city, printed or written copies of such ordinance shall be posted up by the city clerk in at least five public places in each ward of such city for two weeks before the taking effect thereof: *Provided, further,* That whenever any city shall publish any of its ordinances in book or pamphlet form, such publication shall be of itself sufficient publication, and such ordinance or ordinances shall take effect two weeks from the date of publication appearing upon the said book or pamphlet. Any such publication in book or pamphlet form, if the same shall purport to be printed under the authority of the common council of such city, shall be presumptive evidence in all courts and places, of the ordinances therein contained and of the date of adoption, and that the same are properly signed, attested and recorded, and approved by the mayor. R. S. 1894, § 3791.

See notes, *ante,* §§ 82, 84, 117, 117*a*, 118, 124.

402. Approval of ordinances—Veto.—21. Every ordinance, order or resolution of the common council shall, immediately upon its enrollment, attestation and signature by the clerk and presiding officer thereof, be presented by the city clerk to the mayor, and a record of the time of such presentment kept by the clerk. If the mayor approves it he shall sign it, and it shall become a law. If he does not approve it he shall return it to the clerk, with his objections in writing, within ten days after receiving it, and the clerk shall present the same to the common council at its next meeting. It shall be the mayor's official duty to express, in writing, his approval or disapproval, as hereinbefore provided. If for any reason the mayor fails to discharge his duty within the time named, by approving or disapproving the same, in writing, the same shall be deemed equivalent to a disapproval, and in all cases of disapproval by the mayor the same shall not become a law unless the body in which the measure originated, within thirty days after the time named for the mayor's action, again pass the same by a two-thirds vote. R. S. 1894, § 3792.

403. Record of ordinances—Yeas and nays.—22. All ordinances shall, within a reasonable time after their approval by the mayor, or their passage over his veto, be recorded in a book kept for that purpose by the city clerk. Such record shall include the signature of the presiding officer, attestation of clerk, and the mayor's written approval or disapproval, and memorandum of its passage over his veto. Such

record or certified copy thereof shall be presumptive evidence of the going into effect of such ordinance. On the passage of any ordinance or resolution by the council, the yeas and nays shall be taken and entered in full on the journal. R. S. 1894, § 3793.

See notes, *ante*, §§ 117, 117*a*, 118, 124.

B. POWERS AND DUTIES.

404. Powers of common council.—23. The common council shall have power to enact ordinances for the following purposes: To provide a corporate seal, with appropriate device, for such city, to be affixed to all instruments or writings needing authentication. To fix the salaries or compensation of the various officers and employes of such city, except where a different provision is made in this act, upon this subject: *Provided*, That no member of the common council shall be allowed more than two hundred dollars for each year of his service as such member, nor shall any salary be changed after the election or appointment of a person to office, until his term expires or his office is vacated. To protect all city property, real and personal. To provide for the punishment of contempt and disorder in the rooms of the council and of the police court. To authorize a census of the city. To receive gifts, donations, bequests and public trusts, and to agree to conditions and terms accompanying the same and bind the corporation to carry them out.

Public Comfort and Health.

To declare what shall constitute a nuisance, to prevent the same, require its abatement, authorize the removal of the same by the proper officers, and provided for the punishment of the person or persons causing, continuing or suffering the same to exist, and to assess the expenses of its removal against such person or persons, and to provide for collecting such expenses either by placing the same on tax duplicate or by suit. To regulate or prohibit the use of hand-organs or instruments of any annoying character, or other music of itinerant performers, in the streets, alleys or public places of such city. To authorize the cleansing and purification of water and water-courses by the board of public works, to prevent encroachment or injury to the banks thereof, or the casting into the same of offal, dead animals, logs, rubbish, dirt or impure liquids of any kind whatever. For the purposes of this paragraph, jurisdiction is hereby conferred upon said city for ten miles from the corporate limits thereof. To regulate the location and management of starch factories, glue factories, renderies, tallow candleries, bone factories, soap factories, tanneries, slaughter-houses, breweries, distilleries, livery stables, foundries, and of all other establishments of which the business or trade may become noxious or injurious to public comfort or health; to prohibit the erection of such buildings or the continuance of such noxious or injurious occupations

therein whenever the public comfort or health requires it. For the purposes of this paragraph, such city is hereby given jurisdiction for four miles from the corporate limits thereof. To prevent or regulate the use of fire-arms, fire-works, bonfires or other things or practices tending to endanger persons or property. To regulate and prohibit the running at large of cattle, horses, swine, fowls, sheep, goats, dogs or other animals; to authorize the impounding, keeping, sale and redemption of such animals, when found in violation of the ordinances in such cases provided. To prevent the deposit of any unwholesome substance, either on private or public property, compel its removal to designated points, and to require slops, garbage, ashes, and other waste or unwholesome material to be removed to designated points, or to require the occupants of premises to place them conveniently for removal. For the purpose of this paragraph, jurisdiction is given such city four miles from the corporate limits. To compel the occupants of any premises, buildings or out-houses situated in said city, or within four miles of the corporate limits thereof, when the same has become filthy or unwholesome, to abate or cleanse the same, and to authorize the same to be done by the proper public officers, and to assess the expense thereof against such property. To regulate or prevent the storage of gunpowder, tar, pitch, resin, coal oil, benzine, turpentine, hemp, cotton, nitro-glycerine, dynamite, giant powder, petroleum, gasoline or gas, or any product thereof, or any other explosive or combustible material, or any material which may seem dangerous. To regulate the location and management of cemeteries or burial places within or without such city, and to protect the same and to provide for the sanctity of the dead; to regulate or prohibit the interment of bodies; to authorize the removal of bodies now or hereafter buried, or of cemeteries to some other proper place. For these purposes such city shall have jurisdiction for four miles from the city limits. To establish quarantine regulations. To authorize the removal or confinement of persons having infectious or pestilential diseases. For the purposes of this paragraph and the preceding paragraph, jurisdiction is given such city for four miles from its corporate limits. To regulate or prohibit the ringing of bells, crying of goods, or sounding of steam whistles. To direct the location and regulate the management of all public markets and market places, whether established by the city or by private individuals; to prevent the offenses of regrating and forestalling. To regulate and require reports and records of births and deaths, and to make such requirements as may be deemed necessary to prevent the spread of contagious or infectious diseases. To authorize and require the inspection and condemnation, if unwholesome, and to regulate the sale, of meats, poultry, fish, butter, oleomargerine, cheese, lard, vegetables, and all other food or provisions. To regulate the selling, weighing, measuring of hay, wood, coal, coke, and all other articles sold by weight or measure, and to require dealers to keep honest weights and measures, and to provide for their inspection and sealing. To authorize and require the inspection

and licensing of steam boilers and elevators, and to prohibit their use when unsafe or dangerous, or without license. To define fire limits in such city, and the character of buildings which are forbidden to be erected within such limits, and to prohibit the erection of buildings in such city without a license first obtained therefor, and to regulate the construction of buildings to prevent the spread of fire. To authorize and require the inspection of buildings and structures erected, or to be erected, or in process of erection. To authorize the license therefor to be revoked, and the condemnation thereof in whole or in part, when dangerous or insecure in the opinion of the department of public works, and to authorize the same to be taken down within a specified time by the owner thereof, or in default thereof to authorize the same to be taken down at the said owner's expense; or in case of an emergency, to authorize the same to be taken down by the department of public works, without delaying for the owner to do so. To compel persons about to undertake dangerous improvements to execute bond of sufficient sureties, conditioned that the owner or contractor will pay all damages which may be sustained by any person or property from such work. To make all regulations which may be deemed expedient for the promotion of health or suppression of disease. To regulate the construction of chimneys, smoke-stacks, hearths, ovens; the erection of stoves and stove-pipes, boilers and apparatus, used in buildings or other places, and cause the same to be removed or made secure when considered dangerous; to compel owners and occupants of houses and buildings to make scuttles in the roof thereof, with stairs or ladders leading to the same, and to compel the erection of fire escapes. To authorize and require the inspection of gas pipes, water pipes, plumbing, drainage, sewage and electric lines or wires on private property or elsewhere; to compel them to be repaired or made secure by the owner or occupant, and on failure of such owner or occupant to do so, to authorize or require the gas or electric current to be shut off from the same until such repairs are made. To regulate and prohibit the keeping of any lumber yard, and the placing or piling of any lumber, wood or other combustible material within the fire limits.

Streets.

To prevent immoderate or careless driving or riding. To regulate the use of streets and alleys by vehicles, and designate the kind of conveyances and vehicles which may not use designated streets, which have been improved, together with hours for the use of such streets by certain specified classes of vehicles. To prevent the incumbering of streets, alleys, squares, sidewalks and crossings with vehicles, horses, or any substance or material interfering with the free use of the same. To regulate the speed of horses, wheeled vehicles, cars and locomotives. To regulate and protect all bridges, culverts, tunnels, viaducts, aqueducts, sewers, canals and hydrants wholly or partly in said city, and to prohibit digging in such streets, alleys or public places, or in

any way injuring, disturbing or making holes in the surface thereof. To regulate the use of sidewalks and all structures in, under or over the same, and to require the owner or occupant of premises to keep the sidewalks in front of the same free from snow and other obstructions, and prescribe hours for cleaning the same. To regulate and prevent the throwing or depositing of sweepings, dust, ashes, offal, dirt, garbage, paper, hand-bills, dirty liquids or any other material into any street, alley or public place. To regulate and prevent the use of streets, sidewalks and public places for signs, sign posts, awnings, awning posts, poles, horse troughs, steps, railings, entrances, racks, posting hand-bills and advertisements, and display of goods, wares and merchandise. To regulate and prohibit the exhibition or carrying of banners, placards, advertisements, or hand-bills on the streets, alleys, or public places. To regulate and prevent the flying of flags, banners, or signs across the streets or from houses. To regulate the numbering of houses and lots, and compel owners to renumber the same, or in default thereof to authorize and require the same to be done by the department of public works at the owner's expense, such expense to constitute a lien upon the property, and enforceable as provided in the ordinance. To regulate or change the name of streets and parks. To regulate the making of private connection with sewer, gas and water pipes, and to compel owners of property to bring such connections inside of the curb of streets before permanent improvement thereof, and in default of the owners making such connections, to authorize the city to do so at the owner's expense. And to make such expense a lien on the property and collectible in the same manner that expenses for sprinkling streets are collectible.

Occupations.

To regulate and license the use of coaches, hacks, drays and all other vehicles for the transportation of passengers, freight or other articles to or from points within said city, for hire or pay. To regulate, license, tax, restrain or prohibit theatrical and all other exhibitions, shows or entertainments for which money is demanded or received: *Provided,* That lectures on scientific, historic, benevolent, artistic, religious or literary subjects, and apparatus for the elucidation of the same, and specimens of fine art, shall not be deemed to be within this provision. To license, tax, regulate or prohibit runners at railroad stations and other places for stages, cars, public houses or other things or persons. To regulate the sale of all kinds of property at auction in the streets, stores, shops or elsewhere in the city, and to license auctioneers. To license, tax, regulate and prohibit the supply, distribution and consumption of artificial and natural gas, of water and of electricity, and to fix the prices thereof. To license, tax, regulate, suppress and prohibit hawkers and itinerant dealers, peddlers and pawnbrokers, and to revoke such license at pleasure. To license, tax and regulate public hackmen, draymen, omnibus drivers, carters, cabmen, porters, ex-

pressmen, bill-posters and all other persons pursuing like occupations, and to prescribe their compensation. To license, tax, regulate or prohibit all inns, taverns, hotels, restaurants or other places used or kept for public entertainment. To license, tax and regulate the selling or giving away of any spirituous, vinous or malt liquors; and to tax, license and regulate places where such liquors, or either of them, are manufactured or stored, or where such liquors, or either of them, are to be used on the premises where given away, sold, stored or manufactured; but such license shall not exceed the amount provided by the laws of this state for other cities thereof. For the purposes of this section, jurisdiction is given such city for four miles from its corporate limits. To tax, license and regulate distilleries and breweries, and the depots or agencies established in said city of all breweries and distilleries. To regulate and license lumber yards, livery stables and public scales. To tax, license and regulate second-hand and junk stores, and to forbid their purchasing or receiving from minors any article whatever, without the consent of their parents or guardians. To license, tax, regulate and prohibit the keeping or harboring of dogs. To license, tax, regulate and prohibit dairies and the keeping of milch cows. To license, tax and regulate wheeled vehicles, provided that the funds derived therefrom shall be applied only to the maintenance and repair of streets and alleys. To license, tax and regulate branch stores or establishments, and all other concerns established in said city for temporary business only.

Morals.

To preserve peace and good order, prevent vice and immorality, quiet riots and dispel disorderly assemblages. To suppress gaming and gaming-houses and places and houses of ill fame or assignation, or houses kept for any immoral purposes; to prohibit and destroy any instruments and devices of gaming, and to restrain fraudulent practices. To license, tax, regulate, restrain or prohibit all tables, alleys, machines, devices or places of any kind for sports or games. To regulate the time and place of bathing in the rivers or public waters of such city; to direct the location and management of public bathhouses, to license the same or to require the same to be closed, if deemed expedient. To restrain and punish vagrants, mendicants, street beggars, common prostitutes and their associates, thieves and criminals, or persons known or reputed to be such. For the purposes of the last five paragraphs, such city is given jurisdiction for four miles from the limits thereof. To prohibit cruelty to animals.

Drainage.

To keep open rivers, streams or water ways, prevent the waters thereof from pollution; jurisdiction for these purposes being given such city for ten miles from its corporate limits. To provide for

change in the course of streams, rivers or water ways, passing through or bordering upon the corporate limits thereof, and to authorize the exercise of the power of eminent domain, either within or without such city, for the purpose of securing a new course for such stream, river or water way. To provide on what terms real estate in such city may be drained by means of surface or under-drains, over and across other real estate therein, or within four miles thereof.

Railroads.

To secure the safety of citizens and others, in the running of trains, in or through such city; to require persons or corporations, owning or operating railroads, to fence their respective railroads, to construct cattle-guards, street crossings, and viaducts, and public roads, and to keep the same in repair and safe condition for persons on foot, in vehicles, or otherwise; to keep flagmen at railroad crossings, and provide protection against injury to persons or property from the operation of said railroads. To authorize and require railroad companies to change the location, grade and crossings of their respective railroads; to compel them to raise or lower their railroad tracks to conform to any grade which may be established by such ordinance; to compel persons or companies owning or operating railroads to construct bridges, viaducts or tunnels, and approaches thereto, across their respective railroads or rights of way, at street or alley crossings; to compel railroad companies to make and keep open and in repair ditches, drains, sewers and culverts, along and under their respective tracks. To require railroad corporations, or persons owning or operating railroads to keep gutters and street crossings clean along their right of way. To prohibit the laying of any railroad track across any street or alley or public place, without permission first obtained therefor from the department of public works, and to provide for the taking up and removing any track so laid, without notice, and charge the expense thereof against the offending person or corporation. To require any person or company, owning or operating any railroad, to take up and change the location of any railroad track or switch heretofore or hereafter laid within the limits of said city.

Public Enterprises.

To regulate and protect, except as otherwise herein provided, fire engines, hose, hook and ladders and all other property or apparatus belonging to or used by the police or fire department; and to prevent interference with the members of the police or fire departments while on duty. To authorize the closing of any street, alley or public place, or part thereof, whenever the public safety may require. To authorize the alienation and conveyance of any property, real or personal, belonging to such city: *Provided,* That no such property shall be sold

until the same has been appraised by three disinterested freeholders of such city, appointed by the judge of the circuit court, in the county where such city is located, neither of said appraisers to be officers or employes of such city, and their sworn valuation in writing returned to the mayor. No sale or conveyance shall be made for a less sum than such appraisement, and in the case of real estate, only by a two-thirds vote of the common council. To regulate pounds, market houses, market places, houses of refuge, pest houses, hospitals, dispensaries, engine houses and all other public city institutions.

Miscellaneous.

To regulate the building of party walls and partition fences, prescribe in what proportion adjoining owners shall bear the expense of the same, in what manner such expense shall be levied and collected and to define the terms upon which partition walls already established may be used by adjoining owners. To carry out the objects of the corporation, not hereinbefore particularly specified: *Provided*, That such ordinances are not inconsistent with the laws of the state. Where jurisdiction is given by this act to such city beyond its corporate limits, the same shall not extend to any point within the corporate limits of any other municipal corporation, except in matters relating to public health and pollution of water-courses. R. S. 1894, § 3794.

Powers of common council.—See *ante*, § 124, notes.

Municipal powers—Mode of exercise—Municipal contracts—Municipal property, etc.—See *ante*, § 124, notes.

Legislative and ministerial powers—Police power.—See *ante*, § 124, note.

Actions—Statute of limitations, etc.—See *ante*, § 124, note.

Ordinances—Enactment, amendment, repeal, validity, invalidity and construction of, etc.—See *ante*, §§ 117, 117*a*, 118, 124, notes.

Resolution and rules of council.—See *ante*, §§ 116–124, notes.

Special subjects—Powers of council to legislate concerning.—For special subjects under the general law over which council has power to legislate, and the decisions of the courts relating thereto, see *ante*, § 124, notes.

Nuisance.—Where a common council is empowered to declare what shall constitute a nuisance, and to require its abatement and to assess the expenses of its removal against the person causing the same or suffering it to exist, the council can not declare that to be a nuisance which in fact is not. City of Evansville v. Miller, 146 Ind. 613; Bank v. Sarlls, 129 Ind. 201; Baumgartner v. Hasty, 100 Ind. 575.

Nuisance—Power of council to declare.—An ordinance which provides, "that any building, shed, out-house or structure of any kind that shall be partially destroyed by fire, or from any other cause, and shall be suffered by the owner thereof to remain in such condition after being notified by the department of public works to remove, repair or rebuild the same, shall constitute a nuisance," is as to such provisions void. City of Evansville v. Miller, 146 Ind. 613.

Police power—Public welfare—Delegation of police powers.—It is within the general power of a government to preserve and promote the public welfare, even at the expense of private rights. The state may delegate to a municipal corporation authority to enact ordinances to preserve the public health. Walker v. Jameson, 140 Ind. 591.

Power to declare a nuisance—Doubtful instances.—A municipal corporation has no power to treat a thing as a nuisance which can not be a nuisance; but it has the power

to treat as a nuisance a thing which, from its character, location and surroundings, may, or does, become such. In doubtful instances, where a thing may or may not be a nuisance, depending upon a variety of circumstances requiring judgment and discretion on the part of the municipal authorities in the exercise of their legislative functions, under a general delegation of power their action declaring a certain thing a nuisance is conclusive of the question and binding on the courts. Walker v. Jameson, 140 Ind. 591.

Police power—Delegation—Exercise—Discretion.—The state may delegate to a municipal corporation authority to enact ordinances to preserve the public health. It rests solely with the legislative discretion, inside the limits fixed by the constitution, to determine when public safety or welfare requires the exercise of the police power. If power be conferred on a municipal corporation by law of the state, and such law does not prescribe the mode of performing the act, the corporate authorities are necessarily clothed with a reasonable discretion to determine the manner in which the act shall be performed; and all reasonable methods of exercising such power are permissible. Walker v. Jameson, 140 Ind. 591.

Garbage ordinance—Cost of hauling.—An ordinance prohibiting owners or tenants of premises from hauling away garbage from their premises, requiring them to be put in receptacles convenient for removal by a public contractor, requiring such owners or tenants to pay a certain specified amount per pound, but not prohibiting their destruction of such garbage on the premises, is valid under and authorized by the provisions of this section. The cost of removal of such garbage is not an assessment upon the premises from which it is removed. Walker v. Jameson, 140 Ind. 591.

Slaughter-houses—Ordinance.—An ordinance prohibiting the maintenance of any slaughter-house within the city, when authorized by statute, can not be defeated by the courts on the ground that it is unreasonable. The necessity or expediency prohibiting slaughter-houses in a city is implied from an ordinance making the prohibition, without any provision for investigation into the character or condition of the slaughter-houses. Beiling v. City of Evansville, 144 Ind. 644; Rund v. Town of Fowler, 142 Ind. 214.

Street—Safety of—Personal injury—Owner of fee—Negligence.—Neither the city nor the owner of a fee in a street guarantees the absolute safety of the sidewalk; and negligence is essential to the liability of the owner for an injury received upon such walk. Gaston v. Bailey, 14 App. 581.

In order to charge the owner of the fee in a street in front of his premises with negligence, because of the defective fastening of the cover of a coal hole in the sidewalk, it must appear that he made the hole and placed the cover in the sidewalk, or, if made and placed there by others without his authority or acquiescence, that he assumed control thereover. Gaston v. Bailey, 14 App. 581.

License ordinance—Language construed.—An ordinance requiring a license fee of "every person or persons, firm, corporation or company carrying on a distilling or brewing business * * * and of all breweries and distilleries," applies to every establishment, and exacts a separate fee for each one. City of Indianapolis v. Bieler, 138 Ind. 30.

License fee—Discretionary with city authorities.—The power granted by this section, "to tax, license and regulate distilleries and breweries, etc.," is a police power, and an ordinance enacted thereunder imposing a license fee is an exercise of police power in restraint of a harmful occupation, and the fee to be required is subject to the discretion of the city authorities. City of Indianapolis v. Bieler, 138 Ind. 30.

Occupations—Breweries, etc.—License—Discrimination.—An ordinance of the city of Indianapolis licensing breweries, distilleries, and their depots and agencies established in the city, but excepting from its operation residents of the city doing a wholesale business in bottling beer, is, as to the exception sought to be made, void for discrimination. City of Indianapolis v. Bieler, 138 Ind. 30.

Ordinance void in part and valid in part.—Where the part of an ordinance which is void for discrimination can be struck out, leaving the remainder complete in itself, sensible and capable of being exercised against all alike, the latter will stand. City of Indianapolis v. Bieler, 138 Ind. 30.

Viaducts—Bridges—Grade crossings, etc.—The legislature may delegate to municipal corporations the power to require railroads to construct viaducts, bridges, tunnels, etc., and to change grades, etc. Chicago, etc., R. Co. v. Nebraska, 170 U. S. 57; New York, etc., R. Co. v. Bristol, 151 U. S. 556; Wabash R. Co. v. Defiance, 167 U. S. 88; State v. Missouri, etc., R. Co., 33 Kan. 176.

C. MISCELLANEOUS.

405. Penalties—Limit.—24. In every ordinance which the common council shall pass, there may be imposed a penalty for the violation or non-performance thereof. This penalty may be either a forfeiture of money, or a fine or imprisonment, or both of the last two: *Provided*, That no penalty or fine shall exceed five hundred dollars ($500), and no imprisonment shall exceed six months for one offense. R. S. 1894, § 3795.

See notes, *ante*, §§ 118, 211, *post*, §§ 1237, 1383.

406. Imprisonment for not paying fines.—25. The city council shall have power to provide by ordinance for the imprisonment of any person against whom a penalty, fine or cost for violation of any penal ordinance shall have been adjudged, until such fine, penalty and costs are fully paid or replevied; also, to compel the enforcement of manual labor by such defendant, and by persons sentenced to imprisonment, by the use of sufficient force and means. R. S. 1894, § 3796.

Penalty—Not a debt.—A penalty is not a debt in the sense of the constitution. See *ante*, § 12, note.

407. Duties of departments.—26. Whenever any executive or administrative function shall be required to be performed by any ordinance or resolution of such common council, the same shall be performed by the proper executive department, and not by said council. No new department shall be created. Said ordinance shall designate the department which is to perform the duties thereunder; but if such designation is not made, either by statute or ordinance or resolution, the mayor shall assign such duties to the proper department. The council shall not elect or appoint any person to any office or employment whatever. R. S. 1894, § 3797.

Board of examiners—Civil service.—The creating of a board of examiners by the heads of departments, for ascertaining the comparative fitness of applicants for position or promotion, is not the creation of an independent executive or administrative department. Newcomb v. City of Indianapolis, 141 Ind. 451.

D. INVESTIGATION AND IMPEACHMENT.

408. Charges against officers—Trial.—27. The common council

shall have power to supervise and investigate all departments, officers and employes of the government of such city, and to examine into any charges preferred against the same, and into the affairs of any corporation, department or board in which the city may be interested, or with which it may have entered into a contract, or may be about so to do. It shall have power of access to all records thereto pertaining, and power to compel the attendance of witnesses, and the production of books, papers and other evidence, at any meeting of the body, or any committee thereof, and for that purpose may issue subpenas and attachments in any case of inquiry, investigation or impeachment, and cause the same to be served and executed in any part of the county where such city is located. If any witness shall refuse to testify as to any fact within his knowledge, or to produce any books or papers within his possession, or under his control, required to be used as evidence in any such case, the clerk of the body by whose authority such witness was subpenaed, if so directed by the body or committee holding the investigation, shall forthwith report the facts relating to such refusal to the circuit or superior court in such county, or the judge thereof, and all questions arising upon such refusal, and also upon any new evidence not included in such first report (which new evidence may be offered either in behalf or against such witness), shall at once be heard by such court or judge. If the court or judge determine that the testimony or evidence required by such witness is competent and relevant, and material, and ought to be given or produced by the witness, the court or judge shall make an order requiring the witness to testify, or to produce books and papers, or both. In case of a refusal to comply with such order, the court or judge shall have power to commit the witness or otherwise punish him for contempt, as provided for in the laws governing contempt of court in this state. No witness shall be excused from testifying in any criminal proceeding, or in any investigation or inquiry before the council, or any committee thereof, or any officer of the city having the right to conduct the investigation, touching his knowledge of any offense committed against the provisions of this act, or of any ordinance passed in pursuance thereof, or continued in force by this act. But such testimony shall not be used against him in any criminal prosecution whatever. R. S. 1894, § 3798.

See notes, *ante*, § 119.

409. Trial of charges—Vote to remove.—28. Whenever any written charges shall have been adopted by the council or any committee thereof, against any officer, employe or department of the corporation, except members of the council, the same shall be heard by the council, under such regulations as may be prescribed by ordinance. It shall require a two-thirds vote to impeach or remove an officer or employe. R. S. 1894, § 3799.

E. FINANCIAL.

410. Taxes—Levy.—29. The common council shall have power to order and direct the levy of an annual tax not exceeding the rate of ninety cents upon every one hundred dollars ($100) of valuation for any one year, as shown by the tax duplicate for the current year, to manage the finances of the city, subject, however, to the powers and duties herein prescribed in respect to the several executive departments created by this act. The assessment of property and collection of taxes shall be made as now provided by law: *Provided*, That all real estate, within the limits of such city, not exempt from taxation by the laws of this state, shall be assessed at its fair cash value, without discrimination in the valuation of lands used for agricultural purposes within the limits of such city. [As amended, Acts 1893, p. 56. In force February 22, 1893.] R. S. 1894, § 3800.

See Taxation, R. S. 1894, chap. 108 (§ 8408, *et seq.*), and Burns' Supp. 1897, chap. 108 (§ 8411, *et seq.*); and Acts 1899, pp. 422, 430, 497, 516; and notes, *ante*, § 212, *et seq.*

Assessments for public improvements—City property.—A municipal corporation is liable for its proportion of the cost of local improvements assessed against it even though the statute exempts public property from taxation. Warner v. City of New Orleans, 87 Fed. Rep. 829.

411. Loans.—30. The common council shall have power to borrow money to an amount not exceeding two per cent. (2 per cent.) of the taxable property of such city, as the same may appear on the tax duplicate of such city for the year in which such loan shall be effected: *Provided*, That the entire money borrowed shall not at any time exceed two per cent. (2 per cent.) of the taxable property of such city. Such loans may be made only for the purpose of procuring money to be used in the legitimate exercise of the corporate powers of such city, and for the payment of legitimate corporate debts. R. S. 1894, § 3801.

See constitutional limitation, *ante*, § 39, and notes, and notes, *ante*, § 143.

Ordinance should state purpose of loan.—When the city proposes to borrow money the ordinance should state the purpose of the loan, in order that it may appear that the money procured is to be used in the legitimate exercise of corporate powers, or for the payment of legitimate corporate debts. Coffin v. City of Indianapolis, 59 Fed. Rep. 221.

412. Bonds—Issue and sale.—31. Such ordinance for loans may authorize the issue of bonds or other city obligation, negotiable or not bearing interest at a rate not exceeding six per cent., and running not to exceed thirty years. Such ordinances shall provide for the time and manner of advertising the sale of such bonds or other securities, and of the receipt of bids for the same, together with the mode and terms of sale. All duties with regard to the preparation, advertisement, negotiation and sale of such bonds or other securities shall be performed by the head of the department of finance. Said officer, after causing such bonds to be properly executed, shall deliver the same to the city treasurer, taking his receipt therefor, and upon the

conclusion of the contract for the sale of such bonds or other securities shall certify to the treasurer the amount which the purchaser is to pay for the same, together with the name of the purchaser. And thereupon it shall be the duty of the treasurer to receive from the purchaser the amount so certified by the head of the department of finance, and to deliver the bonds or other securities to the purchaser, taking his receipt therefor. The treasurer and the head of the department of finance shall thereupon each make a report of his proceedings to the mayor. R. S. 1894, § 3802.

413. Temporary loans.—32. Temporary loans may be authorized by ordinance of the common council in anticipation of the revenue of the city for the current and following year, and payable within that period, but the aggregate amount of such temporary loan in any fiscal year shall not exceed the amount of the city tax levy for the same year. No temporary or other loan upon the revenue of any current or succeeding year shall be made until all temporary loans upon the revenue of any preceding year shall have been fully paid. R. S. 1894, § 3803.

414. Refunding bonds.—33. The common council shall have power to authorize the issue and sale of refunding bonds, in order to raise money to take up any outstanding bonds of such city, or to exchange with the holders of such outstanding bonds. The same shall be governed by the provisions of the second preceding section, so far as the same are applicable. R. S. 1894, § 3804.

Refunding bonds, see *ante*, §§ 39, 143, 144, 157, *post*, §§ 1001–1003, 1005, and notes.

Refunding bonds.—Under this section refunding bonds can not be issued to raise money to replace in the treasury money theretofore used in the payment of bonds. Coffin v. City of Indianapolis, 59 Fed. Rep. 221.

Under the terms of this statute refunding bonds are of two sorts: First, those which are issued and sold to raise money to take up outstanding bonds of the city; or, second, those which are issued by the city to the holders of its outstanding bonds in exchange therefor. Refunding bonds can not lawfully be issued for any other purpose. Coffin v. City of Indianapolis, 59 Fed. Rep. 221.

Where an ordinance provided for the issue and sale of $64,000 of refunding bonds in one series, and $21,000 of the bonds were not refunding bonds, the whole proposed issue was void, and one who had bid for the whole series and to whom the same had been awarded was not bound to accept them or any part of them. Coffin v. City of Indianapolis, 59 Fed. Rep. 221.

415. Warrants on treasurer—When prohibited.—34. No order or warrant shall be drawn against the funds of such city, in the hands of the treasurer, or other officer, unless an appropriation has been made by ordinance of money for such purpose which is not exhausted, or unless the same shall be for a salary fixed by statute or ordinance, or for payment of any judgment, which such city is compelled to pay. R. S. 1894, § 3805.

416. Interest on loans—Redemption.—35. All bonds or other city securities offered for sale, pursuant to the provisions of this act, may bear annual interest not exceeding six per cent. (6 per cent.), may

run not longer than thirty years, and may contain an option allowing such city to redeem the same at earlier specified dates, in whole or in part, if so directed in the ordinance authorizing such issue. R. S. 1894, § 3806.

417. Failure to levy tax—Appropriations.—36. If the common council for any year shall fail to pass ordinances fixing the annual tax levy and appropriating money for the various executive departments by or before the first day of October in any year, then and in that case the appropriations made for such department, or departments for the preceding year shall be deemed to be continued and renewed for the current year, and the tax levy for the preceding year continued. R. S. 1894, § 3807.

F. ANNEXATION.

418. Corporate boundaries—Annexation of lands.—37. The common council shall have power, by ordinance, to declare and define the entire corporate boundaries of such city, and such ordinance, properly certified, shall be conclusive evidence, in any court or proceeding, of the boundaries of such city, except as provided in the next section. Such ordinance defining the entire city boundary may include contiguous territory, whether platted or not, not previously annexed (and such annexation shall be binding, unless such newly annexed territory shall be within the limits of another town or city, in which case there may be an appeal, as hereinafter provided). Said common council may also, by separate ordinance, not purporting to define the entire boundaries of such city, annex contiguous territory, whether platted or not, to such city, and a certified copy of such ordinance shall be conclusive evidence in any proceeding that the territory therein described was properly annexed and constitutes a part of such city, except as provided in the next section. Immediately after the passage of every such ordinance as is provided for in this section, the same shall be published for at least two consecutive weeks in a daily newspaper of general circulation published in such city. R. S. 1894, § 3808.

See chapter 1, article 6, Annexation of Territory, *ante* §§ 253–255 and notes, and chapter 6, article 2, Annexation—Boundaries, *post* §§ 1017–1048, and notes.

Township school property—Annexation of—Title to—Liability.—The annexation to a city of territory which contains a school house and lot belonging to the school township from which the territory is taken, gives no right of action to such township against the school corporation of the city for the value of the property, or for any part of the unpaid indebtedness of the township for the purchase of the lot, or the erection of the house, and under the act of March 3, 1893, the title to the school property embraced in the annexed territory vests in the school corporation of the city to which the territory is annexed. Said statute is not invalid as destructive or interfering with vested rights, as the township holds the title only as trustee, and the state may change the trustee. Board, etc., v. Center Township, 143 Ind. 391.

419. Appeal from annexation proceedings—Trial—Judgment.—38. Whenever such territory is annexed to such city as provided in

the foregoing section, whether by general ordinance defining the city boundaries, or by special ordinance for the purpose of annexing territory, and such territory so sought to be annexed is unplatted ground, or lies within the corporate limits of any other town or city, an appeal may be taken from such annexation by one or more persons deeming him or themselves aggrieved, or injuriously affected, filing their remonstrance in writing against such annexation, together with a copy of such ordinance in the circuit or superior courts of the county where such territory is situated within ten days after the last publication provided for in the preceding section; such written remonstrance or complaint shall state the reason why such annexation ought not in justice take place. Notice of such proceedings by way of summons shall be served upon the proper officer of the city seeking to make annexation, and such city shall become defendant in such cause, and shall be required to appear and answer as in other cases. The court shall thereupon proceed to hear and determine such appeal without the intervention of a jury, and shall give judgment upon the question of such annexation according to the evidence which either party may introduce relevant to the issue. If the court should be satisfied upon the hearing that less than 75 per cent. of the persons owning property in the territory sought to be annexed, if such territory is unplatted ground, or that less than two-thirds of the qualified voters of the town or city sought to be annexed, if such territory lies within the corporate limits of any other town or city, have remonstrated and that the adding of such territory to the city will be for its interest and will cause no manifest injury to the persons owning property in the territory sought to be annexed, he shall so find and said annexation shall take place. If the court shall be satisfied that 75 per cent. or more of the persons owning property in the territory sought to be annexed, if such territory is unplatted ground, or that two-thirds or more of the qualified voters of the town or city sought to be annexed, if such territory lies within the corporate limits of any other town or city, have remonstrated, then such annexation shall not take place, unless the court shall find from the evidence that the prosperity of such city and territory will be materially retarded and the safety of the inhabitants and property thereof endangered without such annexation. In case the court shall so find, the annexation shall take place, notwithstanding the remonstrance. Such decision shall be final, and no appeal shall lie therefrom, nor shall the laws touching change of venue from the county apply. But changes of venue from the judge may be had as in other cases. Costs shall follow judgment. Pending such appeal, and during the time within which such appeal may be taken, such territory sought to be annexed shall not be deemed a part of the annexing city. Upon the determination of such appeal, the judgment shall particularly describe the ordinance upon which the appeal is based, and it shall be the duty of the county clerk to forthwith deliver a certified copy of such judgment to the clerk of such city, who shall record the same in the ordinance record, and make a

cross reference to the page thereof upon the margin where such original ordinance was recorded. In case the decision is adverse to such annexation, no further annexation proceedings for such territory shall be lawful for two years after the rendition of such judgment: *Provided,* That in case any incorporated town or city shall be located within the corporate limits of such other city and not annexed as contemplated in this act, such incorporated town or city so located as aforesaid, shall not be entitled to have or receive from such incorporated city within which it is located, any fire or police protection, until such minor town or city shall first have entered into a contract or agreement with the city within which it is located, binding such minor corporation to pay a reasonable compensation to be agreed upon mutually by such corporate authorities. The same regulation shall apply to sweeping, cleaning and sprinkling service, and to sewer privileges: *Provided,* That if the corporate authorities of such municipalities can not mutually agree as to the compensation to be paid for such services and privileges by such minor town or city, either of such municipal corporations may by petition present the matter to the judge of the circuit [court] of the county in which such municipalities are located, who shall cause such other town or city to be notified of such petition, and require the same to answer thereto, and shall have jurisdiction on such applications to hear and determine such matter and determine and fix such reasonable compensation, and his adjudication shall be final. The cost of such proceedings shall be paid by the municipality making such application. [As amended, Acts 1899, p. 451. In force March 4, 1899.]

Note—Acts and proceedings of the departments and officers of the city of Indianapolis, under §§ 38, 40, 45, 56, 60, 61, 73, 77, 82, 89, 90, 91, 97, 100, 110, 114, and supplemental § 136 of this act, as the same were attempted to be amended and enacted by act of 1895 (Burns' Supp. 1897, § 3809, *et seq.*), were legalized and validated by act of 1899 (Acts 1899, p. 449).

Appeal—Provisions constitutional.—Under this section prior to its amendment by act of 1895, it was provided that, "an appeal may be taken from such annexation by one or more resident freeholders in the territory sought to be annexed, etc."; this provision as to appeal was not in conflict with § 23, article 1, of the State Constitution as denying equal privileges or immunities to land-owners not resident in the territory sought to be annexed. And said provision is not in conflict with the fourteenth amendment of the federal constitution, as authorizing the taking of property without due process of law, or in denying equal protection of the law. Taggart v. Claypool, 145 Ind. 590.

Same—Railroad.—Under said section, prior to its amendment in 1895, said provision as to the right of appeal confined the right of appeal to those persons who were citizens and freeholders of the territory sought to be annexed, and a railroad company which owned property in the territory sought to be annexed, and maintained the office of the master mechanic of said company and the shops for the construction and repair of the cars, etc., in such territory, and had also an office and place of business in the city to which the territory was sought to be annexed, was not a resident freeholder in the territory sought to be annexed within the intent of the statute, and was not entitled to an appeal. Pittsburgh, etc., R. Co. v. City of Indianapolis, 147 Ind. 292.

420. Parts of city or town not to be annexed—Debts.—39. No

such annexation shall be made, under the foregoing sections, of a part of the territory of any other incorporated town or city, but only of the whole corporate territory thereof. In case of such annexation, the two corporations shall be deemed to be consolidated, and the consolidated corporation shall be bound for all the debts and liabilities, and shall be the owner of all corporate property, franchises and rights of every nature, of both of such municipal corporations. R. S. 1894, § 3810.

421. Disannexing territory.—40. The common council shall have power by ordinance to disannex and throw out any territory forming a part of the corporate limits of such city upon a petition of a majority of the owners of real estate therein, but such disannexation shall not relieve such territory from the payment of any municipal assessments for which such real estate may have become liable. [As amended, Acts 1899, p. 451. In force March 4, 1899.]

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EXECUTIVE.

422. Vesting of executive authority.—41. The executive and administrative authority of such city shall be vested in a mayor, city clerk, the departments hereinafter created, or referred to, and such other officers as may hereafter be appointed by virtue of this act. R. S. 1894, § 3812.

For powers and duties of executive and administrative officers under the general law of 1867, see *ante*, § 59, *et seq.*, and notes.

423. Mayor and clerk—Election—Qualifications.—42. There shall

be chosen at each general election, hereinbefore provided for, by the voters of said city, a mayor and a city clerk, each of whose terms of office shall commence at 12 o'clock, noon, on the Thursday next after their election, and shall continue two years, or until his respective successor is elected and qualified, except as herein otherwise provided. No person shall be qualified for the office of mayor who has not been a citizen and resident of such city for three years previous to his election, and who is not at least twenty-five (25) years of age. R. S. 1894, § 3813.

424. Vacancy in office of mayor—Election.—43. In case of a vacancy occurring in the office of mayor, from death, resignation or otherwise, more than six (6) months before a general election shall occur, it shall be the duty of the acting mayor to take official notice thereof, and within ten (10) days thereafter issue his proclamation calling for a special election by the voters of such city, at a date therein named, not later than forty (40) days, nor earlier than twenty-five (25) days after the issuance of such proclamation, to fill such vacancy or vacancies. Such special election shall be governed by the laws and regulations governing general elections. R. S. 1894, § 3814.

425. Acting mayor.—44. In case of a vacancy in the office of mayor from death, resignation or otherwise, or in case of disability on the part of the mayor to perform the duties of his office, the city comptroller shall perform the duties of acting mayor and be entitled to his salary for the time being: *Provided*, That during the time of performing such duties of acting mayor he shall not perform any duties as comptroller. R. S. 1894, § 3815.

426. Duties of mayor.—45. It shall be the duty of the mayor: To cause the ordinances of the city and the laws of the state to be executed and enforced. To communicate to the council at least once a year a statement of the finances and general conditions of city affairs, and also such information in relation to the same as he may be called upon to furnish from time to time. To make such recommendations in writing, by message to the council, as he may deem expedient. To call special meetings of the council when the same shall be expedient. To perform such duties of an executive or administrative character as may be prescribed by law, and he shall be responsible for the good order and efficient government of the city. To fill by appointment vacancies for unexpired terms in the offices of city clerk and police judge. To appoint the heads of departments as hereinafter created, who shall hold office until their successors are appointed and qualified: *Provided*, That the mayor may at any time suspend or remove from office any or all of such persons whether appointed by him or his predecessors, by notifying them to that effect and sending a message to the council stating in writing his reasons for such removal. To sign all bonds, deeds and written contracts of the corporation, and all licenses issued pursuant to law by any department. He shall upon reasonable notice of not less than three days, to the person complained of, hear any complaint against any person to whom license has been

issued, and may issue subpenas and compel the attendance of witnesses to testify on such hearing; may administer oaths to such witnesses, and require them to testify. The rules of practice and procedure in force in trials in the police court of such city, so far as applicable, including right to appear by counsel and to compel the attendance of witnesses for person complained against, shall apply to such proceedings before the mayor. Upon the hearing, if the mayor shall find that the person complained of has willfully violated any of the terms and conditions of his license, or has willfully done, authorized or permitted to be done any act in violation of the law or the ordinances of such city relating to the business or place of business licensed, he shall revoke or suspend such license. He shall file a copy of his findings and determination with the city comptroller within twenty-four hours after it is made. To approve or disapprove, in writing, within ten (10) days after receiving the same, every ordinance or resolution of the council, and he shall transmit to the body in which the same originated within such time, a message, announcing such approval or veto. In case of a veto, he shall state in writing his reasons therefor, and such resolutions or ordinance shall not become operative unless the same is passed over such veto, by a two-thirds vote of the common council: *Provided*, That in ordinances appropriating money or levying a tax or taxes, the mayor may approve or disapprove of the separate items of such appropriation or levy. In case of disapproval of any item or items, and approval of the remainder of the ordinance, so much of the same as is approved shall be law, and operative, and those items which are disapproved shall not become law and operative unless passed over his veto by a two-thirds vote as above provided. To call together the heads of departments, except of assessment and collection, for consultation and advice upon the affairs of the city at least once a month, and to call on the heads of all departments for reports from the same, which it shall be their duty to prepare and submit in writing. Records shall be kept of such meetings above provided for, and rules and regulations shall be adopted thereat for the administration of the affairs of the city departments, not inconsistent with any law or ordinance, which regulations shall prescribe a common and systematic method of ascertaining the comparative fitness of applicants for office, position and promotion, and of selecting, appointing and promoting those found to be best fitted, except the department of public safety, without regard to political opinions or services. To appoint, as often as he thinks proper, three competent persons to examine without notice, the accounts of any department, officer or employe, and the money, securities and property of the city in their possession or charge, and report the result of such investigation. [As amended, Acts 1899, p. 451. In force March 4, 1899.]

Powers and duties of mayor under general law of 1867. See *ante*, § 80 and notes.

Note.—Acts and proceedings of the departments and officers of the city of Indianapolis, under §§ 38, 40, 45, 56, 60, 61, 73, 77, 82, 89, 90, 91, 97, 100, 110, 114, and supple-

mental § 136 of this act, as the same were attempted to be amended and enacted by act of 1895 (Burns' Supp. 1897, § 3089, *et seq.*), were legalized and validated by act of 1899 (Acts 1899, p. 449).

Power to adopt civil service rules—Examining board.—This statute confers authority to adopt rules and regulations, and to create a board of examiners as a means of ascertaining the comparative fitness of applicants for office, position and promotion, and of selecting, appointing and promoting those found to be best fitted, except in the department of public safety, without regard to political opinions or service. Newcomb v. City of Indianapolis, 141 Ind. 451.

Authority of heads of departments—Discretion—Non-interference by courts.—It was clearly the legislative intent that the governing body, composed of the heads of the several departments, vested with the right or power to adopt rules and regulations and create a board of examiners as a means of ascertaining the comparative fitness of applicants for office, etc., should be clothed with a reasonable discretion as to the medium, agency or means to be employed to give effect to the provisions of the law, and that discretion will not be interfered with or called in question by the courts, except where the power is exceeded or fraud imputed or shown, or in case there is manifest invasion of private rights. Newcomb v. City of Indianapolis, 141 Ind. 451.

The creating of a board of examiners by the heads of departments, which is but a medium or agency by which the comparative fitness of applicants for position or promotion might be ascertained, was not an attempt to establish an independent executive or administrative department in violation of the prohibition in § 48 of this statute. Newcomb v. City of Indianapolis, 141 Ind. 451.

427. Salary of mayor.—46. The mayor of such city shall be paid an annual salary of four thousand dollars, which may be increased by ordinance to any amount not exceeding five thousand dollars. R. S. 1894, § 3817.

428. Clerk—Duties—Salary.—47. The clerk of such city shall be the clerk of the common council and may appoint one or more deputies at his own expense to assist him. He shall keep the records of the proceedings of said body. Said city clerk shall have charge of all the papers relating to the business of said common council, shall prepare and keep an ordinance book, as elsewhere provided in this act, shall have charge of all documents and books, the keeping of which may be intrusted to him by statute or ordinance, shall keep the city seal, and shall perform all other duties prescribed by law or incident to his office. He shall receive a salary of three thousand dollars ($3,000) per year for all such services, and shall not receive any other compensation, fee or perquisite, except for furnishing certified copies of the records in his possession, which shall be received as evidence in any proceeding, and for which the said clerk shall receive like fees as paid to the county clerks for similar services. Said city clerk shall also be the clerk of the police court. Said clerk shall deliver over to his successor, as soon as the same shall have qualified for office, all documents, books and belongings of his office. The city clerk may be authorized by the common council to employ a deputy at a salary not to exceed twelve hundred ($1,200) dollars per year: *Provided*, That

it is shown to the satisfaction of the council that such clerk is necessary. R. S. 1894, § 3818.

See *ante*, § 398.

Duties of clerk under general law 1867, see *ante*, §§ 86, 87, and notes.

DEPARTMENTS.

429. Departments established—Rules.—48. The following executive departments are hereby established in such city:

a. Department of finance.
b. Department of law.
c. Department of public works.
d. Department of public safety.
e. Department of assessment and collection.
f. Department of public health and charities.

No other executive or administrative departments shall be established in such city. Subordinate officers and employes not herein provided for shall be appointed by the heads of their respective departments. Each department shall have power to prescribe rules and regulations not inconsistent with any statute or ordinance, or regulation established pursuant to section 45 of this act, for its own government, regulating the conduct of its officers, clerks and employes, the distribution and performance of its business, and preservation of books, records, paper and property under its control. Each department shall promptly furnish to the mayor or the common council any information which may be called for in relation to its affairs. The heads of said departments, except the department of assessment and collection, shall be appointed by the mayor. Each of said departments shall have power to designate and appoint, and at pleasure remove, a person in such department as deputy or first assistant. All official business of the several departments shall be transacted at the offices thereof, and a continuous record or minute shall be kept at said offices respectively of such business. The officer or officers at the head of any department may appoint and remove any of his or their clerks and assistants, subject to any regulations adopted pursuant to section 45 of this act, and, unless otherwise fixed by ordinance, may fix their salaries: *Provided*, That after the expiration of thirty (30) days from the time when a new officer or officers shall have been appointed to the head of a department, he or they may remove clerks or assistants only upon filing in writing with the city clerk the reasons for any such removal, except that foremen, inspectors and laborers temporarily employed under the department of public works may be removed at any time at the pleasure of the department. All officers shall give bond as required by ordinance, except when otherwise provided herein. R. S. 1894, § 3819.

Examining board—Civil service agency.—The creating of a board of examiners by the heads of departments, under § 45 of this act, as a medium or agency by which the comparative fitness of applicants for position or promotion might be ascertained, is not

the establishment of an independent executive or administrative department, in violation of the prohibition of this section. Newcomb v. City of Indianapolis, 141 Ind. 451.

430. Qualifications of members of departments—Fees, how applied.—49. No person shall be appointed as the head of any department, or as a member of any board herein provided for, unless he shall have been a resident and elector of such city for three years immediately prior thereto. No person who is paid a salary for his services from the city treasury shall receive to or for his own use, directly or indirectly, any fees, perquisites of office, commissions, percentages, or money paid to him in his official capacity, unless specifically authorized in this act; but all fees, perquisites, commissions, percentages, and moneys so paid and received by or for any such officer or person shall be the property of the city, and shall be paid by him into the city treasury; and all moneys received for licenses or permits shall be paid into the treasury weekly without deduction by the officer or department receiving them, and every such officer or person who shall receive any fees, perquisites, percentages, or other moneys which belong to the city, and should be so paid into its treasury, shall, before he shall be entitled to receive or be paid his salary, make, under oath, a detailed statement and return to the head of the department of finance in such form as he may prescribe, showing the aggregate amount of all such moneys received by him since the last preceding statement and return, and shall produce a receipt showing the payment of such sum to the treasurer. The comptroller may require any such officer or person to make such statement and return to him, if it be not made as herein provided, and examine such officer or person under oath touching the matter herein provided for. R. S. 1894, § 3820.

431. Estimates of expenditures—Appropriations.—50. It shall be the duty of each executive department, before the commencement of each fiscal year, to submit to the joint meeting of the heads of the departments and of the various boards hereinbefore provided for in section 45, an estimate of the amount of money required by their respective departments for the ensuing fiscal year, stating with as great particularity as possible each item thereof. The comptroller shall at the same time submit a statement or estimate of city expenditures for other purposes, for the ensuing year, over and above the moneys proposed to be used by the various executive departments, giving with as great particularity as possible each item thereof. After such meeting, and reports and consultation, the city comptroller shall thereupon proceed to revise such estimates for the ensuing year, and the comptroller shall then prepare a report to the mayor of the various estimated amounts required in said comptroller's opinion for each executive department, and for other city expenses, together with an estimate of the necessary per cent. of taxes to be levied. The mayor shall at the next meeting of the common council present such report with such recommendations as he may see fit. It shall be the duty of the committee of finance of

said common council thereupon to prepare an ordinance fixing the rate of taxation for the ensuing year, and also an ordinance making appropriations by items for the use of the various executive departments and other city purposes for the ensuing year. Said ordinance may reduce any estimated item for any executive department, from the figure submitted in the report of the city comptroller, but shall not increase the same unless recommended by the mayor. Such appropriation ordinance shall thereafter be promptly acted upon by the common council. If at any time after the passage of such ordinance an emergency shall arise for further appropriations for the use of any department as certified by such department as hereinbefore provided, or other purposes during the year, such additional appropriation may be made on the recommendation of the comptroller by a two-thirds vote of the council. R. S. 1894, § 3821.

Appropriation for entertainment of Grand Army—Private subscriptions—Unexpended balance.—Having been invested with special authority by the legislature, the common council of the city of Indianapolis appropriated $75,000 out of the treasury of the city for the purpose of defraying the legitimate expense in the preparation for the reception and entertainment of the twenty-seventh national encampment of the Grand Army of the Republic. The ordinance appropriating the money created an "encampment committee," the members of which were vested with the power of disbursing the funds appropriated. Before the said ordinance was passed, the president and secretary of the Commercial Club, an incorporated body, the primary object of which is to promote the business and commercial interests of the city, appeared before the finance committee of the common council, and represented that it would be impossible to secure private subscriptions in a sufficient sum, and stated that if the appropriation was made by the city, that such appropriation should only be drawn upon to make up any deficiency after the private subscriptions, of which the Commercial Club had charge, were entirely exhausted, and that any unexpended balance of the fund appropriated by the city should be turned into the city treasury. Of the $75,000 appropriated, the "encampment committee" appointed by the city turned over $35,000 to the citizens' executive board upon an order signed by the chairman to the effect that it would be paid out for legitimate expenses only, and any unexpended balance remaining should be turned back into the city treasury. The citizens' executive board also had charge of, but kept in a separate account, the funds collected by the Commercial Club. After the encampment had been held, there remained a balance of $584.75 belonging to the city's account, which, with some money belonging to the executive board, was turned over to the city treasurer. Under the facts the city had no claim to any unexpended balance of funds which had been collected by the Commercial Club. Lilly v. City of Indianapolis, 149 Ind. 648.

432. Contracts limited to appropriations.—51. No executive department, officer or employe thereof, shall have power to bind such city by any contract, agreement, or in any other way, to any extent beyond the amount of money at the time already appropriated by ordinance for the purpose of such department, and all contracts and agreements, express or implied, and all obligations of any and every sort, beyond such existing appropriations, are declared to be absolutely void. R. S. 1894, § 3822.

Void contract—Street lights.—Under this section a contract for street lights for five

years, made by the executive department of public works, when no appropriation for the purpose had been made, except for a month or two in advance, is void. City of Indianapolis v. Wann, etc., 144 Ind. 175.

Ratification.—Subsequent appropriations for installments coming due on a contract made by city authorities in violation of a statute prohibiting contracts for which appropriations had not already been made, can not operate as a ratification of the contract so as to make it binding. City of Indianapolis v. Wann, etc., 144 Ind. 175.

When the method of making the contract is prescribed, and the terms in which the method is prescribed may be deemed directory, failure to follow the method prescribed will not always avoid the contract, nor will it be so void that it can not be ratified. But where the terms prescribed are mandatory or prohibitory, and much more when a violation of the terms is made an offense against the state (see next succeeding section), a contract in contravention of the statute is a dead thing, incapable of having life breathed into it, utterly void and incapable of ratification. City of Indianapolis v. Wann, 144 Ind. 175, 178; City of Superior v. Norton, 63 Fed. Rep. 357; Milford v. Milford, etc., Co., 124 Pa. St. 610, 611; Trainer v. Wolfe, 140 Pa. St. 279; Tax-payers v. Plattsburg, 50 N. Y. Supp. 356; Merrill v. Monticello, 138 U. S. 673, 693, 694; Union School Tp. v. First National Bank, 102 Ind. 464; City of Superior v. Norton, 63 Fed. Rep. 357; 15 Am. & Eng. Enc., 1102, 1103, n. 1 and cases; 1 Dillon, §§ 447, 448, 457, and notes. See Hill v. City of Indianapolis, 92 Fed. Rep. 467.

433. Issuing warrants beyond appropriations—Penalty.—52. Any city official who shall issue any bond, certificate or warrant for the payment of money which shall purport to be an obligation of such city, and be beyond the unexpended balance of any appropriation made for such purpose, or who shall attempt to bind such city by any contract, agreement, or in any other way, to any extent beyond the amount of money at the time already appropriated by ordinance for such purpose, and remaining at the time unexpended, shall be liable on his official bond to any person injured thereby, and shall be fined in any sum not more than one thousand dollars ($1,000), and imprisoned in the county jail not more than six months, either, or both. R. S. 1894, § 3823.

A. DEPARTMENT OF FINANCE.

434. Comptroller—Appointment—Salary.—53. The city comptroller shall be at the head of the department of finance, and shall have an appropriate seal. He shall be appointed by the mayor. His salary shall be two thousand dollars ($2,000), which may be increased by ordinance to a sum not exceeding three thousand dollars ($3,000) per year. R. S. 1894, § 3824.

435. Duties of comptroller.—54. It shall be the duty of the comptroller: To prescribe the form of reports and accounts to be rendered to his department, and to have the inspection and revision of the accounts of all other departments and trusts. To audit the accounts of the several departments and trusts, and all other accounts in which the city is concerned, and submit annually to the council at the end of each fiscal year a report of the accounts of the city, under his oath, exhibiting the revenues, receipts and expenditures, the sources from

which the revenues and funds are derived; which report shall be published in pamphlet form. To keep separate accounts for each specific item or appropriation made by the council to each department, and require all warrants to state specifically against which of said items the warrant is drawn. Each account shall be accompanied by a statement in detail in separate columns of the several appropriations, the amount drawn on each appropriation, the unpaid contracts charged against it, and the balance standing to the credit of the same. He shall not suffer any appropriation to be overdrawn or the appropriation for one item of expense to be drawn upon for any other purpose, or by any department other than that for which the appropriation was specifically made, except on transfers authorized by ordinances. He shall sign and issue all orders for money upon the city treasury, and no moneys shall be paid out by the treasurer except upon such order. In case of stated salaries fixed by law or ordinance, said comptroller shall issue orders therefor, but in all other cases he shall require a warrant to be presented to him from the head of the department under whose supervision the obligation has been incurred, or if not so incurred, then such warrant shall be drawn by the mayor. In no case shall the comptroller draw an order on the treasury unless there be at the time money in the treasury properly applicable to the payment thereof. The expenditures of the comptroller must be approved in writing by the mayor before any order is drawn therefor. To have charge of all books or papers pertaining to his department or entrusted to the same, and to turn the same over to his successor. If any warrant presented to the comptroller contain an item for which no appropriation has been made, or there shall not be a sufficient balance of the proper fund for the payment thereof, or which for any other cause should not be approved, he shall not approve the same, and shall notify the proper department of the facts. And if the comptroller shall approve any warrant contrary to the provisions hereof, he shall be individually liable for the amount of the same to the holder thereof, and to the extent of his bond; his sureties shall also be liable. Whenever a warrant shall be presented to him, he shall have power to require evidence that the amount claimed is justly due, and for that purpose may summon before him any officer, agent, or employe of any department of the city, or any other person and examine him upon oath relative to such warrant or claim. Such persons so summoned shall be subject to the provisions of this act, touching the examination of persons by the council, said comptroller having the same power as such body. To perform the duties elsewhere defined by this act with regard to the negotiation and sale of city securities, and to keep a register of all bonds of the city and of the transfers thereof and an account of all outstanding securities. To manage and direct the finances and accounts of the city, and to make investments of city funds, subject to the ordinances of the common council. To issue all city licenses of every nature whatever upon the presentation and surrender of the receipt of the treas-

urer showing the payment of the license fee and to collect comptroller's fees as fixed by ordinance. Said comptroller shall once each week pay to the treasurer the amounts collected by his department for the preceding week, specifying the source from which they have been derived, and the comptroller shall relinquish, in writing, to such city all fees which have been or may be collected. To prescribe the forms and methods of keeping and rendering all city accounts, the form of accounts and pay-rolls to be used in the several departments and offices, the manner in which all salaries shall be drawn, and the mode by which all creditors, officers and employes shall be paid. All salaries shall be payable once in three months. To furnish the treasurer statements of all appropriations made by the council before any warrant shall be drawn on account of the same, and to notify the mayor in case of any neglect or failure on the part of any officer or officers authorized to collect any moneys for or on account of the city, in the performance of such duty or in depositing their collections in the treasury; and thereupon the mayor shall suspend such officer or officers, and proceed against them by an action upon their official bond or otherwise, as he may deem best. To carefully examine tax duplicates in the hands of the county auditor and county treasurer, and see that they are properly made out so far as the same relate to city taxes, and to see that the assessment of property is properly made out by the assessor so far as the same relates to city taxes, and to notify the treasurer of any omitted property that may come to his knowledge. To examine the accounts of the treasurer and make an annual settlement with him, charging to such treasurer the amount of all taxes and other assessments, entered on said duplicate, in favor of such city, together with all penalties, interest and other sums in addition to the amount of such tax, which it may be the duty, according to law, of such treasurer to collect in behalf of the city, and to credit him with all disbursements made on account of lawful orders drawn on him by such comptroller. To draw orders on the treasury for miscellaneous city expenditures, not made under the direction of any executive department, nor specifically fixed by law as in the case of salaries: *Provided*, That no such order shall be drawn by such comptroller, unless the money properly applicable thereto has been appropriated by ordinance, and remains unexpended, and no liability shall accrue against such city, nor can any officer, agent or employe of such city bind the same directly or indirectly for any such miscellaneous expense without the written approval of the comptroller previously obtained and filed in the comptroller's office, nor in any case beyond the appropriation already made and remaining unexpended available for such purpose. All obligations in contravention of the preceding provision are declared to be void for all purposes. R. S. 1894, § 3825.

436. Deputy comptroller—Appointment—Salary—Powers.—55. The comptroller may appoint a deputy for whose acts he shall be responsible, having an annual salary of one thousand dollars, which may be increased by ordinance to a sum not exceeding twelve hun-

dred dollars ($1,200). The comptroller and deputy shall have power to administer oaths in connection with all matters relating to said office, for which no charge shall be made. [As amended, Acts 1893, p. 56. In force February 22, 1893.] R. S. 1894, § 3826.

B. DEPARTMENT OF LAW.

437. City attorney—Assistants—Appointment—Duties—Salaries.—56. The head of the department of law shall be the attorney and counsel of such city; he shall be appointed by the mayor; shall hold office as hereinbefore provided, and give bond with surety in the sum of five thousand dollars ($5,000.00); to be approved by the comptroller. He shall have the management, charge and control of the law business of such city, and for each branch of its government, and prosecute all violators of city ordinances; shall be the legal adviser of all its departments and officers, shall draw up ordinances, leases, deeds, contracts or other legal papers for such city and its various departments when requested to do so by the proper officer; shall be the custodian of the papers properly appertaining to his office, and shall turn the same over to his successor in office. He shall conduct all legal proceedings authorized by this act, and all appeals of every nature whatsoever in which such city or the public shall have an interest, shall make all searches and abstracts of title required in opening, widening or changing any street, alley or public place, or required in any public work of any kind. He shall receive an annual salary of four thousand dollars ($4,000.00) in full for all his services, but which may be increased by ordinance to any amount not exceeding five thousand dollars ($5,000.00).

All fees, perquisites or other emoluments received by him or payable to him, except for prosecuting violators of city ordinances, shall be collected by him for and in behalf of such city, a careful account kept thereof, and the same paid into the city treasury once a week, said payment to be made under oath as to the amount received. Such attorney shall use all diligence to collect costs due such city, and all other fees or recoveries falling within the purview of his official duties. He shall appoint an assistant city attorney who shall receive an annual salary to be fixed by ordinance not exceeding twenty-five hundred dollars ($2,500), and also a second assistant who shall receive an annual salary to be fixed by ordinance not exceeding fifteen hundred dollars ($1,500), and also such other assistants as he may be authorized to do by ordinance and no other, and shall promptly commence all proceedings necessary or advisable for the protection or enforcement of the rights of such city or of the public. He shall report to the mayor in writing all such matters as he may deem important, and to the department of finance all judgments for which such city shall be liable. No judgment against such city shall be enforcible except out of moneys appropriated for that purpose, but the common council and mayor may be compelled by mandamus proceedings to

levy, collect and appropriate the necessary sum for the payment of any judgment, in which case such legislative bodies may be sued collectively by their legal names, service of process being had on any member thereof, and all members shall be bound by such judgment. In all actions in which such city is entitled to pray an appeal, the same shall be granted as to such city without bond. No proceedings shall be had to enforce any judgment against such city pending an appeal therefrom. [As amended, Acts 1899, p. 451. In force March 4, 1899.]

Powers and duties of city attorney.—Appointment, removal, etc., under general law of 1867, see *ante*, §§ 59, 59*a*, 96 and notes.

Note.—Acts and proceedings of the departments and officers of the city of Indianapolis, under §§ 38, 40, 45, 56, 60, 61, 73, 77, 82, 89, 90, 91, 97, 100, 110, 114, and supplemental § 136 of this act, as the same were attempted to be amended and enacted by act of 1895 (Burns' Supp. 1897, § 3809, *et seq.*), were legalized and validated by act of 1899 (Acts 1899, p. 449).

Authority of city attorney.—A city attorney who is charged by statute with the duty to prosecute and defend all suits for and against the city, in several controversies involving the same issues, may bind the city by an agreement that all the controversies shall abide the result of one test case. Bank of Commerce v. City of Louisville, 88 Fed. Rep. 398.

C. DEPARTMENT OF PUBLIC WORKS.

438. Board of public works—Appointment—Salaries—Bonds.—57. The department of public works shall have for its head a board of three members, to be appointed by the mayor, not more than two of whom shall be of the same political party. The mayor shall have the power at any time to remove any member of said board and to fill, by appointment, any vacancy occurring in said office. The person appointed to fill a vacancy shall hold the office, subject to removal by the mayor, until his successor is appointed by the mayor. Each member of said board shall receive a salary at the rate of fifteen hundred dollars ($1,500) per year, which may be increased by ordinance to a rate not exceeding two thousand dollars ($2,000), and give bonds with sureties in the sum of $5,000, to be approved by the comptroller. Said board shall choose a chairman from its own number. No member of said board shall have any authority to act on behalf of the same, except pursuant to an order of the board, regularly made at a meeting of the same, at which meeting a majority of the board shall have been present. All actions of the board shall be recorded by the clerk thereof, together with a record of the vote of each member, where the vote is not unanimous. The board shall make rules governing the time and place for holding regular and called meetings, and for giving notice thereof. R. S. 1894, § 3828.

Board of public works—Rules.—In an action to enforce a sewer assessment lien, it is not necessary to allege the proper appointment or qualifications of the board of public works, or the adoption of rules for the conduct of their business and notice thereof, as required by this section. Spades v. Phillips, 9 App. 487.

439. Clerk of board—Salary—Civil engineer—Appointment—Salary.—58. Said board shall appoint a clerk at a salary of one thousand dollars per annum, which may be increased by the council to a sum not to exceed fifteen hundred dollars per annum. The mayor shall also appoint a city civil engineer, who shall be subject to the discretion of said board, and receive a salary of twenty-five hundred dollars per annum, which may be increased by the council to a sum not to exceed thirty-five hundred dollars per annum. [As amended, Acts 1899, p. 556. In force March 6, 1899.]

Powers and duties of city engineer under general law of 1867, see *ante*, § 91, and notes; and Hirth v. City of Indianapolis, 18 App. 673.

440. Powers of board.—59. The board of public works shall have power to condemn, hire or purchase any real estate or personal property needed by such city for any public purpose, except when a different provision for purchase is made by this act: *Provided,* That when a sum of more than two thousand dollars ($2,000) is required to be paid for the condemnation, hire or purchase of any real estate or personal property, the same shall not take place unless the condemnation, hire or purchase is specifically authorized by ordinance. To have charge of all property, real and personal, belonging to such city, and to care for the same, except where the custody of such property is by this act placed under different control. To design, order, contract for, and execute the improvement or repair of any property, real or personal, belonging to or used by such city, and the erection of all buildings for public purposes, together with all fire cisterns, pounds and all other structures of any nature, needed for any public purpose. To approve the platting of all streets and alleys in any addition to such city, or within the corporate limits thereof; to require the same to correspond in width, and be co-terminus with adjoining streets and alleys. No plat shall be entitled to record in the recorder's office in the county in which such city is located without such written approval endorsed thereon. To lay out, open, change, vacate, and to fix or change the grade of any street, alley, or public place within such city, and to design, order, contract for, and execute the improvement or repair of any street, alley or public place within such city. To repair, clean, light and sprinkle any street, alley or public place within such city which requires the same, in the opinion of such board, said work to be done either by contract or otherwise, and to cause lamp posts or other lighting apparatus to be erected in the streets, alleys or public places of such city. To lay out, design, order, contract for and execute the construction, alteration and maintenance of all public drains or sewers within such city, and all drains or sewers without such city and within four miles thereof, which may be necessary to carry off the drainage of such city. To purchase or erect, by contract or otherwise, and operate water-works, gas works, electric light works, street car and other lines for the conveyance of passengers and freight, natural gas lines, telegraph and telephone lines, steam and power-

houses and lines, for the purpose of supplying such city and the suburbs thereof, or to purchase or hold a majority of the stock in corporations organized for either of the above purposes: *Provided*, That none of the powers conferred by this paragraph shall be exercised except pursuant to an ordinance specifically directing the same. To contract for the furnishing of gas, either natural or artificial, water, steam or electricity, light or power, to said city or the citizens thereof, by any company or individual, and in such contract to fix the prices to be charged for the same in such city, subject to ordinances of such city in relation to consumption by private consumers. To design, order, contract for and execute the erection of any culvert, bridge, way, viaduct, tunnel or aqueduct within such city, or to enter into a contract with any company or individual for the joint erection and maintenance by such company or individual and such city, of any such structure. To authorize and empower by contract, telegraph, telephone, electric light, gas, water, steam or street car or railroad companies to use any street, alley or public place in such city, and to erect necessary structures therein, and to prescribe the terms and conditions of such use, to fix by contract the prices to be charged to patrons: *Provided*, That such contract shall in all cases be submitted by said board to the council of such city, and approved by them by ordinance before the same shall take effect. To license the digging of any hole, or the removal of any material from the surface, or underneath the surface, of any street, alley or public place in such city; to require bonds for damages and for the proper replacement of the street, and to refuse any licenses when the public interest requires it. To direct the removal of any or all structures in the streets, alleys or public places of such city, and to remove the same at the expense of the persons maintaining the same on their failure to make such removal. To design, order, contract for and execute the erection of any levee within the limits of such city, or within four miles thereof. To change any water-course, natural or artificial, within such city, or within four miles thereof. To remove all dead animals, garbage, filth, ashes, dirt, rubbish or other offal from such city, either by contract or otherwise. To prepare a general uniform plan for the drainage and sewerage of such city, and extend the same from time to time. To make and keep a map and record of all sewer, gas, water, electric wire conduits in such city, public and private, showing the size, depth, inclination, location and date of construction of the same, and to record therein every change which may be made in the same, together with all new connections and improvements. To discharge all other duties of an executive character not falling within the sphere of some other executive department, or imposed upon this department by ordinance. To fill up or drain any section of ground within such city, or within four miles from its corporate limits, whenever water has or may become so stagnant or noxious as to be injurious to the public health and comfort, at the owner's expense, the same to be a lien and collectible by foreclosure: *Provided*, That not to exceed ten (10) per cent. of the value of such lot

or land, as valued and assessed upon the tax duplicate for city purposes, shall be expended in filling up or draining the same in any one year. To construct urinals and fountains in public places. To fix, establish, change and keep a record of the grades of all streets, alleys and sidewalks. R. S. 1894, § 3830.

Power over streets, alleys and bridges—Duties—Liabilities—Obstructions—Negligence—Actions—Damages.—See *ante*, § 218 and notes.

Plats—Dedication of streets—Prescription, etc.—See *ante*, § 218 and notes.

Opening and vacation of streets—Eminent domain, etc.—See *ante*, § 218 and notes.

Improvement of streets—Fixing and changing grade.—See *ante*, §§ 91, 218, 219, *post*, §§ 1107–1135 and notes.

Sewers—Drains, etc.—See *ante*, § 124, clauses 26 and 43 and notes, and §§ 127 and 183 and notes; also, *post*, § 1090, *et seq.*, and notes.

Corporations occupying streets under municipal franchises—Duties and liabilities, etc.—See *ante*, § 218 and notes.

Water-works—Contracts, ordinances, etc.—See *ante*, § 124, clause 26 and note, and clause 43 and notes, and § 138, *et seq.*; *post*, §§ 1061–1089, and 1372, *et seq.*

Public lights—Gas and electricity.—See *ante*, § 124, clause 28 and notes, and *post*, § 1136, *et seq.* and notes; also, *post*, §§ 1360, 1371, *et seq.*

Railroads—Occupation of streets, etc.—See *ante*, § 218 and notes, and *post*, § 1316, *et seq.* and notes.

Street car companies—Occupation of streets, etc.—See *ante*, § 218 and notes, and *post*, § 1332 and notes.

Telegraph and telephone companies.—See *ante*, §§ 1 and 4 and notes, and § 218 and notes; and as to telephone companies, *post*, § 1380 and notes.

Municipal property—Purchase—Sale—Control of, etc.—See *ante*, § 124 and notes.

Streets—Regulation of use—Market wagon—License—Non-resident—Reasonableness of toll.—A non-resident of a city may be lawfully compelled to pay a license for driving a market wagon upon its streets, when no discrimination is made against him on account of his non-residence. The fact that some revenue arises to a city from fees collected from licenses for the use of streets by vehicles, and that it is applied to the repair of the streets, does not render a license of three dollars per year for a one-horse market wagon, unreasonable. Tomlinson v. City of Indianapolis, 144 Ind. 142.

The power to license, and to exact a reasonable license fee, for the use of streets and alleys by vehicles, is within the power of a municipality, under a statute giving power to regulate such use. The police power and not the taxing power is exercised in licensing the use of vehicles on streets, and the license fee in such case is a toll for the use of the streets, and not a tax on personal property. Tomlinson v. City of Indianapolis, 144 Ind. 142.

Town plat—Indianapolis—Streets, etc.—The statute of 1831, entitled "an act to authorize the agent of state for the town of Indianapolis, to lay off the lands belonging to the state" etc., is a public act; and it is therefore no objection to the admission, as evidence, of the plat of that town, executed, etc., as the said act prescribes, that the act is not pleaded. The above named statute, by causing the survey, etc., of the town of Indianapolis to be made and declaring the map of the same to be a public record, constitutes, of itself, the streets and alleys in the town to be highways. West v. Blake, 4 Blackf. 235.

Fixing and changing grade of street, etc.—City not liable.—The act of March 6, 1891, commonly designated as the charter of the city of Indianapolis, repeals § 3508, R. S. 1894, as to cities of more than one hundred thousand population, and provides for no liability for damages for changing the grade of a street after it has once been established, nor does it make it obligatory upon the city to have such damages assessed and tendered. Hirth v. City of Indianapolis, 18 App. 673.

Statute construed—Street railway companies.—This act practically established a new system, and vested the whole power of the legislature over street railway companies in the board of public works, subject to the approval of the common council; but such act should not be construed retrospectively or to affect contracts entered into prior to its passage. City Railway Co. v. Citizens' R. Co., 166 U. S. 557.

Removal of garbage—Cost.—This section confers on the board of public works power to fix the price for the removal of garbage. Walker v. Jameson, 140 Ind. 591.

441. Work, how to be done.—60. It shall be the duty of said board of public works whenever any work or improvement of any character ordered or undertaken by it, is payable out of the general treasury of such city from funds belonging to such city, or payable in whole or in part by assessments made for that purpose upon the property benefited thereby, to cause said work to be done either by independent contract or by employes of said board as said board may deem best: *Provided*, That in cases where such work is done by independent contract, such contract shall provide and stipulate under proper penalty that such contractor shall give residents of said city and county wherein it is located the preference as employes. [As amended, Acts 1899, p. 451. In force March 4, 1899.]

442. Drawings for work—Notice of letting—Collusion.—61. Whenever said board shall order any work to be done, which either by order of said board or according to law, it is to be performed by independent contract, said board shall prepare and place on file in the office of said department complete drawings and specifications of said works. Thereupon said board shall cause a notice to be published in one daily or weekly newspaper of general circulation, published in such city, once each week for two weeks, informing the public and contractors of the general nature of the work and of the fact that the drawings and specifications are on file in such office and calling for sealed proposals for such work by a day not earlier than ten (10) days after the first of said publications. Said board shall require each bidder or firm of bidders to file with said board an affidavit that such bidder or bidders have not directly or indirectly entered into any combination, collusion, undertaking or agreement with any other bidder or bidders to maintain the price of any work or contract or to prevent any other bidder or bidders from bidding or to induce any bidder or bidders to refrain from bidding on any contract or work, and that such bid is made without regard or reference to any other bid or bids, and without any agreement, understanding, or combination, either directly or indirectly, with any other person or persons with reference to such bidding in any way or manner whatever, and if after any contract has been let by said board it shall be made to appear to said board that the successful bidder has been guilty of any collusion, combination, understanding or agreement, as defined in said affidavit, such bidder shall forfeit said contract and such work shall be relet by said board. The board may in its discretion fix a later day for receiving such sealed proposals, provided such date shall be mentioned in each of such notices. Said board shall, if a satisfac-

tory bid be received, let such contract to the lowest and best bidder. Such board may by order impose further conditions upon bidders with regard to bond and surety guaranteeing the good faith and responsibility of such bidders or insuring the faithful completion of such work according to contract or for keeping the same in repair for any length of time, or for any other purpose. [As amended, Acts 1899, p. 451. In force March 4, 1899.]

Acts and proceedings of the departments and officers of the city of Indianapolis, under §§ 38, 40, 45, 56, 60, 61, 73, 77, 82, 89, 90, 91, 97, 100, 110, 114, and supplemental §136 of this act, as the same were attempted to be amended and enacted by act of 1895 (Burns' Supp. 1897, § 3809, *et seq.*), were legalized and validated by act of 1899 (Acts 1899, p. 449).

443. Expenses, how paid.—62. All the expenses incurred or authorized by such board of public works shall be payable out of the general funds of such city appropriated to the use of such board and available for the particular purpose, except where this act specifically directs that the same is to be paid for by assessments against property holders. R. S. 1894, § 3833.

Condemnation.

444. Condemnation of property.—63. Whenever the board of public works shall desire to appropriate or condemn, for the use of such city, any property, real or personal, or to open, change, lay out or vacate any street, alley or public place within such city, including proposed street or alley crossings of railways in cases where the proposed street or alley is to cross a railway, it shall adopt a resolution to that effect, describing the property which may be injuriously or beneficially affected, and shall cause notice of such resolution to be published in some daily newspaper of general circulation in such city once each week for two weeks. Such notice shall name a date, after the last day of publication, at which such board will receive or hear remonstrances from persons interested in or affected thereby. Said board shall consider such remonstrances, if any, and thereupon take final action, confirming, modifying or rescinding their original resolution. Such action shall be final and conclusive upon all persons. R. S. 1894, § 3834.

For decisions on eminent domain, opening and vacation of streets, etc., under the general law of 1867, see *ante*, § 218, *et seq.*, and § 224, *et seq.* and notes. See, also, constitutional law, *ante*, §§ 4 and 11 and notes.

445. List of owners of property taken.—64. Upon the final order being made, as provided in the preceding section, said board shall cause to be prepared a list or roll of all the owners or holders of property and of valuable interests therein, sought to be taken or to be injuriously affected, and in the case of opening, laying out, change or vacation of any street, alley or public place in such city, or within four miles thereof, a list of the owners or holders of property, or of

valuable interests therein to be beneficially affected by such work. Such list shall not be confined to the owners of property along the line of proposed work, but shall extend to and include all property taken, benefited or injuriously affected. In addition to such list of names, the same shall show, with reasonable certainty, a description of such property to be taken or affected, either beneficially or injuriously, belonging to such persons. No greater certainty in names or descriptions shall be necessary to the validity of any assessment than is required in the assessment of taxes. R. S. 1894, § 3835.

446. Assessment of damages and benefits.—65. Upon the completion of such list, said board shall proceed to award the damages sustained and to assess the benefits accruing to each piece of property on said list. When such assessments or awards are completed, said board shall cause a written notice to be served upon the owner of each piece of property, showing the amount of such assessment or award, by leaving a copy of the same at his last usual place of residence, in such city, or by delivering a copy to such owner personally. If such person be a non-resident, or his residence shall be unknown, then he shall be notified by publication in some daily newspaper of general circulation in such city once each week for three successive weeks. Such notices shall also name a day, not earlier than ten (10) days after service of notice or after the last publication, as the case may be, on which said board shall receive or hear remonstrances from persons with regard to the amount of their respective awards or assessments. Persons not included in such list of assessments or awards, and claiming to be entitled to the same, shall be deemed to have been notified of the pendency of the proceedings by the original notice of the resolution of the board. R. S. 1894, § 3836.

Statute construed—Notice—Street improvements.—The provisions of this section relating to notice in condemnation proceedings do not apply to notice in street improvement proceedings. Spades v. Phillips, 9 App. 487.

447. Minors and insane persons.—66. In case any person having any interest in land affected by such proceedings shall be of unsound mind or an infant, said board of public works shall certify the same to the city attorney, and said city attorney shall forthwith apply to the proper court and secure the appointment of a guardian for such infant or person of unsound mind; and thereupon said board shall give notice to such guardian, who shall thereupon appear and protect the interest of his ward: *Provided*, that if such infant or person of unsound mind already have a guardian, such notice may be served on such guardian. The requisites of notice to such guardians shall be the same as in the case of other notices. If there be a defect in the proceedings with respect to one or more interested persons, the same shall not affect such proceedings except so far as it may touch the interest or property of such person or persons, and shall not avail any other person concerned therein. In case of such defect, supplementary proceedings of the same general character as those heretofore prescribed may be had in order to supply the same. R. S. 1894, § 3837.

448. Remonstrance—Appeal.—67. Any person notified, or deemed to be notified, under the preceding sections, may appear before such board on the day fixed for hearing such remonstrances with regard to awards and assessments, and remonstrate against the same. After such remonstrances shall have been received, said board shall thereupon either sustain or modify the awards or assessments in the cases of such remonstrances, but in no other case. Any person thus remonstrating who is aggrieved by the decision of the board, may, within twenty days (20) thereafter, take an appeal to the circuit or superior court in the county in which said city is located. Such appeal shall only affect the assessment or award of the person appealing. R. S. 1894, § 3838.

449. Appeal, how taken—Trial.—68. Such appeal may be taken by filing an original complaint in such court against such city within the time named, setting forth the action of the said board of public works in respect to such assessment, and stating the facts relied upon as showing an error on the part of such board. Such court shall rehear the matter of such assessment *de novo*, and confirm, lower or increase the same as may seem just. In case such court shall reduce the amount of benefit assessed against the land of such property-holders, or increase the amount of damages awarded in his favor, the plaintiff in such suit shall recover costs, otherwise not. The judgment of such court shall be final, and no appeal shall lie therefrom. R. S. 1894, § 3839.

450. Roll of assessments—Liens.—69. On the completion of such assessment-roll by said board of public works, the same shall be forthwith delivered to the department of finance, and from that time the respective amounts of benefits therein assessed shall severally be liens, superior to all other liens except taxes, against the respective lots or parcels of land upon which they are assessed. Said department of finance shall at once prepare a duplicate of said assessment-roll of benefits, the same to be known as the local assessment duplicate, and deliver the same to the treasurer. The duties of the treasurer and of the department of finance in respect thereto shall be the same as are hereinafter more specifically prescribed with regard to assessments for street improvements. R. S. 1894, § 3840.

451. Assessments, when due—Collection.—70. Said assessments of benefits shall be due and payable to the treasurer from the time of the delivery of said assessment duplicate to said treasurer. If not paid within sixty (60) days thereafter, the said city by its attorney shall proceed to foreclose said liens in a court of competent jurisdiction as mortgages are foreclosed, with similar rights of redemption, and have the same sold to pay such assessments. Such city shall recover costs, with a reasonable attorney's fee, and interest from the expiration of the sixty (60) days hereinbefore allowed for payment, at the rate of six per cent. (6 per cent.) per annum. In all cases where the party against whom the assessment is made is a resident of such city, demand for the payment of the same shall be made by delivering to

him personally, or leaving at his last and usual place of residence, a notice of such assessment and demand for payment. R. S. 1894, § 3841.

Statute construed—Notice—Demand—Street improvements.—The provisions of this section relating to notice of and demand for the payment of assessments do not apply to street improvement proceedings. Spades v. Phillips, 9 App. 487; Sloan v. Faurot, 11 App. 689; Myers v. Indianapolis, etc., R. Co., 12 App. 170. But as to notice before suit see amendment of 1895, Burns' Supp. 1897, § 3853 (*post*, § 463).

Demand is necessary before bringing action upon an assessment in condemnation proceedings. Spades v. Phillips, 9 App. 487; Myers v. Indianapolis, etc., R. Co., 12 App. 170.

Assessments.—In condemnation proceedings assessments are due and payable to the treasurer from the time of the delivery of the assessment duplicate to the treasurer. Spades v. Phillips, 9 App. 487; Myers v. Indianapolis, etc., R. Co., 12 App. 170.

452. What damages paid by city.—71. Said board of public works shall have power to determine what, if any, part of the damages awarded shall be paid out of funds appropriated for the use of such board by the common council: *Provided*, That not more than $2,000 in damages shall be paid out of the city funds for any improvement or condemnation unless pursuant to an ordinance appropriating for the specific improvement or condemnation. All benefits assessed and collected by the treasurer shall be subject to draft, in the usual manner, upon certificate by the board of public works in favor of persons in whose favor damages have been awarded. Any surplus remaining above actual awards shall belong to such city. Said board may delay proceedings until such benefits have been collected. R. S. 1894, § 3842.

453. Certificates for damages.—72. It shall be the duty of the board of public works, upon the completion of their award of damages, or whenever any time for delay as above mentioned shall have expired, to make out certificates for the proper amounts and in favor of the proper persons, upon the presentation of which to the head of the department of finance such person shall be entitled to a warrant on the city treasury. Such certificates or vouchers shall, whenever practicable, be tendered actually to the persons entitled thereto, but where this is impracticable the same shall be kept for such person in the office of said board of public works, and the making and fixing of such certificate shall in all cases be deemed to be valid and effectual tender to the person entitled thereto, and the same shall be delivered to him on request. In case of a dispute, or doubt as to which of the various persons said money shall be paid, said board shall make out such certificate in favor of the city attorney for the use of the persons entitled thereto, and said attorney shall thereupon draw the money and pay the same into court in a proper proceeding, requiring the various claimants to interplead and have their respective rights determined. In any case where an injunction is obtained because damages have not been paid or tendered, said board may tender such certificate for the amount thereof with interest from the time of entry upon the property, if any has been made, and all accrued costs, and

thereupon the injunction shall be dissolved. The pendency of an appeal shall not affect the validity of a tender made under this section, but such city shall be entitled to proceed with its appropriation of the property in question. R. S. 1894, § 3843.

454. Order—Petition for improvement—Notice—Remonstrance—Appraisement.—73. Whenever the board of public works shall order the improvement of any street, alley, sidewalk or other public place in such city, in whole or in part, it shall adopt a resolution to that effect, setting forth a description of the place to be improved, and full details, drawings and specifications for such work. Notice of such resolution shall be published, remonstrances heard, said original resolution modified, confirmed or rescinded in the same manner as hereinbefore more specifically provided by this act with regard to the condemnation of property and the opening of streets. *Provided, however,* That if at any time, on or before the day appointed for modifying, confirming or rescinding said resolution there shall have been filed in the office of said board of public works, a petition or petitions in writing of resident freeholders upon such street or alley sought to be improved, requesting that said street or alley be paved with any certain kind of the accepted kinds of modern city pavement, then the board of public works shall not have the power or authority to pave said street or alley, or any part thereof, with another kind of material without the same is specifically ordered by an ordinance passed by a two-thirds vote of the council of said city. If several such petitions shall have been filed in the office of said board of public works at such time, each requesting the said street or alley be paved with a different kind of material, then the board of public works shall grant the petition upon which is the names of the largest number of resident freeholders on the street or alley to be improved, and the said board of public works shall not have the power or authority to pave such street or alley, or any part thereof, with another kind of material, unless the same is specially ordered by an ordinance passed by a two-thirds vote of the council of said city. If such original resolution be confirmed or modified it shall be final and conclusive on all persons, unless within ten days thereafter one-half of the resident freeholders upon such street or alley, or proposed improvement, remonstrate against such improvement. In case of such remonstrance the improvement shall not take place, unless specifically ordered by an ordinance within sixty days thereafter passed by a two-thirds vote of the council and approved by the mayor. *Provided further,* That before any street, alley, or other public place shall be improved, and before a contract is let for such improvement, it shall be the duty of the board of public works to have the property abutting on the street, alley, or public place, or any part thereof proposed to be improved, and which is liable for such improvement, appraised by three disinterested resident freeholders of the city wherein such property is located, which appraisers shall be appointed by said board of public works, and the cost of which appraisement shall be added to the cost

of such improvement, which said appraisement shall show the value of such abutting property, exclusive of the improvements thereon, and shall be filed in the office of the board of public works. No improvement on any street, alley, or other public place, shall be made or ordered which, when completed, is to cost more than twenty-five per cent. of such aggregate appraised value of the property abutting on such street, alley, or other public place, or part thereof proposed to be improved, as shown by the appraisement hereinabove provided for. [As amended, Acts 1899, p. 399. In force March 4, 1889.]

Municipal powers over streets, duties and liabilities, improvement of streets, etc., under the general law of 1867, and amendatory and supplemental laws, see *ante*, §§ 218–223 and notes, and *post*, §§ 1107–1135 and notes.

"Resident freeholders"—Who are.—"Resident freeholders" within the meaning of this section means resident freeholders upon the street, and not simply residents of the city, owning property on the street. Kirland v. Board, etc., 142 Ind. 123.

455. Cost of improvements—Improvement of one side of street or sidewalk, etc. — Cost — Apportionment. — 74. If said board shall finally order such improvement and shall advertise for bids and let the contract for the same, the cost of any street or alley improvements shall be estimated according to the whole length of the street or alley, or so much thereof to be improved as is uniform in the extent and kind of the proposed improvements per running foot, and the total cost thereof, exclusive of one-half the cost of street and alley intersections, shall be apportioned upon the lands or lots abutting thereon. The remaining one-half cost of street and alley intersections shall be apportioned upon the lands or lots abutting on the street or alley intersecting the street or alley under improvement for a distance to the street line of the first street intersecting or extending across the said intersecting street or alley in either direction from the street, or alley improved: *Provided*, That in case of intersections with diagonal streets or avenues the remaining one-half cost of each intersection shall be apportioned on the lands or lots abutting on each of the intersecting streets for a distance to the street line of the first street intersecting or extending across each of said intersecting streets in each direction from the street improved. Should a street or alley enter into and not cross the street or alley under improvement, then the assessment for the cost of one-half of said entering street or alley, measured to the center line of the street or alley under improvement, shall be made on the lots or lands abutting on said entering street or alley, for a distance to the street line of the first street intersecting or extending across the said intersecting street or alley, and such last named assessment shall be made pro rata upon the lots or lands abutting on said street or alley. *Provided, however*, That if it may be deemed necessary by the board of public works to improve only a part, or one side of any street or sidewalk, or other public place in such city, then one-half of the cost of such improvement shall be assessed against and paid by such city, and the remaining one-half of the cost thereof shall be assessed against the lands or lots abutting upon and

adjacent to such half or side of the street or alley so to be improved, as now provided by law: *Provided, also, however*, That when the board of public works orders the improvement of any sidewalk, the cost of the same shall be estimated according to its whole length, including the street and alley intersections, and shall be apportioned upon the lots or lands abutting thereon. Such assessments shall be made without regard to the assessment for taxation, as hereinafter provided. Such city shall be liable to the contractor for the contract price of such improvement to the extent of the moneys actually received by such city from the assessments for such improvements hereinafter provided for, and the owners of property bordering on such street or alley shall be liable to the city for their proportion of the cost, exclusive of one-half the cost of street or alley intersections, in the ratio of the front line of their land or lots, whether platted or not, owned by them, to the whole cost of the improvements for that part of the said street or alley on which said lands or lots are located, and which is uniform in extent and quality of improvement, and the owners of lots or lands on the streets or alleys intersecting or entering into such street or alley shall be liable to the city for their proportion of the cost of improving the one-half of the street or alley intersections, in the proportion that their front line on said street or alley bears to the sum of the length of the front lines of said lots or lands abutting on said street or alley for a distance, as provided above, from the street or alley under improvement. Said city shall have separate and several liens upon such lands or lots from the time the contract for such improvement is finally let, for the respective assessments against each lot or parcel of land. [As amended, Acts 1899, p. 556. In force March 6, 1899.]

Cost of improvement—Assessment.—In a case of ordinary street improvement only half the cost of such improvement, exclusive of one-half the cost of street and alley intersections can be legally assessed against the abutting land on one side of the street. Drake v. Grout, 21 App. 534.

Sewer—When part of street improvement—Assessments.—Drains or sewers, when necessary for the purpose of carrying off surface water from the street, may be constructed for such purpose as a part of the paving improvement of the street, and where such drain or sewer is a necessary part of the street improvement, and is not to be used to drain the abutting property, the cost thereof may be included in the street improvement assessment, and need not be assessed according to the benefits or area of the lands affected as drainage sewers as such are required to be assessed. Kirland v. Board, etc., 142 Ind. 123.

Alley—Assessment—Statute construed—Constitutional.—A lot abutting upon an alley intersecting a street improved between the latter and the next parallel street is assessable under the provisions of this section, that half the cost of street and alley intersections shall be apportioned upon the lots abutting upon the intersecting streets or alley to the first street parallel to the street or alley improved, although between it and the street improved the alley is intersected by an alley wide enough to make a street in some cities. A statute can not be held unconstitutional merely because it is unjust. Praigg v. Western, etc., Co., 143 Ind. 358.

City's liability, secondary.—Under the similar provisions of the "Barrett law," the city's liability is but secondary, and arises only when it has sold bonds, collected assessments, or otherwise realized the amounts owing from the property benefited, and the

contractors have not been paid. Porter v. City of Tipton, 141 Ind. 347; Myers v. Indianapolis, etc., R. Co., 12 App. 170.

Public property—Liability.—A municipal corporation is liable for its proportion of the cost of local improvements assessed against it, even though the statute exempts public property from taxation. Warner v. City of New Orleans, 87 Fed. Rep. 829.

456. Lots liable to assessment—Liens—Sales—Redemption.—75. Lots or lands bordering on such street or alley shall be assessed and liable to the payment of such assessment primarily, and if not sufficient to pay for the same, then the lots or land shall be liable for a distance back from the front line along such street or alley of fifty (50) feet, whether the same shall be owned by the same or different persons. In case said fifty (50) feet shall not sell for enough to pay such assessment, then the ground for a distance of one hundred (100) feet farther back shall be liable to sale; and in case of unimproved lands or unplatted ground, if said one hundred and fifty (150) feet fail to sell for enough to pay the assessment, the whole of such land shall be liable to sale. This section shall be deemed to include the assessment, principal and interest, together with costs of foreclosure and a reasonable attorney's fee. The lien of the same shall have precedence over all liens except taxes. In all suits brought to foreclose such liens the plaintiff shall recover the amount of the assessment, principal and interest, together with a reasonable attorney's fee, and the court shall order that sale shall be made without relief from valuation or appraisement laws. The sheriff shall make sale without relief from valuation or appraisement laws as lands are sold upon execution, and within five days after such sale, shall execute a certificate to the purchaser, which certificate shall vest title in the purchaser on the delivery thereof subject only to the right to redeem as herein provided. Suits to foreclose may be brought by any contractor entitled to enforce any liens, or any assessment or assessments, against a person or persons who have made default in payment thereof, or by his assignee. No sale shall be ineffective because of any irregularity or error or mistake of any officer in making the same, unless it be made to appear that such error or irregularity substantially prejudiced the property owner. Foreclosure suits may be instituted for the enforcement of assessments and liens as herein provided by the holder of any bonds or coupons in cases where bonds are issued in anticipation of the collection of assessments against a party or parties in default, for the collection of such bonds or coupons and the enforcement of the lien or assessment securing the same, as well as by any contractor or his assignee where no bonds are issued. In such foreclosure suits no defense shall be allowed upon any irregularity in the proceedings making, ordering or directing such assessment, nor shall any question as to the propriety or expediency of any improvement or work be therein made. A property owner who has not, or property owners who have not, signed a waiver or exercised or claimed the option to pay in installments, may however contest the amount of his or their assessment, but where a property owner or property

owners has or have exercised the option to pay in installments and has or have signed a waiver or exercised the option to pay in installments such property owner or owners shall be concluded thereby and shall not be permitted to set up any defense whatsoever. It shall not be necessary in any such foreclosure suit or suits to set forth or refer to the proceedings at length or specifically, but it shall be sufficient to state in such complaint the day on which the contract was finally let, the name of the street or highway improved, the amount and date of the assessment, that the assessment is unpaid, and a description of the lot or property upon which the assessment was levied. A property owner or property owners shall have one year from the day of sale in which to redeem therefrom, and shall be entitled to redeem from such sale upon paying principal, interest and costs of the judgment together with eight per centum per annum interest thereon. If no redemption is made, then, and in that event, the sheriff shall execute a deed to the purchaser which deed shall relate back to the final letting of the contract and shall be paramount to all liens, claims and interests of every nature whatsoever, except liens for taxes. It is hereby declared that the provisions hereof are intended to and do give a remedy to all persons, contractors, assignees and bond or couponholders for the enforcement or collection of claims and liens for assessments for street improvements, the construction of sewers or drains under this act or any acts in relation thereto governing cities of more than one hundred thousand inhabitants, and do regulate and provide for matters of procedure and things appertaining thereto. No mistake in the description of property or in the name of the owner, shall vitiate such assessments or liens. If before ordering such improvement any land or lots have already an improvement in front of them conforming to the general plan, said board shall make an allowance to said owner thereof, to be deducted from his assessment and from the total amount of the contract price. [As amended, Acts 1895, p. 384. In force March 15, 1895.] Burns' Supp. 1897, § 3846.

Amount of assessment—Contest of.—Where the property owner has not signed any waiver or exercised or claimed the option of paying the assessment in installments, he may contest the amount of the assessment. Drake v. Grout, 21 App. 534.

Complaint—Exhibit.—A diagram filed with the complaint as an exhibit to show location and direction of certain work with reference to the lot is not the foundation of an action to foreclose an assessment lien, and is not made a part of the complaint by attaching it thereto. Drake v. Grout, 21 App. 534.

Complaint—Averments—Defense.—A complaint for the foreclosure of a street improvement assessment lien is not bad for failure to aver that no improvement conforming the general plan had already been made. Whatever benefit might be derived from this fact is available only by defense. Spades v. Phillips, 9 App. 487.

Sprinkling assessment lien.—A sprinkling contractor has a lien on property assessed for sprinkling, including interest, cost and reasonable attorney's fees. Palmer v. Nolting, 13 App. 581.

457. Payment by installments.—76. Whenever said board of pub-

lic works shall order the improvement of any street or alley, as provided in the preceding sections, the assessment for such improvement may, at the option of each property-holder, be payable in ten (10) annual installments, as follows: Ten (10) per cent. of the principal, together with all accrued interest on the entire assessment on or before the third Monday of April next succeeding the allowance of the final estimate on such work by said board, except where such estimate has been made between March 15 and October 1, of any year, in which case such first installment shall be payable on the first Monday of November next succeeding such estimate. The next payment on said assessment shall be six (6) months' interest on the unpaid principal, payable at the date for the general payment of taxes, either spring or fall, as the case may be, next after the first installment on such assessment falls due. The next payment on said assessment shall be ten (10) per cent. of the original principal and six (6) months' interest on the unpaid principal, payable on or before the date for the general payment of taxes, spring or fall, as the case may be, accruing one year after the first installment was payable, and so on, thereafter ten (10) per cent. of the original principal with six months' interest on the unpaid principal once each year, and six months' interest in alternate turn with each annual payment of principal and interest until the entire principal and interest has been paid. Interest not exceeding six (6) per cent. shall be specified by said board in the resolution for improvements, and shall commence from the date of the allowance of such final estimate. R. S. 1894, § 3847.

458. Assessment roll—Contents—Affidavit of contractor.—77. In making assessments against each lot or parcel of land, said board of public works shall, as soon as any contract has been let for the improvement on any street or alley, make out an assessment roll with names of property holders and descriptions of the property adjoining the place of such proposed improvement. Said roll shall also have set opposite each name and description the total pro rata assessment against each piece of property. When completed said assessment roll shall be delivered to the head of the department of finance.

Before the said board shall approve and accept the work under any contract and allow a final estimate therefor, the contractors who have performed such work shall file with said board an affidavit of some one or more persons having knowledge of the facts, that all work done under such contract and all materials used are of the character, kind, quantity and quality required by the specifications on which such contract was let and that said work has been done in conformity with said contract and specifications and according to the directions of said board and the city engineer. [As amended, Acts 1899, p. 451. In force March 4, 1899.]

Note.—Acts and proceedings of the departments and officers of the city of Indianapolis, under §§ 38, 40, 45, 56, 60, 61, 73, 77, 82, 89, 90, 91, 97, 100, 110, 114 and supplemental § 136 of this act, as the same were attempted to be amended and enacted by act of 1895 (Burns' Supp. 1897, § 3809, *et seq.*), were legalized and validated by act of 1899 (Acts 1899, p. 449).

Assessment roll as exhibit—Foreclosure.—In an action to foreclose a street improvement lien, a copy of the assessment roll, or at least that portion of it which relates to the defendant's property, should be made an exhibit of the complaint, to make the complaint sufficient on demurrer or on an appeal from judgment by default. Sloan v. Faurot, 11 App. 689.

459. Improvement assessments—Duplicate—Payment—Notice to delinquents.—78. Whenever the board of public works shall approve and accept the entire work under any contract and allow a final estimate therefore [therefor], it shall be the duty of the department of finance forthwith to deliver to the treasurer a certified copy of the assessment roll. Such duplicate assessment roll shall be known as the local assessment duplicate, and shall be appropriately prepared showing the amount due on each piece of property, if paid in cash within the time limited, together with necessary columns in which such assessment shall be extended, showing the amount of each installment and when payable, whenever the same shall be paid in installments, together with the interest due at each spring and fall payment of taxes until the same shall be fully paid. Said book shall also have appropriate columns in which payments may be properly credited, and also a place for the satisfaction of the lien by the treasurer. All assessments, whether payable in installments or not, shall be payable to the treasurer, whose duty it shall be to receive the same and give proper receipts therefore [therefor], and enter proper credit and satisfaction in said book, or duplicate assessment roll. Upon receipt of the certified copy of the assessment roll by the treasurer, it shall at once become his duty to notify each person affected by the same, of the amount of the assessment against him by placing in the postoffice in such city a notice addressed to such person. The treasurer shall also, on the first Monday in each month, give notice in some newspaper of general circulation, to persons who have failed to take advantage of the opportunity to make payment of assessments made against him in ten annual installments, or pay in cash the amount of said assessment within thirty days from the date of the approval of final estimate by the board of public works, by publishing a description containing the name of such person, the name by which the improvement is known and the amount owing by each person, and a statement to the effect that unless such assessment is paid within thirty days suit will be instituted for recovery of the amount due. The treasurer shall add to the amount due from each person so notified twenty cents for each tract or parcel of land mentioned in the advertisement, and collect the same to cover the cost of such advertisement, and such sum shall be added to the amount due from each person and shall be included in and covered by the lien of the assessment. [As amended, Acts 1897, p. 56. In force February 23, 1897.] Burns' Supp. 1897, § 3849.

Acceptance by board—Conclusive.—The board of public works are the sole judges of the question whether the work has been done according to the terms of the contract or not. Its acceptance of the work is conclusive upon the property owner unless such acceptance was fraudulent. Darnell v. Keller, 18 App. 103.

Judgment of board quasi judicial—Fraud—Effect.—The judgment of the board in passing upon the question of the contractor's compliance with the contract is of a *quasi* judicial character. Fraud may render such act void; but, if so, the fraud must be upon the part of the contractor in connection with the act of the board in the approval of the work. The mere fact that the work was fradulently done will not, of itself, render the approval void. Darnell v. Keller, 18 App. 103.

Quaere.—The statute does not provide for notice to the property owner of a hearing before the board upon the question of the acceptance of the work, or the making of the assessment. Can he be bound by such *quasi* judicial action without notice and opportunity to be heard; and, is it not the intent of the subsequent provisions of the statute relating to the enforcement of the lien of the assessment by foreclosure suit, that he shall then have his day in court upon the question as to whether the work has been done according to the contract and his property benefited thereby to the amount of the assessment? Under the general law for the incorporation of cities the acceptance of the work by the city authorities is only prima facie evidence that the work was done according to the contract. Upon the questions suggested see, Gulick v. Connely, 42 Ind. 134; Garvin v. Daussman, 114 Ind. 429; Barber, etc., Co. v. Edgerton, 125 Ind. 455; Johnson, etc., v. Lewis, 115 Ind. 490; Law v. Johnson, 118 Ind. 261.

460. Payment by installments—Waiving errors—Payment before due.—79. Whoever desires to exercise such privilege of payment by installment shall at any time before the expiration of thirty (30) days after the allowance of the final estimate aforesaid, enter into an agreement in writing, that in consideration of such privilege he will make no objection to any illegality or irregularity with regard to the assessment against his property and will pay the same as required by law with the specified interest. Such agreement shall be filed in the office of the department of finance. In all cases where such agreement has not been signed and filed within the time limited, the entire assessment shall be payable in cash without interest before the expiration of said thirty (30) days. After said thirty days, if not paid when due such total assessment shall bear interest at the rate of six per cent. (6 per cent.) from the date of the final estimate. Persons signing and filing the agreement within the time limited, and entitled to pay in installments, may nevertheless at any time after the expiration of the first year, pay up their entire assessment and stop the interest thereon, and be relieved of the lien of the same, on condition that they at the same time pay up all accrued interest, and also interest up to the time the next installment of interest is payable: *Provided*, That before such persons shall be entitled to make such prepayment they shall give notice in writing at the treasurer's office of their intention so to do, six months in advance of the time when such payment is made. R. S. 1894, § 3850.

Payment—When due—Demand.—If the property owner does not, within thirty days after the allowance of the final estimate, enter into an agreement in writing to pay the assessment for street improvements in installments, the entire assessment becomes due. No provision is made for a demand before suit. Myers v. Indianapolis, etc., R. Co., 12 App. 170; Sloan v. Faurot, 11 App. 689. But as to notice before suit, see amendment of 1899, § 463, *post*.

461. Duty of treasurer—Separate accounts.—80. It shall be the duty of the treasurer to receive the same, keep all account thereof, and give proper vouchers therefor. The department of finance shall charge the treasurer with the amounts of such assessments and interest as it accrues. The department of finance shall carefully keep a separate account of the funds arising from each particular improvement ordered by the board of public works pursuant to this act, and no proceeds arising from assessments for the improvement of any particular street or alley shall be diverted to the payment for any other improvement whatever. The proceeds shall in each case constitute a separate special fund for the payment of contractors for the particular work, upon the allowance of estimates by the board of public works, or for the security and payment of street improvement bonds, if any are issued, as hereinafter provided for such street or alley. R. S. 1894, § 3851.

Assignment—Payment by check—Receipt of treasurer.—Payment of a street improvement assessment by the cashing of a check received therefor by the city treasurer relates back to the delivery of the check so as to defeat an action by a bond-holder to enforce the lien of the assessment as upon a default between the time of acceptance and the payment of the check, although a receipt therefor is not given nor a credit therefor entered upon the assessment roll as required by statute. The receipt of the treasurer and the memorandum he is required to make are evidence of payment, but they are not the only evidence thereof. The same may be proved by parol. Indiana Bond Co. v. Bruce, 13 App. 550.

462. Bonds for street improvements—Installments—Penalty—Foreclosure.—81. For the purpose of anticipating the collection of such assessments, the department of finance shall issue street or public improvement bonds, payable out of the funds actually paid to and collected by such city on such account, the proceeds of the same to be applied exclusively to payment for the improvements on the particular street or alley for the anticipation of the assessment for which the same are issued. Bonds shall be issued for the principal of such assessment or assessments, and appropriate coupons shall be attached thereto, evidencing and representing the semi-annual interest. Each bond shall be issued for a sum not exceeding five hundred dollars, and the coupons thereto attached shall evidence and represent the semi-annual interest thereon. The bonds shall bear interest at a rate not exceeding six per centum per annum, to be computed from the date of the final estimate, which interest shall be payable semi-annually as herein provided. The bonds shall form a series numbered from one to ten, inclusive, and shall be payable annually, but the interest shall be payable semi-annually. In cases where the final estimate is allowed at any time during the period intervening between the first day of March and the first day of October in any year, the bonds and coupons shall be dated on the first day of December of such year, and in all cases where the final estimate is allowed at any other period in any year than that intervening between the first day of March and the first day of October in any year, the bonds and coupons shall be dated on the first of June, following. The interest shall be computed from the

date of the final estimate up to the date of such bonds and the coupons shall properly evidence and provide for such interest computed as aforesaid from the date of the final estimate. Each bond shall bear the name of the street or alley for which it is issued, in cases where it is issued for street improvement assessments, and in cases where it is issued for sewer or other assessment shall appropriately designate the improvement or work for which it is issued. Assessments in cases where the option to pay in installments is exercised shall be payable as follows: Ten per centum of the principal, together with all accrued interest on the same, on the third Monday of April next succeeding the allowance of the final estimate on such work by the board, except where such estimate has been made between March first and October first of any year, in which case such first installment shall be payable on the first Monday of November next succeeding such estimate; the next payment shall be six months' interest on the entire unpaid principal, payable at the date for the general payment of taxes, either spring or fall, as the case may be, next after the first installment falls due; the next payment shall be ten per centum of the original principal and six months' interest on the unpaid principal, payable on or before the date for the general payment of taxes, spring or fall, as the case may be, occurring one year after the first installment was payable; and so on, thereafter, ten per centum of the original principal, with six months' interest on the unpaid principal once each year, and six months' interest on the unpaid principal in alternate turn with the annual payment of principal and interest, until the entire principal and interest have been paid.

It being hereby intended and provided that installments of principal and interest shall be paid in advance of the maturity of bonds and coupons, in order to enable the treasurer to pay such bonds and coupons, as they respectively fall due, for which purpose the said treasurer shall hold the money paid to him. It shall be the duty of the treasurer to promptly and properly apply all money paid in on such installments to the holders of the bonds and coupons, and he shall not use the money received by him in payment of such installments for any other purpose whatever than that of paying the bonds and coupons, and he shall promptly ascertain the amount paid in on such installments, and without delay pay the same to the bond and coupon holders entitled thereto. In case any person shall exercise his right of prepayment of his assessment, as by law provided, and shall fully pay such assessment and interest, all interest and liability shall thereupon cease as to the property upon which the assessment so paid is levied.

The liens against property shall be extinguished as rapidly as the treasurer shall collect funds, by reason of such prepayments, and the funds so collected shall be applicable to the outstanding bonds and coupons in the order of their serial numbers, and interest thereon shall cease, *pro tanto*, from the time of such collection.

It shall be the duty of the treasurer to promptly pay to the person

presenting a bond or coupon such sum as may be applicable to the payment thereof, out of any prepayment or prepayments. It shall be the duty of the treasurer, in case prepayments are made, to notify the bond or coupon holders, in cases where such coupon or bond holders are known, or to give written notice to the person who presents such bonds or coupons and where such bond or coupon holders are not known, or such bonds or coupons are not presented, then to notify the contractor by whom the improvement was made. In cases where property owners are in default, or become delinquent in the payment of any installments, the treasurer shall forthwith notify, in writing, the holder of such bond or coupon, where such bond or coupon holder is known, of such default or delinquency; if such bond or coupon holder is not known, then a like notice shall be given to the contractor.

Coupon holders or bond holders who shall furnish their names and address to the treasurer, and a general description of the bonds and coupons held by them, shall be entitled to written notice from the treasurer. Such notice shall, by the treasurer, be properly addressed and mailed. The treasurer shall keep a register of all coupon holders or bond holders who may furnish him a description of their coupons or bonds, and their names and addresses.

It shall be the duty of the treasurer, in all cases where any property owner is in default in the payment of any installment, or any part thereof, chargeable upon or against his property, to add a penalty of twenty per centum upon any installment, or any part thereof, for such delinquency, which said penalty, when collected, shall be and become the property of such city. And the treasurer shall, on the first day of January, of each year, certify to the county auditor a list of such delinquency or delinquents. And the county auditor, in making out the list of lands and lots in such city returned and remaining delinquent for state, county, township, road, city, school, and other taxes, which he is required by law to make between the first Monday of November and the first day of January, in each year, shall enter therein against the name of each person remaining delinquent on account of state, county, township, road, city, school, and other taxes, for which said lands are liable, the amount of such delinquent special assessments so certified to him by the treasurer, as aforesaid, against the lands and lots described in such certification of the treasurer, which said assessments shall be carried out with the taxes for state, county, township, road, city, school, and other purposes, into one total. Payment of such assessments, with interest, penalty and costs, shall be enforced by sale of the lands and lots liable therefor, or so much thereof as may be necessary, which sale shall be made by the county treasurer in the same manner, at the same time and place, and upon the same notice as is prescribed by law for the sale of lands and lots for the payment of delinquent state, county, township, road, school, city, and other taxes, the property to be offered for sale and sold for the payment of all the taxes and assessments of every kind, for which the same is liable, with interest, penalty and costs thereon, as one

entire sum, and not separately for said assessments. Nor shall notice of the sale be given separately for the said assessments, but it shall be stated in the notice required to be given of the sale of the lands and lots for state, county, township, road, city, school, and other taxes, that the sale thereof will also be for the payment of the delinquent municipal assessments of the city, which shall be the only notice required to be given. Payment of the bid, upon the sale of any such lands and lots, shall be enforced, so far as it relates to such municipal assessments, together with the penalties above provided for, by the same officer, and in the same manner, as is provided for by law for the enforcement of the payment of a bid made upon the sale of lands and lots for the state, county, township, road, city, school, and other taxes, and the proceeds of sale shall be held by the treasurer and paid to the parties entitled thereto. The guarantee required by law to be indorsed by the county treasurer upon each certificate given by him upon a purchase of lands and lots for state, county, township, road, city, school, and other taxes, shall, in every case where such sale is made for said municipal assessments, also apply to and embrace the amount of such municipal assessments for which sale was made; and the holder of such certificate shall have the same remedy upon such guaranty as to municipal assessments embraced therein, that he has as to the state, county, township, road, city, school, and other taxes, to which the same relates. All provisions of law in reference to the certificate to be issued to a purchaser of lands and lots upon sale for state, county, township, road, city, school, and other taxes; the effect of such sale, and the rights of the purchaser; redemption therefrom; the making of deeds upon failure of redemption, and as to the force and effect of such deeds; for the quieting of titles acquired thereunder; for transferring to the purchaser the original lien for the taxes and municipal assessments for which the sale was made, and subsequent assessments paid; and for the enforcement of such lien by judicial proceedings, when the purchaser fails to acquire a valid title by virtue of the purchase; and as to the interest and penalties to be collected upon redemption from such sales before deed is made, or upon judicial proceedings to quiet the title or enforce the lien of the purchases; and all other provisions of law relating to the collecting and accounting for state, county, township, road, city, school, and other taxes, shall, so far as the same are applicable, apply with like force and effect in the case of municipal assessments in cities of the class referred to in this act.

Said board may provide in its original resolution of improvement for the issue of such bonds and coupons directly to the contractor, in which case it shall be the duty of the department of finance, upon the allowance of the final estimate made by the board of public works, to issue the same directly to the contractor; otherwise they shall be issued and sold as other city bonds. After the issue of such bonds, no suit shall lie to enjoin the collection of any assessment, and the validity of the same shall not be questioned, but all

property owners shall be conclusively estopped and precluded from in any manner assailing the effectiveness or validity thereof. Such bonds, when issued, shall convey and transfer to the owners thereof all lien, right, title, and interest in and to the assessments and liens upon the respective lots and parcels of ground hereinbefore provided for, which liens shall stand as security for such bonds and coupons until they are paid, with full power to enforce the collection thereof, if such bond or coupon be not paid on presentation to the treasurer, by foreclosure in any court of competent jurisdiction, as provided in the preceding section, and sales to satisfy such bonds and coupons shall be made as hereinbefore provided for sales upon judgments or decrees foreclosing liens for assessments levied for street improvements: *Provided*, That the first bond-holder who institutes foreclosure suit in any court of competent jurisdiction against such property, or any lot or parcel thereof, shall be entitled to have the proceeds of said suit applied, pro rata, to the payment of his own bonds and of bonds held by others. The property upon which the assessment is laid shall, in no event, be sold for less than the amount of the assessment, attorney's fees and costs, and the avails of the sale shall be distributed as herein provided. If the property shall sell for more than enough to pay the principal, interest, attorney's fees, costs and expenses, the surplus shall be paid to the property owner or party lawfully and rightfully entitled thereto. No more than one foreclosure suit shall be brought against the any one lot or parcel of land, but all lots or parcels of land, the assessments against which are in default, may be joined in one proceeding. All bonds, as herein provided, shall be negotiable as inland bills of exchange, and be free from all defenses by any property owner or property owners. It shall not be necessary in said bonds to recite the steps taken in ordering such improvements, or directing the assessment, but it shall be sufficient to make a general reference to such assessment, and to the statute. [As amended, Acts 1897, p. 79. In force February 26, 1897.] Burns' Supp., 1897, § 3852*a*.

Bonds—Pledge of assessments.—The assessments are pledged by the terms of the bond issued to the contractor as a security for the payment thereof, and in case of a failure to pay by the property owner when an installment falls due, the holder of the bond may sue such property owner and enforce the lien for the entire assessment, including attorney's fees. Indiana, etc., Co. v. Bruce, 13 App. 550.

463. Failure to pay installment—Effect—Foreclosure—Attorneys' fees—Notice to pay—Limitation.—82. Failure to pay any installment of principal or interest when the same is due shall bring all installments of principal yet unpaid forthwith due and payable. If such city shall fail to collect any unpaid assessment or installment thereon when due, no liability shall thereby accrue against such city, but the owner of the lands hereinbefore provided for, or in case no bonds have been issued, then the person to whom is due and owing the amount of such unpaid assessment for the performance of such work shall have the right to proceed in any court of competent jurisdiction to enforce the

liens or unpaid assessment recovering interest, costs and a reasonable attorney's fee, and to have the proceeds of sale applied on his claim: *Provided*, Such attorney's fee to be so recovered shall not be more than five dollars, if the amount due shall be paid or tendered within ten days after service of the summons in such suit, or after notice by publication, in case of non-residents, and in no case shall the attorney's fee exceed the amount of the assessment; if the amount due shall not be paid or tendered within said ten days, then the attorney's fees in cases in which the assessment exceeds fifty dollars shall not exceed ten per cent. on the first one hundred dollars of the sum due and five per cent. on the excess thereof: *And provided further*, In case the person from whom is owing an assessment shall not elect to pay in installments the person to whom such assessment is owing at least ten days before bringing suit to foreclose as above, shall notify such person from whom the assessment is owing of the amount thereof, and that the same is or will become due. A notice mailed to the person whose name appears upon the assessment roll as the owner of the property, addressed to such person within such city, shall be deemed a sufficient notice. It shall be the duty of the county clerk to certify to the treasurer all satisfactions of assessment liens by such sale and the treasurer shall enter the same of record. No action shall be maintained for such foreclosure which is not commenced within three years from the time when the right of action accrues. The provisions of this section, so far as applicable, shall apply to assessments for sewers, drains, levees, or for the change of any water-course or the drainage of any section of ground. [As amended, Acts 1899, p. 451. In force March 4, 1899.]

Note.—Acts and proceedings of the departments and officers of the city of Indianapolis, under §§ 38, 40, 45, 56, 60, 61, 73, 77, 82, 89, 90, 91, 97, 100, 110, 114 and supplemental § 136 of this act, as the same were attempted to be amended and enacted by act of 1895 (Burns' Supp. 1897, § 3809 *et seq.*), were legalized and validated by act of 1899 (Acts 1899, p. 449).

Assignment—Payment by check—Receipt of treasurer.—Payment of a street improvement assessment by the cashing of a check received therefor by the city treasurer relates back to the delivery of the check so as to defeat an action by a bond holder to enforce the lien of the assessment as upon a default between the time of acceptance and the payment of the check, although a receipt therefor is not given nor a credit therefor entered upon the assessment roll as required by statute. The receipt of the treasurer and the memorandum he is required to make are evidence of payment, but they are not the only evidence thereof. The same may be proved by parol. Indiana, etc., Co. v. Bruce, 13 App. 550.

Assessment roll as exhibit—Foreclosure.—In an action to foreclose a street improvement lien, a copy of the assessment roll, or at least that portion of it which relates to the defendant's property, should be made an exhibit of the complaint, to make the complaint sufficient on demurrer or on an appeal from judgment by default. Sloan v. Faurot, 11 App. 689.

Complaint—Averments—Description.—In an action to foreclose an improvement assessment lien where the complaint describes the property assessed as being in "Milligan's Brook Park Addition to the city of Indianapolis," and in an exhibit it appears that the proposed improvement is to be made "in said city," the city of Indianapolis

being mentioned in the preceding line, the allegations sufficiently show the improvement to have been made within the city of Indianapolis. Spades v. Phillips, 9 App. 487.

Parties to action—Wife.—The wife of the property owner is a proper party defendant to answer to her interest, that her inchoate interest in the property may be foreclosed to satisfy the lien. Coburn v. Bossert, 13 App. 359.

Assessment lien—Complaint to foreclose.—A complaint that avers "that said plaintiff completed said work in accordance with the terms and stipulations of said agreement, to the entire satisfaction of the department of public works of said city, and the same was duly accepted by said department," is sufficient; it is sufficient in such case to allege generally that the plaintiff "performed all the conditions on his part"; it is not necessary to state the facts constituting the performance. Darnell v. Keller, 18 App. 103.

Counter-claim—Answer in bar.—The fact that the work was not done according to contract is not matter of counter-claim, and counter-claim will not lie in an action to foreclose an assessment lien; if such fact can be inquired into at all in such case it must be on answer in bar. Darnell v. Keller, 18 App. 103; Bozarth v. McGillicuddy, 19 App. 26.

The acceptance of the work by the board of public works is conclusive upon the property owner, unless such acceptance was fraudulent. Darnell v. Keller, 18 App. 103.

464. Change of levees or water-course.—83. Whenever the board of public works shall order the erection or change of any levee, or the change of any water-course, natural or artificial, or the drainage of section of ground, it shall cause the necessary drawings and specifications to be prepared for the work and filed in such office, and shall publish a notice of the resolution ordering the work to be done, shall hear remonstrances, modify, confirm or rescind their original resolution, prepare a list of property-holders beneficially or injuriously affected by such work, advertise for bids for such work, let the same by contract, assess benefits and award damages, and in these and all other respects proceed in accordance with the provisions of this act relating to the appropriation of property and the laying out of streets. R. S. 1894, § 3854.

465. Liens of assessments—What governs.—84. The provisions of this act for the liens of assessments, preparation of the duplicate assessment roll by the department of finance, delivery of such roll to the treasurer, the collection of assessments, right of election of property-holders to pay the same in installments, the issue of bonds to anticipate the same, and all other provisions with regard to street improvement assessments, shall govern in the matter of levee assessments so far as the same are applicable. R. S. 1894, § 3855.

466. Sewers and drains—Establishing.—85. Whenever the board of public works shall order the construction of any local sewer or drain, it shall cause the necessary drawings and specifications for such work to be prepared and filed in such office; shall cause a notice of the adoption of the resolution ordering the work to be done to be published in some daily newspaper of general circulation in such city once each week for two weeks. Such notice shall name a date after the last day of publication at which said board will receive or hear remonstrances from persons interested in or affected thereby. On the date set, said

board shall consider such remonstrances, if any, and thereupon take final action, confirming, modifying or rescinding their original resolution. Such action shall be final and conclusive on all persons. If such original resolution be confirmed or modified, said board shall cause a notice to be published in such city once each week for two weeks, informing the public and contractors of the general nature of the work and of the fact that the drawings and specifications are on file in the office of the board, and calling for sealed proposals for such work by a day not earlier than ten (10) days after the first of said publications. The board may, in its discretion, fix a later day for receiving such sealed proposals, provided such day shall be mentioned in each of such notices. Whenever such sewer or drain shall, from its size and character, be intended and adapted not only for use by owners of abutting property along the line of such sewer or drain, but is also intended and adapted for receiving sewage from collateral drains, already constructed or which may be constructed in the future, then the board of public works shall prepare a map which will give thereon the exact course of said proposed sewer, and its appurtenances, and which will clearly show, by boundary lines, the total area, or district to be drained and to be assessed for the construction of said sewer; shall prepare all necessary profiles, drawings and specifications for such work, which map, profiles, drawings and specifications shall be placed on file in the office of said board; shall publish a notice of the adoption of the resolution ordering the work to be done, and shall describe in such resolution, and in such advertisement, the boundary lines of the district, or area, intended to be drained by such sewer and to be assessed for the cost of the same, and such publication of the adoption of said resolution shall constitute a legal notice to all owners or holders of property, or persons having valuable interests therein, within the bounds of the district or area described; that such property in said district or area is to be assessed for the construction of said sewer. Such publication shall be made in some daily newspaper of general circulation in such city once each week for two weeks, and shall name a date, after the last day of publication, at which said board will receive or hear remonstrances from persons interested in or affected by the construction of said sewer. On the date set, said board shall consider such remonstrances, if any, and thereupon take final action, confirming, modifying, or rescinding their original resolution. Such action shall be final and conclusive upon all owners or holders of property, or persons having valuable interests therein, in the district or area intended to be drained and assessed for the construction of said sewer. Advertisements for bids shall be made in the same manner as for the construction of a local sewer or drain, above provided for. [As amended, Acts 1893, p. 56. In force February 22, 1893.] R. S. 1894, § 3856.

Sewers, drains, etc., and construction of under the general law, see *ante*, § 124, clauses 26 and 43 and notes, §§ 127 and 183 and notes; and *post*, §§ 1090, *et seq.* and notes, and § 1107, *et seq.* and notes.

Statute construed—Construction of sewer—Notice—Due process of law.—This section, relating to the construction of sewers, the giving of notice of the work to be done,

describing in such notice the boundary lines of the district or area intended to be drained and to be assessed for the costs, and fixing the day on which remonstrances will be heard, is constitutional, the notice required by statute being ample for the property holders of the district, and ample opportunity being given for the property owners to be heard. Swain v. Fulmer, 135 Ind. 8.

Remonstrance.—This section provides a remedy for the property-owner by permitting him to remonstrate, but if he fail to do so within the time fixed by the statute he must abide the decision of the board of public works, whose action is made final by the statute. Byram v. Foley, 17 App. 629.

467. Costs of sewers—How paid.—86. Whenever any such sewers shall, from its size and character, be intended and adapted only for local use by property holders along the line of street or alley on which it is constructed, and, in the opinion of such board, is not intended or adapted for receiving sewage from collateral drains, then, and in that case, the whole cost of said sewer, and all appurtenances shall be paid for by the holders of property abutting on the street, alley or public highway, on which said sewer shall have been constructed. The cost of such sewer shall be estimated according to the total number of square feet of property abutting on the line of said sewer, and such cost shall be apportioned on the lands or lots abutting thereon, in the proportion as their area bears to the total assessed area: *Provided,* That in making such assessment against any unplatted land the depth of the same from the front line thereof shall not be assumed greater than two hundred (200) feet, or less than the depth of the platted lots next adjoining such unplatted ground nearest to the center of the city: *And provided, further,* That whenever any lot or parcel of land which abuts on two or more streets or alleys, has already been assessed for a local sewer constructed in one of such streets or alleys, such board shall have power, at the time of the adoption of the assessment roll for such sewer to reduce and fix the assessment against such lot or parcel of land according to the benefit it will, in the opinion of such board, derive from such sewer, and the amount of such reduction shall be assessed pro rata against the other property abutting on the line of such sewer. In case that such unplatted ground borders upon two streets or alleys intersecting each other, and assessments have been already made against such land for a sewer on one side, such assessment extending back for a distance as prescribed above, then, in that case, assessment shall be made for a distance of but fifty (50) feet back from the line of the street or alley in which the sewer is located. [As amended, Acts 1899, p. 554. In force March 6, 1899.]

Lots abutting on alley—Assessment.—In the construction of a local sewer, a lot which does not abut upon the street in which such local sewer is laid, but does abut upon an alley through which a collateral drain extends connecting with such local sewer, may be assessed for the construction of said sewer. Byram v. Foley, 17 App. 629.

After the work has been done and assessment made it is too late to interpose a defense that the improvement did not benefit the property against which the assessments were made. Byram v. Foley, 17 App. 629.

Power to construct sewers a continuing one—Double assessment.—The power to

construct sewers is a continuing one, and the necessity for a sewer must be determined by the municipal officers, and comes within their discretion. And where property fronted on one street, and it had been assessed for the construction of a sewer on that street, and the property extended back toward another street, to an alley, and along that alley the board of public works had constructed another sewer, said property might be again assessed for such other sewer. Byram v. Foley, 17 App. 629; Coburn v. Bossert, 13 App. 359.

The power in the officers to determine when they should act in the matter of constructing sewers, carries with it the power to determine how frequently they shall act. Coburn v. Bossert, 13 App. 359.

Double assessments—Special benefits—Frontage.—Assessments for local sewers are not placed upon the basis of special benefits, like public sewers, but according to the frontage as in street improvements, and a hardship may be imposed upon the landowner by what amounts to a double assessment upon the whole area of his property, but relief therefrom must be sought in the legislature and not in the courts. Coburn v. Bossert, 13 App. 359.

468. Main sewers—Assessment of costs—Construction through cemeteries.—87. Whenever in the opinion of such board, any sewer or drain ordered to be constructed, or any enlargement of one already constructed, shall from its size and character, be intended and adapted not only for use by abutting property holders along the line of such drain or sewer, but is also intended and adapted for receiving sewage from collateral drains already constructed, or which may be constructed in the future, then, and in that case, such board shall make a division of the cost of such work. So much of such cost as shall be equivalent to the construction of an adequate local sewer not adapted to receive sewage from collateral drains or sewers, shall be paid for exclusively by the abutting property holders in the same manner and to the same extent as local sewers are paid for by them. The excess of cost, over and above what would be equivalent to the cost of a local sewer, shall be assessed against each piece of property in the district or area to be drained, in the proportion its area bears to the total area of the district, including abutting property holders, as well as the holders not situated on the line of such drain or sewer.

If such board shall determine that it is necessary to extend any sewer or drain through or adjacent to any parcel of land, held, used, or occupied for cemetery purposes, all necessary rights of way therefor may be acquired by such city either by purchase or by condemnation proceedings as in this act provided, any other law to the contrary notwithstanding, but lots or parcels of land held, used, or occupied for such purpose shall not be assessed for the construction of such sewer or drain, but so much of the cost of such sewer or drain as would be assessable against such lots or parcels of land if not so held, used or occupied, shall be assessed against such city and shall be paid by it. If such city shall proceed in such case by condemnation proceedings to acquire such right of way, and any of the owners or holders of property and of valuable interests therein sought to be taken, or to be injuriously affected, are unknown, the owner or holder may be designated as unknown upon the list or roll provided for by section

sixty-four (64) of this act, and in all subsequent steps in such proceedings, including notice by publication. If upon acquiring such right of way there shall remain buried within the limits thereof, any dead body, it shall be the duty of the friends, relatives or next of kin to promptly remove the same; if, however, they fail to do so, said board of public works, prior to the construction of the sewer or drain in such right of way, shall cause the same to be removed and decently interred elsewhere in a public cemetery, and the place of such interment to be marked in some appropriate manner. The name of the person so reinterred, if known, and the place of such reinterment shall be entered upon the records of said board. [As amended, Acts 1895, p. 384. In force March 15, 1895.] Burns' Supp. 1897, § 3858.

469. Assessment roll—Contents—Collection—Laws applicable.—88. In making assessments against each lot or parcel of land, said board of public works shall, as soon as any contract has been let for the construction of any sewer or drain, make out an assessment roll, with names of property holders and descriptions of the property assessed for such proposed sewer or drain. The assessment roll, when completed, according to these provisions, shall be delivered to the department of finance in the same manner as street improvement assessment rolls. The department of finance and the treasurer shall thereupon discharge the same duties in respect thereto as are heretofore prescribed in relation to street improvement assessments. The provisions of this act in relation to liens for street improvements, to the payment of street improvement assessments by installments, and the issuance of bonds and coupons to anticipate the same, and the duties of the treasurer, shall also apply to the lien, the enforcement thereof and to *payments* of assessments for the construction of sewers, drains, levees, or for the change of any water-course, or the drainage of any section of ground. The provisions of this act concerning the enforcement of assessment liens for street improvements, foreclosure suits, attorney's fees, the procedure therein, the conduct of sales by the sheriff, the execution of certificates and deeds, and all matters of a similar nature regarding assessments for street improvements and the collection thereof, and the rights of contractors, assignees, and bondholders shall apply to the enforcement of assessments made for the construction of sewers, levees, or drains, or to pay for the drainage of any parcel, lot or tract of land or to pay for a change in any stream or water-course, as well to the collection of any bond or coupon issued under the provisions of this act. [As amended, Acts 1895, p. 384. In force March 15, 1895.] Burns' Supp. 1897, § 3859.

[Acts 1899, p. 451. In force March 4, 1899.]

470. Levees, drains and water-courses—Change and construction.—Supplemental section No. 136. Whenever the board of public works shall declare that the erection or the change of any levee, or the change of any water-course, natural or artificial, or the drainage of any section of ground, or the construction of any sewer or drains,

is necessary for the public welfare of the said city, or any part or portion thereof, and shall order that the same shall be made, it shall cause the necessary drawings and specifications to be prepared for the work, and filed in such office. At the time of making the order for such improvement or work, the board of public works may take into consideration whether the said work or improvement, when completed, will beneficially or injuriously affect any lands or property outside of the corporate limits of said city. In case the board shall find and declare that the proposed work, when completed, will injuriously or beneficially affect lands or property without the corporate limits of such city, then and in that case only, the said board shall file a copy of all proceedings had in the matter of the said improvement or work in the circuit court of the county in which such city is situate, including a list of all the persons whose property will be so affected, as the same appears upon the records of county at the time the said board passes said declaration for improvement, with a description of the boundaries embracing the same; which proceeding shall be docketed in the circuit court as a cause; and the court shall fix a time when the same shall be heard. And thereupon the clerk of said court shall notify all persons mentioned in said proceedings, or to be injuriously or beneficially affected thereby that the said proceedings will be heard at a date named, which notice said clerk shall cause to be published once a week for at least three weeks in some newspaper of general circulation throughout the county. It shall not be necessary in said notice to set forth the names of all the persons beneficially or injuriously to be affected by such work, but it shall be sufficient in said notice to give the outlying boundaries of the district or locality which said board shall have determined to embrace all the persons to be injuriously or beneficially affected thereby, as set forth in the said proceedings, and the same may be continued and adjourned from time to time as the court may direct. At said hearing any property holder within the boundaries of said district may file an answer showing any reason why the said improvement should not be made, and upon such issue the court shall hear evidence and determine the fact.

If the court shall determine that such improvement or work should be made substantially as proposed by the said proceedings, then the court shall enter a judgment accordingly; otherwise, dismiss the proceedings. From such judgment there shall be no appeal.

In case the court shall order and adjudge that the said work or improvement shall proceed, the same shall be done under the control and supervision of the board of public works, which board shall advertise for bids for such work, let the same by contract, and in these and all other respects proceed in accordance with the provisions of this act relating to the construction of sewers and drains wholly within the city, except that after the contract shall have been awarded the said board of public works shall report the same to said court to be filed in said proceeding, and thereupon the court shall appoint

three competent, disinterested persons, who may be residing anywhere within the county, to be known as the board of assessors for said improvement. The members of said board shall take an oath to honestly and faithfully perform their duties as such assessors. It shall be their duty to inspect the line of the said proposed improvement or work, and the property within such district, and estimate and assess the benefits against each piece of property to be benefited by said work, and award damages to each piece of property to be injuriously affected thereby; and in the performance of this duty they shall sit at such times and places as the court may direct, administer oaths, send for persons and papers, and hear testimony touching the question of benefits and damages to be assessed. At the conclusion of such hearing, which may be continued from day to day and [from] time to time, the said commissioners shall prepare a list or roll of the property holders together with a description of the property beneficially affected by such work, setting opposite each description or parcel the benefits thereto; and also a list or roll of such property holders, with a description of the property injuriously to be affected by such work, and the damages thereto. Any description may be corrected at any time, or omissions supplied by the said commissioners, or the board of public works, and no proceeding shall be held to be defective or void by reason of any omission or defect in the said descriptions, and no property holder shall be heard to make any objection to the proceeding on the ground of any mistake or omission of name of his own or any other property holder within the said district, or that the property of any person is incorrectly described or wholly omitted, but upon such mistake or description being made known to the court, the judge shall have power to call the said assessors together, who shall be authorized and empowered to make any such additions or corrections as may be necessary in the premises from time to time.

The work shall be carried on under the supervision of the board of public works, and when the same is finally accepted by said board it shall certify the fact of such completion and acceptance to the said court, which court shall thereupon by proper order direct the clerk of said court to make out in duplicate a true and corrected list or roll showing the names of the property holders, together with a description of each piece or parcel of property, together with the benefits and damages assessed upon or in favor of such parcel, and certify the same, under the seal of the court, and deliver one copy thereof to the city comptroller, and the other to the treasurer of the county: *Provided*, That if said board of public works shall find that such improvement is necessary for the public welfare of such city, and that the benefits assessed shall fall below the amount required to pay the damages awarded and to pay for such improvement, said board shall order and direct that any balance required for such purpose shall be paid by the city out of the general fund or out of any sewer fund applicable to such payment.

The provisions for the liens of assessments, the collection of assessments, right of election of property holders to pay the same in installments, the issue of bonds to anticipate the same, and all other provisions with regard to street or sewer improvement assessments, shall govern in the matter of assessments made for or on account of improvements and public works constructed under the provisions of this section, as the same are applicable.

At the conclusion of the proceeding the court shall make a reasonable allowance to the said assessors and tax the same with the other costs of the proceeding, which shall be payable out of the treasury of the city.

In case it shall be necessary at any time to take, acquire, appropriate or condemn for the use of such city, any property, real or personal, whether within or without such city, in order to carry out and complete such work or improvement, the same may be taken, appropriated, condemned and paid for as in other cases, provided in said act; or the said board of public works, for and in behalf of said city, may purchase and acquire the same and take a conveyance therefor to the use and benefit of the said city, under the provisions and regulations of said act.

Note.—Acts and proceedings of the departments and officers of the city of Indianapolis, under §§ 38, 40, 45, 56, 60, 61, 73, 77, 82, 89, 90, 91, 97, 100, 110, 114 and supplemental § 136 of this act, as the same were attempted to be amended and enacted by act of 1895 (Burns' Supp. 1897, § 3809, *et seq.*), were legalized and validated by act of 1899 (Acts 1899, p. 449).

SPRINKLING OR SWEEPING.

471. Sprinkling and sweeping—Contracts.—89. Whenever such board of public works shall order any street, alley, or public place to be sprinkled, or any street, alley or public place to be swept or otherwise kept clean, which is permanently improved with asphalt, vulcanite, brick, granite, wooden block, or other pavement, it shall cause the necessary specifications for such work to be prepared and filed in such office, shall publish a resolution ordering the work to be done, shall hear remonstrances, modify, confirm, or rescind their original resolution, and shall advertise for bids and let the same by contract as more specifically provided in this act with relation to the appropriation of property and laying out of streets: *Provided, however*, It shall not be necessary to hear remonstrances in connection with the letting of the contract for any such work whenever the same is to be paid for out of the general funds in the treasury. [As amended, Acts 1899, p. 451. In force March 4, 1899.]

472. Cost of sprinkling and sweeping.—90. The cost of such sprinkling shall be assessed pro rata against the lots, tracts, and parcels of land along the line of such street, alley or public place, as the cost of street improvement is assessed, except that such city shall not be liable to pay for the sprinkling of any street or alley crossing, but the total cost of such sprinkling shall be paid for by abutting prop-

erty holders, and such assessments shall be liens upon abutting property as of date of the letting of the contract: *Provided*, That the city council of any such city may by ordinance provide that such sprinkling of the streets and alleys of such city shall be paid out of the general funds of the treasury of such city, and when any such ordinance shall be adopted by the city council of any such city, then and in that event no assessment shall be made upon abutting property for the cost of any such sprinkling, and in letting the contract for such sprinkling it shall not be necessary for the board of public works to hear remonstrances. The cost of such sweeping or cleaning shall be paid by such city out of funds of the treasury. Such board in its annual estimate of the amount of money needed by it for the ensuing fiscal year shall include as an item thereof an estimate of the amount of money needed for such sweeping or cleaning, and in the event that such city shall by ordinance provide for the cost of such sweeping to be paid out of the general funds of the treasury of such city, then such board shall also include the costs thereof as an item in its said annual estimate, and the common council shall in the ordinance fixing the tax levy for each year fix the same so as to create a fund for such purpose equal to the amount of such estimate, as it may have been revised by the comptroller under the provisions of section fifty (50) of the said act hereby amended, and such item shall not be reduced by such ordinance after revision by the comptroller. Such board may at its option embrace in one order or resolution, and also in one contract, any number of streets, alleys or public places for which the specifications for such sweeping, sprinkling and cleaning are uniform, or such board may include in one resolution and contract such streets as to which the specifications for sprinkling, or sweeping, or cleaning are not uniform: *Provided*, That such contract and the bids therefor shall separately state the cost of sprinkling or sweeping and cleaning streets or alleys which are uniform with regard to the specifications to such sprinkling, or sweeping, or cleaning. In such cases such board may accept part of such bid on one group of streets uniform in their specifications and reject other parts of such bids on other groups of streets: *Provided, further*, That all contracts entered into by such city prior to the taking effect of this act, for such sweeping and cleaning, which are and shall remain by their terms unforfeited, shall be performed and property assessed thereunder for the cost of such sweeping or cleaning, and such assessment enforced according to the provisions of law in force at the date of making of such contracts. [As amended, Acts 1899, p. 451. In force March 4, 1899.]

Note.—Acts and proceedings of the departments and officers of the city of Indianapolis, under §§ 38, 40, 45, 56, 60, 61, 73, 77, 82, 89, 90, 91, 97, 100, 110, 114 and supplemental § 136 of this act, as the same were attempted to be amended and enacted by act of 1895 (Burns' Supp. 1897, § 3809, *et seq.*), were legalized and validated by act of 1899 (Acts 1899, p. 449).

Cleaning streets—Assessments—Police power.—Under this section as it existed prior to the attempted amendment of 1895, and under the then provisions authorizing the city to contract for sprinkling and sweeping the streets at the cost of the property

holders abutting on such streets, an assessment made against an owner of property along a street required to be swept to pay the expense of such sweeping, is not a tax but a local assessment, and does not fall within the constitutional provision requiring equal and uniform rate of taxation. Such assessment does not amount to a taxing of private property without compensation, and without due process of law, and the assessment in such case is made in the exercise of police power. Reinken v. Fuehring, 130 Ind. 382.

Sweeping street crossings.—The fact that the statute, as it then existed, contemplated the sweeping of crossings, did not render it invalid, as it can not be said that the property owner did not receive a special benefit from keeping them clean. Reinken v. Fuehring, 130 Ind. 382.

General tax—Cleaning other streets.—As the property owner is fully compensated for his outlay in the enhanced value of his property, he may be taxed generally also with the remainder of the public for cleaning other streets in which the public alone have an interest. Reinken v. Fuehring, 130 Ind. 382.

Sprinkling assessment—Lien.—A sprinkling contractor has a lien on property assessed for sprinkling, including interest, cost and reasonable attorney's fees. Palmer v. Nolting, 13 App. 581.

473. Collection of sprinkling assessments.—91. The duties of the department of finance and of the treasurer, the rights of contractors, and the liabilities of such city in relation to such street sprinkling assessments, shall be the same as in the case of street improvement assessments, and all the provisions of section 82 of this act respecting street improvement assessments including foreclosure by suits, and the recovery of interest, cost and attorney fees, so far as applicable, except as otherwise herein provided, shall apply to such sprinkling assessments. Such sprinkling assessments shall be payable on the first Monday in November for any one year, in the manner that street improvement assessments are payable. The provisions of this act in relation to the payment of street improvement assessments by installments, and the issuing of bonds to anticipate the same, shall have no application to street sprinkling assessments: *Provided, however*, That the provisions of this section shall not apply to street sprinkling when the cost thereof is required by ordinance to be paid out of the general funds in the treasury of such city. [As amended, Acts 1899, p. 451. In force March 4, 1899.]

Demand.—Prior to amendment of 1895, a demand was not a prerequisite to an action for the collection of a street sprinkling assessment. Myers v. Indianapolis, etc., Co., 12 App. 170.

Lamp Posts.

474. Contracts and costs for lamp posts.—92. Whenever such board of public works shall order any street, alley or public place, to be supplied with lamp posts, by the construction of the same, it may by resolution order the same without publication or notice, or the hearing of remonstrances. Contracts for the same may be let, like other contracts, and the cost thereof assessed against the holders of abutting property, as the cost of street sprinkling, and the same shall be col-

lected, and the department of finance and the treasurer shall perform the same duties, and the contractor shall have the same rights, as in the case of street sprinkling assessments. R. S. 1894, § 3863.

D. DEPARTMENT OF PUBLIC SAFETY.

475. Board of public safety—Appointment—Salary.—93. The department of public safety shall be under the charge of a board of three commissioners, to be appointed by the mayor of such city as hereinbefore provided. No more than two of said commissioners shall be of the same political party. Said commissioners shall give bond to such city, to be approved by and filed with the department of finance, for the faithful performance of their duties respectively, as required by ordinance. Said board shall have the care, management and supervision, and exclusive control of all matters relating to the fire and police force, fire-alarm, telegraph, erection of fire-escapes, inspection of buildings and boilers, market places, and food sold therein, pounds and prisons. Said board shall have power to purchase all necessary supplies and apparatus, and make all repairs needed in its department, subject to the same provisions as are herein prescribed for the exercise of similar powers by the department of public works. Said commissioners shall receive annual salaries of $600 each. R. S. 1894, § 3864.

Fire department and metropolitan police and fire department under the general law.—See *ante*, §§ 256, *et seq.*, 296, *et seq.* and notes.

Police property—Injunction.—Where it is sought to take possession of the police property of the city, without authority of law, those in possession may protect their rights and the rights of the city by injunction. City of Huntington v. Cast, 149 Ind. 255.

476. Rules—Quorum—Chairman—Clerk.—94. Said commissioners shall adopt rules for the appointment of members to said fire and police forces, their regulation and duties, subject however to the laws of the state and to the ordinance of the common council. Any two of said commissioners shall constitute a quorum. Said commissioners shall adopt rules and regulations with regard to the time of the holding regular and called meetings and of giving notice thereof. They shall elect one of their number as chairman, who shall hold such position as long as may be prescribed by the rules of said board. Said commissioners shall cause all of their proceedings to be carefully recorded by a competent clerk, who shall give bond for the faithful performance of his duties, to be approved by such board in such sum as may be fixed by ordinance. They shall only act as a board, and no member thereof shall have power to bind said board, or such city, except pursuant to a resolution of such board authorizing him to act in that behalf as its authorized agent. Said commissioners shall have the care and charge of all property of every kind pertaining to the fire and police force, and to the market places, pounds and prisons of such city. R. S. 1894, § 3865.

477. Duties of board.—95. Said commissioners shall appoint a superintendent of police, chief of the fire force, and all other officers, members and employes of said fire and police forces, together with a market master, station-house keeper, and other officials necessary for such department of public safety. The annual pay of such appointees shall be fixed by ordinance of the common council, and it shall be lawful in such ordinance to grade the members of such forces and to regulate their pay, not only by rank, but by their length of service. In default of any ordinance fixing the compensation for any member of such fire or police force, said commissioners shall have power to fix the same subject to change by ordinance by said council. Said commissioners of public safety may also fix the number of members of said fire and police forces, and the number of appointees for other purposes. Said commissioners of public safety shall, in like manner, divide such city into police precincts and fire districts. Said commissioners shall also have power to make and promulgate rules and regulations for the appointment of members to such forces, and for their government: *Provided,* That said forces shall be as nearly as possible equally divided politically, and no member thereof shall be dismissed except for cause as hereinbefore provided. The superintendent of police shall have exclusive direction and control of the police force, and the chief of the fire force shall have exclusive control and charge of such fire force, subject to the rules, regulations and orders of said department of public safety. In times of peril, danger, riot, extensive conflagration, disorder, or the apprehension thereof, said chief of the fire force and the superintendent of the police force shall, for the time being, be subordinate to the mayor and obey his orders and directions, anything to the contrary in this act or in the ordinances of such city, or in the regulations or orders of such commissioners of public safety, to the contrary notwithstanding. R. S. 1894, § 3866.

478. Members of fire and police force.—96. Every member of the fire and police force, and all other appointees of the commissioners of public safety, shall hold office until they are removed by the board. They may be removed for any cause other than politics, and the written reasons for such removal shall be entered upon the records of such board. R. S. 1894, § 3867.

479. Charges against firemen and policemen—Hearing.—97. On conviction of a member of the said fire or police force for any criminal offense or neglect of duty, or of violation of rules, or neglect or disobedience of orders, or incapacity, or absence without leave, or conduct injurious to the public peace or welfare, or immoral conduct, or conduct unbecoming an officer, or other breach of discipline, said commissioners shall have power to punish the offending party by reprimand, forfeiture, suspension without pay, dismissal, or by reducing him to a lower grade and pay. Upon any investigation of the conduct of any member of the fire or police force, or upon the trial of any charge preferred against any member thereof, said board of commissioners shall have power to compel the attendance of witnesses, and

the production of books, papers and other evidence, at any meeting of such board, and for that purpose may issue subpenas, and cause the same to be served and executed in any part of the county where such city is located. The provisions of this act in respect to any witness who shall refuse to testify, or to produce books or papers in his possession or under his control, in investigation and impeachment proceedings before the common council, or any committee thereof, so far as applicable, shall govern in like cases before said board, and the proper court may compel by attachment, commitment, or other punishment, compliance with its orders. [As amended, Acts 1899, p. 451. In force March 4, 1899.]

480. Powers of policemen.—98. The officers and members of such police force shall possess all the common law and statutory powers of constables, except in relation to the service of civil process, and any warrant of search or arrest, issued by any judge, or magistrate, or justice of the peace of this state, may be executed in any part thereof by any member of said police force, subject to the laws of this state governing arrests and bail. The members of such police force shall have the exclusive power, and it shall be their duty to serve all process within such city issuing from the police court. They shall be conservators of the peace in such city, and shall arrest without process all persons who within view commit any crime or misdemeanor contrary to the statutes of this state, or ordinance of such city, take them before the police court or judge of such city, or other officers having jurisdiction of the offense with which such person is charged, and retain them in custody until the cause of such arrest has been investigated, suppress all breaches of the peace within their knowledge, and authority is hereby given to them to call to their aid the power of such city; to pursue and commit to jail all felons and persons guilty of misdemeanors or crimes in violation of the statutes of this state or of the ordinances of such city. They shall have the exclusive power, and it shall be their duty to serve all process issued by the common council, or any committee thereof pursuant to this act, or by any of the executive departments of such city. They shall attend upon the police court and assist the bailiff to preserve order in such court. R. S. 1894, § 3869.

Powers and duties of city marshal, police officers, constables, etc., under the general law of 1867, see *ante*, §§ 94, 95 and notes.

481. Duties of policemen.—99. The members of the police force, under the direction of the superintendent thereof, shall convey prisoners to and from the county jail or station-houses of such city for arraignment or trial in the police court, or to the house of correction, work-house, reform school, county jail or other place of punishment or imprisonment, under judgment, sentence, order, process of such court. R. S. 1894, § 3870.

482. Additional fire and police force.—100. Said commissioners shall have power, on application of any person or corporation, if

deemed expedient, to detail regular patrolmen of the police or fire force, or appoint and swear any additional number of special policemen or firemen, to do special duty at any place within such city, or within the county wherein such city is located, upon such person or corporation paying for the use of such city the same rate per diem of service on such detail of special duty as is paid to the regular members of the force, and shall have power when deemed expedient, to make such detail without application of any person or corporation or payment of per diem. Such special patrolmen shall be subject to the superintendent, and such special firemen to the chief of the fire force. They shall obey the rules and regulations of their respective departments, conform to its discipline and orders, and wear such dress or badge as the commissioners may direct, and shall, during the term of their appointment, possess all the powers, privileges and duties of regular patrolmen or firemen. Such persons so appointed may be removed at any time by said commissioners without notice and without assigning any cause. Said commissioners may, also, upon an emergency or apprehension of riot, tumult, mob or insurrection, pestilence, or invasion, appoint as many special patrolmen as may be desirable, to be paid the same rate per day and possess the same powers, privileges, and duties as members of the regular force, and be subject to the same ordinances, regulations and orders. Such patrolmen and firemen shall wear badges, furnished by their respective departments. Such commissioners may also detail members from the regular forces for the use of the department of public health, or any department of the city government. [As amended, Acts 1899, p. 451. In force March 4, 1899.]

483. Oaths—Who may administer.—101. Said commissioners and superintendents of fire and police are authorized to administer oaths to any person summoned in any proceeding authorized by this act, or to take any depositions under the rules, regulations, or orders of said department of public safety. R. S. 1894, § 3872.

484. Duties of police force.—102. It is hereby made the duty of said police force, at all times within such city, and the members thereof are specially empowered, to preserve peace, prevent crime, detect and arrest offenders, suppress riots, mobs and insurrections, disperse unlawful and dangerous assemblages, and assemblages which obstruct the free passage of public streets, sidewalks, parks and places, protect the right of persons and property, guard the public health, preserve order at elections and public meetings, direct the movement of teams and vehicles in streets, alleys or public places, remove all nuisances in public streets, parks or highways, arrest all street beggars, provide proper police assistance at fires, assist, advise and protect strangers and travelers in public streets or at railroad stations, carefully observe and inspect all places of business under license, or required to have the same, all houses of ill-fame or prostitution, and houses where common prostitutes resort or reside, all lottery or policy shops, all gambling houses, cock pits, dance houses, resorts, and to suppress and

restrain all unlawful or disorderly conduct or practices, enforce and prevent the violation of all ordinances and laws in force in such city. The superintendent of police and each captain in his precinct shall possess the power of supervision and inspection over all pawnbrokers, venders, junk shop keepers, cartmen, expressmen, dealers in second-hand merchandise, intelligence offices and auctions, and any member of such force may be authorized by the superintendent to exercise the same powers, by authority in writing. Said superintendent or any captain may, by written authority, empower any member of such police force, when in seach of stolen property, of evidence, or of suspected offenders, to examine the books, business, or premises of any of the persons named in this section, and to examine property in whosesoever possession the same shall be. R. S. 1894. § 3873.

485. Gaming.—103. If any member of such force, or if any two or more householders in such city, shall report in writing, under his or their signature, to the superintendent of police, that there are good grounds (and stating the same) for believing that any house, room or premises within such city is kept or used as a common gaming-house, room or premises for therein playing for wagers of money at any game of chance, or to be kept for lewd or obscene purposes of amusement, or for the deposit or sale of lottery tickets or policies, it shall be lawful for said superintendent to authorize any member or members of said police force, in writing, to enter the same, who shall forthwith arrest all persons there found offending against law, and seize all instruments of gaming, or lottery tickets, and deliver the same to the superintendent, who shall destroy them. R. S. 1894, § 3874.

486. Arrest and trial of offenders.—104. Whenever any arrest has been made by any member of such police force, it shall be the duty of the officer in making the arrest to forthwith bring the person arrested before the police court, or court having jurisdiction thereof, to be dealt with according to law. If the arrest is made during the hours when such court is not in session, or if the judge is not holding court, such offender shall be detained in the city prison until there shall be an opportunity for such hearing at the earliest practicable time, or until he shall have given bond for his appearance. And no person shall be detained longer than twenty-four hours without such examination, except where Sunday intervenes, in which case no person shall be detained [longer] than forty-eight hours. Any person or corporation who shall interfere with said commissioners of public safety, or their appointees in the legal discharge of their duties, shall, upon conviction, be fined not more than one thousand dollars ($1,000), to which may be added imprisonment for not more than ninety (90) days. R. S. 1894, § 3875.

487. Political work prohibited—Penalty.—105. It shall be unlawful for said commissioners of public safety, or any persons appointed by them or their predecessors, or holding any position on said fire or police force, to solicit any person to vote at any election for any candidate, or to challenge any voter, or in any manner attempt to influ-

ence any elector at such election, or to be a delegate or candidate for delegate to any political convention, or to solicit for any candidate for, or delegate to such convention, or to be a member of any political committee. Any person violating the provisions of this section shall be fined in any sum not exceeding five hundred dollars, to which may be added imprisonment for a period not exceeding six months. R. S. 1894, § 3876.

488. Bonds of appointees.—106. Said commissioners shall have power, subject, however, to city ordinances, to adopt rules regulating the giving of bond by any appointee or class of appointees in such department for faithful performance of official duty. R. S. 1894, § 3877.

489. Insurance fund.—107. Said commissioners may at any time draft an ordinance and submit the same to the common council, who shall have power to enact the same like other ordinances, for the creation, management and distribution of a police insurance fund, or of a firemen's insurance fund, together with a provision for retaining a per cent. of each appointee's salary, for the creation of such fund, and prescribing the conditions of its investment and who shall be entitled to the benefit thereof. R. S. 1894, § 3878.

See *post*, §§ 1476, *et seq.* and 1493, *et seq.*

E. DEPARTMENT OF ASSESSMENT AND COLLECTION.

490. Treasurer and assessor.—108. The treasurer of the county in which the city is located shall be *ex officio* assessor and treasurer for such city, and head of the department of assessment and collection. Nothing herein shall be deemed to repeal the provisions of "An act concerning taxation for city and school purposes in cities containing a population of over seventy thousand, as shown by the last census of the United States; to abolish the offices of city treasurer and assessor in such cities, and provide for the discharge of the duties of such offices, and repealing laws in conflict therewith," approved February 21, 1885, as to cities with respect to which this act is applicable, except so far as the provisions of this act are inconsistent therewith. R. S. 1894, § 3879.

Treasurer's duties under the general law of 1867, see *ante*, §§ 97–103, *post*, § 1060 and notes.

County treasurer—Loaning county funds—Recovery—Public policy.—A county treasurer who loans the county funds in violation of § 2019, R. S. 1894 (*post*, § 1412), can not maintain an action for the recovery of the same, although the county itself might maintain such action. An action to recover the same can not be maintained on the ground of public policy when it does not appear from the pleadings that other interests than those of the parties to the contract are concerned. Winchester, etc., Co. v. Veal, 145 Ind. 506.

491. Duties of head of department of finance.—109. The duties of the head of the department of finance shall be the same as those imposed upon the city clerk by the provisions of the act of 1885, named in the preceding section, subject to the provisions of this act. R. S. 1894, § 3880.

492. Salary of treasurer in cities of one hundred thousand.—110. The county treasurer, in lieu of his annual salary as provided by the act of 1885, shall receive an annual salary of the sum of eighty-five hundred ($8,500) dollars, and in addition thereto shall receive five per centum of the amount of delinquent taxes collected by him, said per centum to be calculated on the original amount of the tax so collected as charged on the duplicate, and not including interest or penalty. No other percentage or allowance shall be made to said treasurer, either directly or indirectly, for his services for said city. The treasurer shall keep an account of the money received by him for taxes due the city, and on the first day of each month he shall receipt to the comptroller for the amount collected by him as aforesaid for the preceding month, which amount shall at once be available for the city's use. [As amended, Acts 1899, p. 451. In force March 4, 1899.]

493. Pay for assessment.—111. The county in which such city is located shall receive as such city's proportion for such township assessor's work, annually, the sum of twenty-five hundred dollars ($2,500), in full payment and discharge of all services by said assessor or his deputies, or other persons, with respect to such city's share in the making of such assessment, and no other compensation shall be allowed such assessor or his deputies, directly or indirectly, by such city. R. S. 1894, § 3882.

494. Penalty for treasurer or assessor receiving pay.—112. Any county treasurer or his deputy, or any township assessor or his deputy who shall directly or indirectly ask or receive any compensation from such city other than is expressly allowed by this act, shall be liable to be fined in any sum not exceeding five thousand dollars ($5,000), to which may be added imprisonment not exceeding one year. Any councilman of such city who shall propose any appropriation for such treasurer or assessor, or any deputy or either of them, shall be subject to the same penalty previously mentioned in this section. R. S. 1894, § 3883.

495. Failure to perform duties—Removal.—113. Whenever any county treasurer or township assessor shall fail to faithfully, fully and promptly discharge any duty imposed upon him by this act or by the act hereinbefore referred to, approved February 21, 1885, he shall be liable to impeachment and removal from office, and to damages for such failure, for which damages his bondsmen shall be liable. Such impeachment may be instituted by such city by filing a complaint in the circuit or superior courts of the county in which such city is located. Such causes shall be tried as other civil causes are tried, and a removal from office may be decreed and damages may be awarded. The bondsmen of such officer may be made co-defendants in the suit, in case such city seeks to recover damages. R. S. 1894, § 3884.

DEPARTMENT OF HEALTH AND CHARITIES.

496. Board of health and charities—Appointment—Salary—Duties—Sanitarian—Duties—Sanitary officers.—114. The department of health and charities shall be under the control of a board of three commissioners, who shall be physicians in good standing, to be appointed by the mayor as hereinbefore provided. Said commissioners shall each receive a salary of one hundred ($100.00) per year. Said board shall have power to purchase all necessary supplies and apparatus, and make all necessary repairs in the department, subject to the same provisions as are herein prescribed for the exercise of similar powers by the department of public works. They shall have charge of all matters relating to the public health and the enforcement of laws in relation thereto, including the charge of the city hospital, city dispensary and all other city charities; they shall keep a careful record of all their proceedings. Said commissioners shall appoint a superintendent of the city hospital and also a superintendent of the city dispensary, who shall have control and management of each thereof. Said commissioners shall appoint a city sanitarian, who shall be a doctor of medicine, and well informed in sanitary science, whose salary shall not exceed $2,000.00 per annum, which salary shall be fixed by the said commissioners, subject to the approval of the mayor: *Provided,* That it shall not exceed the sum of two thousand dollars ($2,000) per annum. Said sanitarian shall not engage in any other business, or occupation or profession. Said sanitarian shall at all times be under the direction and control of said commissioners in the performance of his duties. He shall be secretary and executive officer of said board, and attend to the proper registration of births, marriages, and deaths and such other statistical information as the department of public health and charities may require. He shall have the immediate control and direction of the sanitary police force, and in connection therewith shall make all necessary sanitary surveys and inspections, and he shall also make and superintend in relation to the sanitary condition of the city, such chemical, histological, pathological and other investigations as shall be deemed advisable by the commissioners, shall have charge of the office occupied by the commissioners, and shall carry out and perform all such orders and directions as the said commissioners may require him to do, and shall keep all the records of the same, and shall render to the commissioners a full report of all matters pertaining to his office, monthly, and also an annual report in like manner at the close of each calendar year. It shall be the duty of the said commissioners, with the advice and assistance of the sanitarian, to prepare such ordinance or ordinances as shall make the department effective in the prevention and suppression of disease, and submit the same to the city council for passage as are other ordinances. Said sanitarian may be removed at any time for incompetency or neglect of duty.

Said commissioners shall nominate for appointment by the depart-

ment of public safety, as special sanitary officers, skilled and competent persons for live stock and meat inspectors and food inspectors, whose duty it shall be to inspect all live stock, meat, and food offered for sale for human food in such city, and to attend the public markets and carefully watch over the same and prevent the selling or offering to sell for human food any and all articles unfit for use, and said commissioners are hereby authorized to require from the department of public safety special details of policemen or firemen to execute orders for the department of public health whenever needed.

Said department of public safety shall detail policemen who shall be constantly subject to the order of the department of health.

In case of disagreement as to the number or duration of service of such details of firemen and policemen, or the number of sanitary officers required between said two departments, the mayor shall decide the question. [As amended, Acts 1899, p. 451. In force March 4, 1899.]

Note.—Acts and proceedings of the departments and officers of the city of Indianapolis, under §§ 38, 40, 45, 56, 60, 61, 73, 77, 82, 89, 90, 91, 97, 100, 110, 114 and supplemental § 136 of this act, as the same were attempted to be amended and enacted by act of 1895 (Burns' Supp. 1897, § 3809, *et seq.*), were legalized and validated by act of 1899 (Acts 1899, p. 449).

497. Health ordinances—Plumbing inspector.—115. Said health commissioners are hereby authorized and directed to prepare ordinances for the protection of public health, for securing the proper registration of births, marriages and deaths, and such other statistical information as the department may require, with penalties for their violation; for the removal and burial of the dead, the maintenance of an ambulance service for the speedy removal of sick and needy persons, for the efficient regulation and management of the city hospital and city dispensary as may seem to them desirable, and the destruction or fumigation of infected property or premises, for the registration of plumbers and the inspection of plumbing and house drainage in all buildings, both public and private, erected after the passage of this act, and in all buildings, both public and private, erected prior thereto wherein changes in or additions to the plumbing or drainage are to be made, for the appointment of an inspector of plumbing and house drainage, who shall be a practical plumber, who shall be required to pass an examination as to his qualifications by a board of three practical plumbers doing business and residing in such city, said board to be selected by the health commissioners of such city; such ordinances shall be submitted to the council for passage as other ordinances. R. S. 1894, § 3886.

DEPARTMENT OF PUBLIC PARKS.

[Acts 1899, p. 386. In force March 4, 1899.]

498. Board of park commissioners—Appointment—Oath of members.—1. That all cities of this state which had a population of more

than one hundred thousand inhabitants as shown by the last preceding United States census, shall be governed by the provisions of this act. That in addition to the executive departments now established by law in such cities there is hereby established as one of the executive departments of such city a "department of public parks," which shall be under the control of a board of four (4) members, two and not more than two of whom shall be of the same political party, to be appointed by the mayor of such city, and to be known as the "board of park commissioners," and who shall serve without compensation, except their actual expenses, to be approved by the mayor, and whenever the words "said board" are used in this act it shall be understood to mean the said board of park commissioners, provided for by this act. Each and every member of the said board shall, before entering upon the duties of office, take and subscribe an oath, to be indorsed on the back of the certificate of appointment before some officer authorized to administer the same, to support the constitution of the United States, and the constitution of the state of Indiana, and to faithfully and honestly discharge all official duties as a member of said board, and cause the same to be filed with the city clerk of such city. Any person who shall not file such oath with the city clerk as herein provided within twenty days after the beginning of the term for which appointed or the date of appointment, if appointed after the beginning of such term, shall be deemed to have refused to serve and the office shall be deemed to be vacant.

Act of 1895 unconstitutional—Tenure of office.—The act approved March 1, 1895 (Burns' Supp. 1897, § 3904*a*, *et seq.*), creating a department of public parks in cities having a population of more than 100,000, and providing that the board of park commissioners shall hold office for the term of five years, was in violation of the inhibition of § 2, art. 15, of the state constitution, that "the general assembly shall not create any office the tenure of which shall be longer than four years," and was void. Indianapolis, etc., Co. v. Claypool, 149 Ind. 193.

Parks.—For parks under the general law applicable to smaller cities, see *ante*, § 347, *et seq.* and notes, and *post*, § 1142, *et seq.* and notes.

499. Terms of office.—2. The first members of said board shall hold office respectively, as follows: One for the term of one year, one for the term of two years, one for the term of three years and one for the term of four years, from and after the first day of January, 1899, and annually thereafter, on the expiration of the respective terms aforesaid the mayor shall appoint a commissioner or commissioners to fill the vacancies caused by such expirations, and the commissioner or commissioners so appointed shall hold office for a term of four years, beginning with the first day of January in the year of appointment, and if any vacancy occurs in said board by resignation or otherwise the mayor shall appoint one or more commissioners for the residue of the term, or terms, and may also remove any commissioner, but only upon his filing in writing with the city clerk his reasons for such removal.

500. Chairman—Clerk—Employes—Removals—Duties and compensation.—3. The said board shall choose one of its members chairman, and may from time to time appoint a clerk and such other employes as it deems necessary to carry out the purposes of this act; it may determine the duties and compensation of such appointees and may remove such appointees at pleasure, and make all reasonable rules and regulations not in conflict with the laws of the state or the ordinances of such city.

501. Office—Records, etc.—4. Said board shall have a suitable office provided for it by such city, where its maps, plans, documents, records and accounts shall be kept, subject to public inspection at all reasonable times.

502. Report to mayor—Receipts and expenditures.—5. On or before the first day of February, each year, said board shall make a report to the mayor of its proceedings with a full statement of its receipts and disbursements for the preceding calendar year. All moneys received by said board shall be forthwith paid into the city treasury, and all expenditures relating to said parks, parkways, and public grounds, boulevards, driveways and other avenues and places under the control of said department shall be provided for in the same manner as the expenditures of the other departments are provided for and shall be paid from the city treasury when required under the same rules and regulations governing the expenditure of other departments of such city.

503. Quorum.—6. A majority of the members shall constitute a quorum, and no action of said board shall be binding unless authorized by a majority of the members at a regular or duly called special meeting thereof and such meeting shall be open to the public.

504. Superintendent of parks.—7. Such board may appoint a competent superintendent of parks, who shall, under the direction of said board, have active charge, control and direction of the parks, parkways, park boulevards, and public playgrounds of such city.

505. Government of parks.—8. The said board of park commissioners shall have the exclusive government, management and control, subject, however, to the laws of the state and to the powers of the common council in relation thereto, of all the parks, parkways, park boulevards and public playgrounds, and the full and exclusive power to govern and manage the same and all public parks, driveways and public grounds outside of the city, which may be established under the provisions hereof, and shall direct the public use thereof, and such parts of the several roads, streets or avenues as run through or intersect the same and shall have full power to enforce all laws and ordinances for the proper use, regulation and government thereof; and for all purposes of such government, maintenance and direction of public use such parts of said roads or avenues as pass through said public grounds or parks shall be deemed to be a part thereof, and shall be under like control and management of said board of park commissioners.

506. Powers of board.—9. And the said board of park commissioners shall have, subject to the limitations aforesaid, full and exclusive power:

First. To acquire, lay out, improve, maintain, and regulate public parks, parkways, park boulevards and playgrounds of such city, and to govern, manage and direct the public use of the same.

Second. To make rules and regulations for their proper management and government.

Third. To appoint such engineers, surveyors, clerks and other officers as they may deem expedient, and to prescribe and define their respective duties and authorities, and to fix and regulate the compensation to be paid to the several persons so to be employed by them, and the said board of park commissioners are hereby authorized to require from the department of public safety of such city a special detail of police to execute the orders and enforce the rules and regulations made by said board of park commissioners and thereupon said board of public safety shall detail policemen who shall be constantly subject to the orders of said board of park commissioners. In case of disagreement between said two departments as to the number or duration of service of such details of policemen, the mayor shall decide the question.

Fourth. To locate, erect and maintain fountains on said parks or either of them, as well as the streets and avenues which form the boundaries thereof or intersect the same; and to erect and maintain suitable fences around said parks.

Fifth. To seize and impound any cattle, sheep, swine, goats, horses, geese, or any other animals found running at large on any of the public parks of such city as shall be provided by ordinance of such city, and to establish suitable places for such impounding.

Sixth. To let and lease any buildings or grounds belonging to such city which may lie within the limits of any park, until the same shall be required for public use; and to sell any buildings, improvements or materials within the limits of any park and belonging to the city, which, in the judgment of the said board of park commissioners, may not be required for the purposes of said park, or for public use, and the proceeds thereof shall be deposited with the city treasurer to the credit of said department and devoted to the improvement of such parks.

507. May bring actions.—10. They may also, in the name of the city, bring any action which they deem proper to recover damages for the breach of any agreement, express or implied, relating to or growing out of the management or improvement of said parks, streets, boulevards and driveways under their control, and for penalties for the violation of any ordinance, and for injury to the personal or real property appertaining to the parks, streets, boulevards, driveways or other territory belonging thereto, and to recover the possession of any such property.

508. Charge of parks—Rules and regulations.—11. The said board shall have charge and management of such park lands taken for such

purposes, pursuant to the statutes of this state, and all rules and regulations which such board shall at any time adopt, under and in pursuance of the provisions herein contained shall be published for at least ten (10) days in a daily newspaper printed in such city.

509. Authority of board—Expenditures.—12. The said board shall have full, complete and exclusive authority, subject to the laws of the state, and the powers of the common council relating thereto, to expend for and on behalf of the city all sums of money appropriated by the city council from the general revenues of the city for the same purposes; and all money that may be realized by said board of park commissioners from the sale of privileges in the parks of such city, or from any other source, or realized from the sale of bonds of the city, and set apart for park purposes, and the common council of such city shall from time to time appropriate out of the general revenues of the city a stated sum to be set apart for the use of the department of public parks, and may borrow money for the use of said department of public parks and may issue the bonds of the city therefor as provided by law for the general purposes of such city, but the said board shall have no power to contract debts beyond the amount so appropriated.

Contracts in excess of amount appropriated.—See *ante*, § 432 and notes.

510. Franchises for railway prohibited.—13. No franchise shall be granted by the city authorities for the construction or maintenance of any railway lengthwise upon any parkway or park boulevard within the limits of any park, or connecting any one park with any other, as provided herein.

511. Sale of park lands—Concerning erection of buildings.—14. If said board should wish to sell any portion of the park lands now owned by the city or that may hereafter be acquired, they are hereby authorized to prepare an ordinance authorizing such sale and submit the same to the city council. If the council shall pass such ordinance and the same be signed by the mayor, then the said board shall have power to sell the same, and the proceeds of such sale shall be expended in the improvement of the remaining park lands or in the purchase of other lands for park purposes, as said board may deem for the best interests of the city: *Provided*, That such lands shall not be sold for a less sum than the purchase price thereof when acquired by such city. Said board may establish a line or lines determining the distance at which all structures to be erected upon any of the lots or blocks so sold under the provisions of this section, or upon any private premises fronting any park, parkway or park boulevard under the jurisdiction and control of said board, shall be erected upon such premises; and may in the name of the city condemn the right to prevent the erection of, and to require the removal of, all structures outside of said lines; and when so condemned no permit shall be issued authorizing any structure outside of the line so established. The establishing of any building line outside of any boulevard or park, or

either, as herein provided in connection with the condemnation of the land for the same shall be understood to be the condemnation and the perpetual annihilation of all the rights of the owners of property which shall front on such park, parkway or boulevard, or across which said building line shall run to erect any building whatever or any part thereof between such building line and such boulevard, park or parkway; or it may be accomplished by absolute condemnation of the land, with perpetual and irrevocable free license to use and occupy fifty (50) feet in the width of the same for all purposes not otherwise forbidden, except buildings, as said board shall determine to be preferable and most effective. No subdivision into lots of any lands, lying within five hundred feet of such boulevards, or either of such parks or parkways shall be valid without the approval of said board of park commissioners; and they shall also have the power to forbid by general order or rules and to abate any horse racing, gambling, offensive or dangerous business or amusements within five hundred (500) feet of such boulevards, parks and parkways, or either of them, and the right to use such adjacent lands for any such purpose shall be deemed to be included in any gift, donation or assessment and condemnation above provided for. But no lawful business at the time of acquiring such lands and carried on upon such adjacent lands shall be probibited or abated without a fair valuation and due and full compensation.

512. Grants—Conveyances—Devises, etc., for parks.—15. Real and personal property may be granted, devised, bequeathed or conveyed to such city for park purposes or for the improvement or ornamentation of any park, play-ground, boulevard, pleasureways, parkways or other public grounds, or for the establishment or maintenance therein of gardens for horticulture and floriculture and of museums, zoological gardens, collections of natural history, observatories, libraries, fountains, monuments or works of art upon such trust or conditions as may be approved by the said board and city council, and all such property or the rents, issues and profits thereof shall be subject to the exclusive management and control of the said board. Said board shall also provide such accommodations for, and take such steps as the money at their disposal will justify for the securing and reservation of collections of natural history and the establishment of museums in the parks of such city. But all such property and the rents, issues and profits thereof, must be subject to the management and control of said board, and may be improved and added to and changed in its discretion, and shall be protected, preserved and arranged by said board for public use and enjoyment, and under such rules and regulations as said board shall from time to time prescribe.

513. Admission to gardens and museums.—16. Admission to said gardens and museums may be either free to the public, or upon the payment of such sums of money as the said board of park commissioners may determine; and all income to be derived from such admissions shall be applied to the improvement and maintenance of such gardens and museums, or of the said parks. The said board may also

agree for the management and maintenance of any of said gardens or other institution, with any society incorporated, or to be incorporated under the law of this state; but such gardens or other institutions shall always remain subject to the control of the said board of park commissioners or those who shall succeed to their duties.

514. Streams and water-courses within city limits—Rules—Regulations—Ordinances.—17. The said board shall have power to keep open rivers and streams or waterways, and to prevent the deposit or maintenance of unsightly or obnoxious material in the same or on the banks thereof, and to provide for the protection of the banks thereof within said city, and to make such rules and regulations concerning said streams and the banks thereof as shall in their judgment be necessary for such purposes, and the common council of said city is empowered to provide for the enforcement of said rules by ordinance with suitable penalties. Said board shall have power to provide for the damming or changing the course of any river, stream or waterway within the boundaries of any park, so as to provide water for use in said parks for sprinkling, boating or other purposes. Also to provide pools of water or artificial lakes in such parks; also to construct all necessary bridges and viaducts over, or tunnels under, rivers, water-courses or railroads within or bordering on the line of such parks, boulevards or pathways.

515. Power of eminent domain.—18. The said board of park commissioners are authorized to exercise the power of eminent domain within such city, for the purposes of carrying out any of the provisions of this act. And in case said board of park commissioners can not agree with the owners, lessees or occupants of any real estate selected by them for the purposes herein set forth, they may proceed to procure the condemnation of the same as hereinafter provided, and in addition thereto, when not in conflict nor inconsistent with the express provisions of this act, may proceed under the general laws of the state of Indiana for condemning the right of way for the purposes of internal improvement, which may be in force at the time, and the provisions of such laws are hereby extended to park boulevards, parks, parkways, and park commissioners to be created by this act, so far as the same are not in conflict or inconsistent with the terms of this act.

516. Assessment of benefits and damages—Appraisers—Condemnation proceedings—Appeal.—19. Whenever said board of park commissioners shall have determined to have condemned any grounds selected by them for the purposes of a boulevard, or shall have selected any grounds for such purpose and secured a contract or agreement for the same, by purchase or otherwise, they may apply to the judge of the circuit court for the county in which the real estate, or the real estate to be affected thereby, may be situated, for the appointment of three disinterested freeholders of said county as assessors, and thereupon such court shall appoint three assessors, qualified as aforesaid for the purposes provided in this act. The said assessors shall proceed to assess damages and benefits upon the property or appurten-

ances thereto belonging, by them deemed to be injured or benefited by reason of the improvements occasioned by the location and construction of such boulevard as near as may be in proportion to the injuries or benefits resulting thereto: *Provided*, That not more than fifty per cent. of the cost of any such location and construction in the aggregate, shall be assessed as benefits, and the remaining cost thereof shall be paid out of the general fund of such city: *Provided, further*, That all the said assessments of benefits shall be made upon all of the lots and lands situate within six hundred (600) feet of the boundary of such boulevard in proportion to the benefits received, *And provided, further*, That no assessment of benefits shall be made in excess of fifteen per cent. of the value of the lands so assessed exclusive of the improvements upon the land so assessed. The damages, if any, occasioned by the taking or condemnation of the land or easement as aforesaid and in general the form and the particulars of such proceedings and assessments, when not inconsistent with this act, shall be as near as may be, the same as required by the laws in force at the time governing such city for the condemnation of land for and laying out of streets. Whenever said board of park commissioners shall have determined to have condemned any grounds selected by them for park purposes, they shall proceed to acquire or condemn said grounds in the same manner as is herein provided for the condemnation of lands for boulevards, except that the entire cost thereof shall be paid out of the funds of said city: *Provided*, That any aggrieved party in such condemnation proceedings shall on appeal to the circuit court be entitled to a trial by jury.

517. Assessments—Notice—Hearing property owners—Assessment roll—Confirmation—Assessment lien—Foreclosure.—20. Before entering upon the duties of their office, said assessors shall make oath before the clerk of the said county, faithfully and impartially to discharge the duties of their offices. They shall give at least ten (10) days' notice in at least one of the daily papers published in such city, of the time and place for their meeting for the purpose of making such assessment, and may adjourn from time to time until the same shall be completed. In making such assessment said assessors shall estimate the value of the several lots, blocks, and parcels of land deemed benefited as aforesaid, and shall include the same, together with the amount assessed as benefits, in the assessment roll, and shall estimate the damages to the several lots, blocks and parcels of land, which shall be taken or injuriously affected by said improvement, and shall include the same together with the several amounts assessed as damages in said assessment roll. All parties may appear before said assessors and be heard touching any matter connected with the assessment. When the same shall be completed by the said assessors it shall be signed by said assessors and returned to said board of park commissioners, who shall fix a day upon which they will review, revise and correct such assessment, and shall give at least ten (10) days' notice, by publication in some daily paper published in such city, of

the time and place when said commissioners will meet and consider said assessment. The said commissioners shall have power to adjourn such hearing from time to time and in their discretion to revise and correct the assessment as to damages, benefits, or otherwise, and confirm or amend the same, or refer the same back to said assessors for revisal or direct a new assessment to be made; said assessment, when confirmed by said commissioners, shall be final and conclusive upon all the parties interested therein, except as hereinafter provided. When such assessment is confirmed by said commissioners they shall make a copy thereof as corrected by them and file the same together with their certificate of confirmation, in the court which shall have appointed such assessors; and they shall also file therewith all such objections as shall have been made to them, in writing, to said assessment at the hearing hereinbefore provided for. Said board shall thereupon give at least ten (10) days' notice in one or more of the daily papers published in such city, of the filing of said assessment roll, and that they will on a day therein named apply to such court for confirmation of the same, which notice shall be published at least ten (10) days' before the time fixed for such application. Said court shall have the power to revise, correct, amend or confirm said assessment, in whole or in part, and may make or order a new assessment, in whole or in part, and revise and confirm the same upon like notice. All parties may appear before the said circuit court either in person or by attorney, when such application shall be made, and may object to said assessment, either in whole or in part, provided all objections be in writing and shall be filed at least three (3) days before the time fixed for application, and shall specify the lot, block or parcel of land, on behalf of which objection is made, and any party so objecting shall be entitled to a trial by jury of the objection so made. After the confirmation of the said assessment the clerk of the said circuit court shall file a copy thereof, under the seal of the said court with the department of finance, and from that time the respective amounts of the benefits therein assessed shall severally be liens superior to all other liens, except taxes, against the respective lots or parcels of land upon which they are assessed. Said department of finance shall at once prepare a duplicate of said assessment roll of benefits, the same to be known as the local assessment duplicate, and deliver the same to the treasurer. The duties of the treasurer and the department of finance, in respect thereto, shall be the same, as are, or may be hereinafter prescribed by law in such cities with regard to assessments for street improvements. Said assessments or benefits shall be due and payable to the treasurer from the time of the delivery of said assessment duplicate to the treasurer. If not paid within sixty (60) days thereafter, such city, by its attorney, shall proceed to foreclose the liens in a court of competent jurisdiction as mortgages are foreclosed, with similar rights of redemption, and have the same sold to pay such assessments, such city shall recover costs with a reasonable attorney's fee, and interest, from the expiration of sixty (60) days, hereinbefore

allowed for payment, at the rate of six per cent. per annum. In all cases where the party against whom the assessment is made is a resident of such city, demand for the payment of the same shall be made by delivery to him personally, or leaving at his last and usual place of residence, a notice of such assessment and demand for payment: *Provided*, That all persons assessed for benefits may within thirty days after the confirmation of such assessments as aforesaid avail themselves of the payment of such assessments in installments in the same manner as provided for the payment of assessments made for the improvement or paving of streets in such cities.

518. Benefits and damages—Tender—Payment.—21. Said board of park commissioners shall have power to determine what, if any part of the damages awarded, shall be paid out of the funds set apart for the use of said board by the common council, or received from other sources. All benefits assessed and collected by the treasurer shall be subject to draft, in the usual manner, upon certificate by the board of park commissioners in favor of the person to whom damages may have been awarded. Any surplus remaining above actual awards shall belong to the general park fund, and be subject to the control of the said board of park commissioners. Said board may delay proceedings until such benefits have been collected.

It shall be the duty of the board of park commissioners, upon the completion of the award of damages, or whenever the time for delay as above mentioned shall have expired, to make out certificates for the proper amounts and in favor of the proper persons, upon the presentation of which to the head of the department of finance, such persons shall be entitled to a warrant on the city treasury. Such certificates or vouchers shall, whenever practicable, be tendered actually to the person entitled thereto, but where this is impracticable the same shall be kept for such persons in the office of the board of park commissioners and the making and fixing of such certificates shall, in all cases, be deemed to be a valid and effectual tender to the person entitled thereto, and the same shall be delivered to him on request. In case of a dispute, or doubt as to which of the various persons said money shall be paid, said board shall make out the certificate in favor of the city attorney for the use of the persons entitled thereto, and said attorney shall thereupon draw the money and pay the same into court in a proper proceeding, requiring the various claimants to interplead and have their respective rights determined. In any case where an injunction is obtained because damages have not been paid or tendered, said board shall tender such certificate for the amount thereof with interest from the time of entry upon the property, if any has been made, and all accrued costs, and thereupon the injunction shall be dissolved. The pendency of an appeal shall not affect the validity of a tender made under this section, but such city shall be entitled to proceed with its appropriation of the property in question.

519. Payment for lands.—22. From the funds derived from such assessments and from the other funds of such city applicable to such

purpose, the said board of park commissioners shall pay to the parties entitled thereto, the amounts respectively due them for any lands so taken. In case said lands or any portion thereof are secured by purchase or contract such payment shall be made according to the terms of such contract, and in case of any lands taken by condemnation as herein provided, the amount of damages so assessed shall be paid or tendered as herein provided, within ninety (90) days after the final determination of the proceedings herein provided, and thereupon the title of such lands, ways, building lines, easements, boulevards and parks, or that portion thereof so paid for or otherwise acquired for such purpose, shall become fixed and vested in such city in the manner, to the extent, for the purpose and subject to the limitation hereinbefore provided.

520. Description of land filed in recorder's office.—23. Within sixty (60) days after any land or right therein is acquired or taken under this act, the board shall file and cause to be recorded in the recorder's office of the county in which the land is situated, a description thereof sufficiently accurate for its identification, with a statement of the purpose for which it is acquired or taken, which shall be signed by a majority of the board.

ARTICLE 4.—POLICE COURT.

SEC.		SEC.	
521.	Police court.	529.	No fees to be received.
522.	Seal—Change of venue.	530.	Salary of judge—Payment.
523.	Police judge — Election — Term — Bond—Jurisdiction.	531.	Clerk—Bond—Duties.
524.	Penalties imposed.	532.	Bailiff—Bond—Duties.
525.	Rules—Oaths—Practice—Appeals.	533.	Salary of bailiff.
526.	Judge pro tem. — Powers — Docket fees.	534.	Prosecuting attorney—Duties—Fees.
527.	Discharge of poor prisoners.	535.	Witness fees.
528.	Vacancy—Appointment.	536.	Process—Issue—Service.
		537.	Duties of police force.
		538.	Old officers to continue to act.

JUDICIAL.

521. Police court.—116. The judicial power of such city shall be vested in a police court. The officers thereof shall be one judge, a clerk, and a bailiff. The style of such court shall be: "The police court of the city of ———," according to the name of such city. Said court shall be a court of record, and all its judgments, decrees, orders and proceedings shall have the same force and effect as those of the criminal or circuit courts, except that no judgment shall be a lien on the real estate otherwise than is provided by taking transcript, and the same shall be enforced in the same manner as liens by transcript from justices of the peace in similar cases. R. S. 1894, § 3887.

City court under the general law.—See *ante*, § 262, *et seq.* and notes.

522. Seal—Change of venue.—117. The police judge shall provide, at the expense of the city, a seal for such court, which shall con-

tain on the face the words: "Police court of ———, Indiana," the blank to be filled with the name of the city. A description of such seal, together with an impress thereof, shall be spread on the records of such court. No change of venue shall be taken from such court, but any defendant may take a change of venue from the judge thereof as is now provided by law relating to criminal and circuit courts. R. S. 1894, § 3888.

523. Police judge—Election—Term—Bond—Jurisdiction.—118. The police judge shall be elected by the legal voters of such city at the same time and in the same manner as the other city officers are elected for the term of two years and until his successor is elected and qualified. His term of office shall begin at twelve o'clock noon, on the Thursday next after his election. Before entering upon the discharge of his duties he shall execute a bond, payable to the city of Indianapolis, in the penal sum of five thousand ($5,000) dollars, with good and sufficient freehold surety, to be approved by the mayor and filed in the office of the city comptroller, conditioned for the faithful and honest discharge of the duties of his office. He shall hold daily sessions of the police court, Sundays excepted, at a place within such city provided and designated by the common council. He shall have and exercise within such county in which such city is located the powers and jurisdiction now or hereafter conferred upon justices of the peace in all crimes and misdemeanors except as otherwise herein provided. He shall have and exercise within such city the powers and jurisdiction now conferred upon mayors except as herein otherwise provided. He shall have exclusive jurisdiction of all violations of the ordinances of such city. He shall also have original concurrent jurisdiction with the criminal courts in all cases of petit larceny and all other violations of the laws of the state where the penalty provided therefor can not exceed a fine of five hundred ($500) dollars and imprisonment not exceeding six months, or either or both: *Provided*, That such police judge, in all such cases of petit larceny, if he find the prisoner guilty, shall assess his punishment; or, if, in the opinion of such police judge, the punishment he is authorized to assess is not adequate to the offense he may so find, and in such case the police judge shall hold such prisoner to bail for his appearance before the proper court, or commit him to jail in default of such bail. [As amended, Acts 1895, p. 90. In force March 2, 1895.] Burns' Supp. 1897, § 3889.

Mayor—Powers and jurisdiction.—See *ante*, § 80 and notes.

524. Penalties imposed.—119. In the trial of any person in the police court for the violation of any law of this state or ordinance of such city, the court or jury shall have power to assess a fine in any sum not exceeding five hundred dollars ($500), or adjudge imprisonment as a part of the sentence for any time not exceeding six months in the county jail, workhouse or other lawfully designated place of confinement, either or both. R. S. 1894, § 3890.

Constitutional law—Creation of court.—The provisions of the Indianapolis charter

for the creation of a police court are in all respects constitutional and valid; the creation of such court is but an exercise by the legislature of power long recognized as valid in the organization of inferior courts. The constitution does not prohibit special acts creating courts of inferior jurisdiction. Stevens v. Anderson, 145 Ind. 304; Clem v. State, 33 Ind. 418.

Petit larceny—Fine and imprisonment—Constitutionality.—The statute gives to the police court power to assess, as punishment for a violation of the law, in addition to a fine, imprisonment in the county jail or work-house for a time not exceeding six months, and this power is made to apply in particular to the offense of petit larceny. This provision is constitutional. The fact that the general statute fixes, as one punishment for petit larceny, imprisonment in the county jail, fine and disfranchisement, while the police court is authorized to impose a fine and imprisonment only, does not affect the jurisdiction of the court. Stevens v. Anderson, 145 Ind. 304.

Jury trial.—The provisions of the statute with respect to the police court do not deprive defendant of his constitutional right of trial by jury guaranteed to him by art. 1, § 13, of the constitution. Stevens v. Anderson, 145 Ind. 304.

525. Rules—Oaths—Practice—Appeals.—120. Such judge shall have full power and authority to make and adopt rules and regulations for conducting the business of said court not repugnant to the laws of this state, and shall have all powers incident to the court of record in relation to the attendance of witnesses, the punishment of contempts, and enforcing its orders, and to issue commissions for taking depositions in cases pending in said court. He shall have full authority to administer oaths and to give all necessary certificates for the authentication of the records and proceedings of said court in the matter of changes of venue, and in the trial of any person charged with the violation of any law of this state, such court shall be governed as far as may be by the law, rules, practice and pleadings relating to criminal courts, except where herein otherwise provided, and in the trial of any person charged with the violation of any ordinance of such city, such court shall be governed as far as may be by the laws, rules, practice and pleadings now in force relating to mayor's courts, except where herein otherwise provided. Appeals shall be from the judgment of said court in criminal cases to the criminal circuit court and in civil cases to the superior or circuit courts in the same manner that is now provided for appeals from the mayor's court. R. S. 1894, § 3891.

526. Judge pro tem.—Powers—Docket fees.—121. In case of the temporary absence or inability of the police judge to act, he shall appoint any reputable practicing attorney to preside in his absence, and such judge *pro tem.* shall have and possess all the powers and rights, and perform and exercise all of the duties of judge of such court as fully and completely as the police judge appointing him. It shall be the duty of such judge to tax, for the use and benefit of such city, a docket fee of five dollars ($5) in each case where a defendant is adjudged guilty of a violation of any law of this state or ordinance of such city, which docket fee shall be collectible in the same manner as other costs are collected; and no other fees whatever shall be taxed against a defendant except as herein provided: *Provided, however,*

That nothing herein shall prevent the taxing and collection of the penalties and fees now provided by law in case of the collection of judgments on execution, levy and sale of personal property, but such penalties and fees when collected shall be for the use and benefit of such city. R. S. 1894, § 3892.

527. Discharge of poor prisoners.—122. Any person having been adjudged guilty of a violation of an ordinance of said city and committed therefor may be discharged by such court or judge after said defendant has been imprisoned, in addition to the term of imprisonment, if any adjudged against him as a part of the sentence, one day for every dollar of such fine and cost, if it appear to such court or judge that such defendant is unable to pay or replevy such fine and cost, but an execution may issue against the property of the defendant, as in the case of other judgments. In no such case, however, shall the city be liable to any person for costs or fees. R. S. 1894, § 3893.

528. Vacancy—Appointment.—123. In the case of a vacancy in the office of police judge, the mayor shall appoint a successor, who shall hold such office during the unexpired term of his predecessor. R. S. 1894, § 3894.

529. No fees to be received.—124. The police judge, clerk of the police court, or the bailiff thereof, shall not receive any fees, or other compensation whatever than their respective salaries. R. S. 1894, § 3895.

530. Salary of judge—Payment.—125. The salary of the police judge shall be two thousand five hundred dollars per annum, payable quarterly, as the salaries of other city officers are paid. [As amended, Acts 1895, p. 90. In force March 2, 1895.] Burns' Supp. 1897, § 3896.

531. Clerk—Bond—Duties.—126. The city clerk shall be the clerk of the police court. Before entering upon the discharge of his duties he shall execute a bond payable to such city in the penal sum of five thousand dollars ($5,000), with good and sufficient resident freehold sureties, subject to the approval of the mayor, which bond shall be filed with the city comptroller. Such clerk shall have full power to administer oaths; he shall issue all process of said court, affix the seal of the court thereto, and attest the same. He shall keep a true, correct and complete record and docket of all cases and persons arrested and brought before the said court, how tried and disposed of, and of the fees, fines, penalties, forfeitures, judgments, executions, decrees and orders had therein, in the same manner, as nearly as may be, as such records are kept by the clerks of the criminal courts. He shall collect, pro ecute and receive payments of all such fees, fines, penalties and forfeitures, and all judgments and executions and all money whatever accruing to or to be paid in for the use of said city from the enforcement of any of the laws thereof. At the close of each day's session of such court, he shall make out and deliver to the police judge a written report of all cases in which he has received or col-

lected any moneys during said day, and shall forthwith pay over all such moneys to said judge, and take his receipt therefor. R. S. 1894, § 3897.

532. Bailiff—Bond—Duties.—127. The bailiff of such police court shall have the powers of a constable, and shall be a police officer of such city, designated and assigned to such court by the superintendent of police of such city. He shall give bond, payable to such city, in the penal sum of one thousand dollars ($1,000), with sufficient freehold surety, to be approved by the mayor, conditioned upon the faithful and honest discharge of his duties, which bond shall be filed in the office of the comptroller. It shall be his duty to be present at the sessions of such court, maintain order therein, and perform all other ordinary court duties, subject to the order of the court. He shall have and exercise the powers and duties of a constable, as now prescribed by law, except as herein otherwise provided. He shall take charge of all executions issued by the police court, and shall see to the collection of the same. He shall keep, in books to be furnished him by the comptroller, a full and accurate account and docket of all executions which may come into his hands, showing the names of the defendants, date and number of execution, amount of fines, fees or penalties imposed, and the disposition of such execution. He shall make out and deliver a written report to the clerk of the police court, every Tuesday of each week, of all moneys, collected by him during the week, giving the names of the defendants, number of executions, amount of fines, fees or penalties collected, and forthwith pay such moneys to such clerk, taking his receipt therefor. R. S. 1894, § 3898.

533. Salary of bailiff.—128. The salary of the bailiff of the police court shall be fixed by the police board of such city in any sum not exceeding $800 per annum, payable as other salaries of other police officers are paid. R. S. 1894, § 3899.

534. Prosecuting attorney—Duties—Fees.—129. The prosecuting attorney of the judicial circuit in which such city is located shall prosecute all cases in said court for violations of the laws of this state and shall be entitled to receive the same fees therefor as is now provided in case of such prosecutions before the justices of the peace, and the city attorney shall prosecute all cases of violations of the ordinances of such city, and he shall be entitled to receive the same fees therefor as are allowed such circuit prosecutor. R. S. 1894, § 3900.

535. Witness fees.—130. Witness fees in all cases in such police court shall be taxed and collectible only when claimed or demanded by the witness at the time of the trial. And no witness shall be allowed more than one fee for any one day's attendance, nor shall any witness fee be taxed in any case in favor of any member of the police force of such city. All witness fees when collected and received by the police judge shall be paid by him to such witness upon his demand and his receipting upon the proper docket for such fee. R. S. 1894, § 3901.

536. Process—Issue—Service.—131. All warrants or other proc-

ess issued by the police court shall be directed to the superintendent of police or any member of the police force of such city, which shall be executed, served and returned. R. S. 1894, § 3902.

537.—Duties of police force.—132. It shall be the duty of the members of the police force of such city to cause all persons arrested by them for a violation of any ordinance of such city, or any law of the state, to be taken before such police court for trial or examination, as the case may be. R. S. 1894, § 3903.

538. Old officers to continue to act.—133. From the taking effect of this act until Thursday at noon after the first election, the mayor of such city shall act as police judge and perform all the duties thereof, as required by this act. In case of the mayor's inability to be present and hold said court, he may in writing appoint any reputable attorney of said city judge *pro tem.* to hold the same, who, before entering upon the discharge of such duty, shall take an oath to faithfully serve as such judge *pro tem.* Such judge *pro tem.* shall receive a salary at a rate of six dollars and fifty cents ($6.50) per day, to be paid as the salary of officers is paid, upon the certificate of the mayor that the services have been rendered. The mayor may revoke such appointment at any time. R. S. 1894, § 3904.

ARTICLE 5.—CEMETERIES.

SEC.
539. Locating streets or highways through cemeteries.
SEC.
540. Locating railways through cemeteries.

[Acts 1895, p. 16. In force February 18, 1895.]

539. Locating streets or highways through cemeteries.—1. That nothing in any of the statutes of this state contained, shall be construed to authorize the board of commissioners of the county, or the municipal authorities of any city, in any county in this state having a city of more than one hundred thousand inhabitants within its boundaries, to locate any street, alley or other highway, through the lands owned by any cemetery, dedicated or purchased with a view to their being dedicated to burial purposes: *Provided*, That this act shall not apply to the grounds of any cemetery which has been abandoned, or in which burials are no longer permitted. Burns' Supp. 1897, § 4708*b*

540. Locating railways through cemeteries.—2. That nothing in the statutes of this state contained shall be construed to authorize any corporation organized for the purpose of constructing any railroad, or street railroad, or any electric railway, or any person or persons to locate and construct the line of any such road through the lands of any cemetery dedicated or purchased with a view to their being dedicated to burial purposes, situated in any county in this state having within its boundaries a city containing a population of more than one hundred thousand inhabitants. Burns' Supp. 1897, § 4708*c*.

CHAPTER 3.

CITIES OF MORE THAN FIFTY THOUSAND.

ART.
1. Incorporation and officers.
2. Legislative—Common council.
3. Executive officers and departments.
4. Police court.
5. Department of water-works.
6. School trustees—Taxation—Wharfmaster.

ARTICLE 1.—INCORPORATION AND OFFICERS.

SEC.
541. Cities governed by this act.
542. Elective officers—Election.
543. Powers of officers under old charters.
544. Vacancies—Filling of.
545. Notice to persons elected.
546. Oaths and bonds.
547. Officers not to have interest in contracts.
548. Officers not to purchase claims.

[Acts 1893, p. 65. In force March 3, 1893.]

541. Cities governed by this act.—1. That all cities of this state which had a population of more than fifty thousand and less than one hundred thousand inhabitants, as shown by the last preceding United States census, shall hereafter be governed by the provisions of this act. Any city falling within the scope of this act shall be, and continue to be, the same legal corporation as heretofore, subject to the same liabilities heretofore incurred, and possessing the same rights which have heretofore accrued. All by-laws, ordinances and regulations, not inconsistent with this act, shall remain and continue in full force until altered or repealed by the common council in conformity with the provisions of this act, but all by-laws, ordinances and regulations inconsistent with this act are hereby abolished. R. S. 1894, § 3905.

See note, § 382, *ante*.

Charter—Rules of construction—The charter or statute by which a municipal corporation is created or governed is its organic law, and the rules applicable to the interpretation of constitutions may be used in the construction thereof. Newcomb v. City of Indianapolis, 141 Ind. 451.

Rules of construction.—See *ante*, § 45, general notes.

Incorporation and organization.—For decisions relating to incorporation and organization under the general law of 1867, see *ante*, § 46, notes.

Organization of municipal corporation—Validity of tested by quo warranto.—See *ante*, § 46, notes.

Incorporation—Presumption as to—Prescription—Judicial notice of.—See *ante*, § 46, notes.

Amendments—Repeal, etc.—The charter of a municipal corporation may be amended or repealed at the pleasure of the legislature. Special charters may be amended by either general or special act. See *ante*, § 46, notes and cases.

Municipal powers—Sovereign—Legislative—Judicial—Not liable for exercise or non-exercise of.—See *ante*, § 46, notes.

Municipal corporation defined.—See *ante*, § 46, notes.

Special charter 1847.—The charter granted to the city of Evansville by the act of 1847 was continued in force as an entirety, with the reserved power of amendment and repeal by clause 4 of the schedule to the constitution. Warren v. City of Evansville, 106 Ind. 104.

For construction of said charter and amendments thereto in regard to taxes, street improvements, etc., see Warren v. City of Evansville, 106 Ind. 104; Chamberlain v. City of Evansville, 77 Ind. 542; City of Evansville v. Summers, 108 Ind. 189.

Ordinances—Continued in force.—The ordinances enacted by the city of Evansville under its prior charter, which were in force upon the taking effect of this act, and which are not inconsistent with this act, are continued in force by this section. Beiling v. City of Evansville, 144 Ind. 644.

542. Elective officers—Election.—2. The elective officers of such city shall be a mayor and councilmen as hereinafter provided. There shall be held a city election in such city on the first Monday of April of every alternate year, commencing with the year 1893, and next thereafter in the year 1895, and so on continuously for the choice of such mayor and councilmen. Such election shall be held in conformity to and in accordance with the general election laws of this state, and with the laws for the making out of certificates and memoranda of the result, the delivery of the list of voters and the tally papers, the assemblage of inspectors or judges of elections as a board of canvassers, and the duties of such board in reference to state elections: *Provided*, That such board in city elections shall assemble in the room of the council of such city on the day following such election at 10 o'clock A. M. The duties of the county clerk in reference to such state elections shall be performed by the clerk of such city. All special elections in such city shall be governed by the same provisions. The laws of this state in reference to contests after state elections and all other matters shall be applicable to such city elections as far as they are adapted to the same. R. S. 1894, § 3906.

City officers—Legislature can not appoint.—See *ante*, § 59, note.

Nature of office—Salaries—Allowances, etc.—See *ante*, § 59, note.

Officers—Duties—Liabilities.—See *ante*, § 59, note.

Election of officers—Validity of—Quo warranto.—See *ante*, § 59, note.

Officers—Jurisdiction of—Injunction—Mandamus.—See *ante*, § 59, note.

Removal of officers.—See *ante*, § 59, note.

Mayor—Under general law.—See *ante*, § 80, note.

Councilman.—And other officers, under general law, see §§ 59-68.

Municipal elections.—See *ante*, § 61, *et seq.*, notes.

A municipal corporation is bound by the declarations of its officers, where such declarations accompany, and are explanatory of, an act done by the officer in the scope of his authority. Los Angeles, etc., Co. v. City of Los Angeles, 88 Fed. Rep. 720; 1 Dillon Munic. Corp., 4th ed., § 237, n. p. 321.

543. Powers of officers under old charters.—3. On the taking effect of this act, the present common council, mayor, city clerk and all other city officers and employes, shall possess the powers conferred by this act and no other. All officers of such city created by the statutes of the state or ordinances of the city in conflict with the provisions of this act are hereby abolished, but all officers elected by the common council, and now serving as such, and all officers now serving who have been elected by the people, shall continue until the expiration of their respective terms for which they were elected, and at salaries now fixed for such officers respectively, except the mayor shall receive the salary provided for in this act from and after April 3, 1893: *Provided, however*, They shall not be removed from office except by impeachment, as provided herein: *And provided, further*, That upon the taking effect of this act the mayor shall assign such officers to appropriate departments, and they shall perform such duties and render such services as may be required of them by the respective departments. In case such city, prior to the passage of this act, shall have commenced, by its proper officers, any proceedings or undertakings of a public nature which was lawfully commenced or undertaken, the same shall not be interrupted by the passage of this act, but it shall be taken up and carried forward by the proper officer or department as prescribed by this act, except that in case of public improvements of any sort, whether of sewers, streets, alleys, levees, public buildings, or any other matter of an executive nature, in which a contract has not at the time of the passage of this act been actually let and entered into, the executive department having charge of such matter shall not be bound, unless it so elects by the previous proceedings, but may review the whole subject and modify, change or rescind all orders previously made in that behalf. The present officers of such city shall surrender the custody of all property, records, documents of every nature whatsoever, to the appropriate office or department entitled to the possession of the same under this act. R. S. 1894, § 3907.

See notes to *ante*, § 59, *et seq.*

544. Vacancies—Filling of.—4. In the event of a vacancy occurring in any elective office of such city from death, resignation or other cause, except councilmen at large, it shall be the official duty of the acting mayor to take notice thereof, and within ten days from the time when such vacancy begins to exist, to issue his proclamation for a special election to be held on a day therein named, not more than forty days nor earlier than twenty-five days from the date of such proclamation, in the city or ward, as the case may be, to fill the vacant office for the unexpired term. R. S. 1894, § 3908.

545. Notice to persons elected.—5. The city clerk shall forthwith, after the execution of the certificate of election by the board of inspectors of election of said office, as hereinbefore provided for, notify every person selected of the time when he must qualify, either by personal service or leaving a copy at his usual place of residence, and shall

make return of such service and file the same in his office. R. S. 1894, § 3909.

546. Oaths and bonds.—6. Every elective officer of such city shall, before entering upon the duties of his office, take and subscribe an oath, to be indorsed on the back of his certificate of election, and every appointive officer shall likewise take such oath, to be indorsed upon the back of his certificate of appointment, before some officer authorized to administer the same, to support the constitution of the United States and the constitution of the state of Indiana, and to faithfully and honestly discharge all his official duties, such oath to be filed with the city clerk. Each of said officers, except the mayor and members of the common council, shall likewise execute a bond with surety, to be approved by the mayor, payable to such city in such penal sum as said council may enact by ordinances covering such cases, conditioned for the faithful performance of the duties of his office, and the payment of moneys received by him as such officer to the proper person, such bond to be filed with the head of the department of finance. Any person who shall not file his oath, or oath and bond as the case may be, with the proper officer, within ten days after the beginning of the term for which he is elected or appointed, shall be deemed to have refused to serve, and shall forfeit to the city the sum of ten dollars ($10), recoverable in a civil action, and the office shall be deemed to be vacant: *Provided*, That in case of such default a member-elect of the council may, within thirty days from the date of his election, present his excuse therefor in writing to the body to which he is elected, and any other officer may, within the same time, present his excuse in writing to the council, and if such excuse is accepted, may be relieved from such penalty, and on taking such oath and giving such bond may assume the duties of his office. R. S. 1894, § 3910.

See notes, *ante*, § 113.

547. Officers not to have interest in contracts.—7. No member of the council, nor any other officer, clerk or deputy, or employe of such city shall, either directly or indirectly, be a party to, or in any manner interested in any contract or agreement, either with such city, for any matter, cause or thing, or by which any liability or indebtedness is in any way or manner created or passed upon, authorized or approved by said council, or either of them, or by any officer, board, clerk, deputy or employe of such city. Any contract in contravention of the foregoing provisions shall be absolutely void. Whoever shall knowingly violate the provisions of this section shall be fined not more than one thousand dollars ($1,000), to which may be added imprisonment for any period not exceeding one year. R. S. 1894, § 3911.

548. Officers not to purchase claims.—8. No councilman, or other officer, clerk, deputy or employe of such city shall purchase, either directly or indirectly, any bond, order, claim or demand whatever against such city, during his continuance in office or employment for

any less sum than the amount specified therein; and any bond, order, claim or demand so purchased by any such person, in contravention of the foregoing provision, shall be forfeited to such city, and no action shall ever be maintained thereon. Gifts and the acquirement of equitable interests shall be deemed to be within the meaning and scope of the provisions of this section. R. S. 1894, § 3912.

See *ante*, § 122, *post*, § 1420 and notes.

ARTICLE 2.—LEGISLATIVE—COMMON COUNCIL.

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549. Legislative authority.
550. Wards.
551. Councilmen—Election.
552. Qualifications of councilmen—Vacancy.
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556. Meetings public.
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559. Passage of ordinances.
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566. Executive and administrative functions.
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579. Part of city or town not to be annexed—Debts.
580. Disannexing territory.

LEGISLATIVE.

A. ORGANIZATION.

549. Legislative authority.—9. The legislative authority of the city shall be vested in a common council. R. S. 1894, § 3913.

For decisions and interpretation of statutes relating to the powers of the common council under the general law of 1867, see notes to *ante*, §§ 114–211.

550. Wards.—10. Such city shall be divided by the common council, by ordinance, into seven wards, of as nearly equal population, and of as compact and contiguous territory as practicable. It is made the duty of the present council of such city to readjust the ward, or common council boundaries in such city, and every sixth (6th) year after the year 1893 a new readjustment shall be made, but no oftener, unless the same is made necessary by the annexation of new

territory, in which case the same may be done at any time by an ordinance passed by a two-thirds vote of the council. R. S. 1894, § 3914.

Creation of wards—Judicial notice of existing wards.—See *ante*, § 53.

551. Councilmen—Election.—11. Each ward shall elect one councilman at the city election hereinbefore provided for, and the whole city shall elect four councilmen at large, whose terms of office shall commence at 12 o'clock, noon, on the Monday following such election, and shall continue until the same hour of the same day, week and month of the second year thereafter: *Provided*, That at the first general election after the taking effect of this act there shall be elected councilmen only four from the city at large, who shall serve for a term of two years, and one from each ward who shall serve for a term of one year, commencing at the expiration of the terms of their respective present predecessors as herein provided. R. S. 1894, § 3915.

552. Qualifications of councilmen—Vacancy.—12. No person shall hold the office of councilman from any ward, unless he is at the time of his election a resident and voter thereof; a removal of residence from such ward shall vacate his office. No person shall hold the office of councilman at large unless he is a resident and voter of such city. In the event of a vacancy in the office of councilman at large, from death, resignation or other cause, the common council shall within thirty (30) days from the time when such vacancy begins to exist, fill the vacant office for the unexpired term. The election therefor shall be held at a special meeting of the common council on the call of the mayor. Ten (10) days' notice of such meeting shall be given by the city clerk to the members of said common council, and also by one publication in a daily newspaper of general circulation published in such city, five days prior to such meeting. The person receiving a majority of the votes cast at such meeting shall be declared elected such councilman at large. R. S. 1894, § 3916.

553. Expulsion of members—Rules.—13. The common council shall have the power to expel any of its members for violation of official duty and to declare the seat of any member vacant, by reason of his disability to perform the duties of his office. The council may adopt its own rules to govern such cases, but a two-thirds vote shall be required to expel a member or vacate his seat under this section. R. S. 1894, § 3917.

See note, *ante*, § 119.

554. Meetings of council—Quorum—Passage of ordinances.—14. The members-elect of the council shall hold their first regular meeting on the first Monday after the day of their election at 7:30 P. M., in the council chamber. The council shall thereafter meet not less than once a month, and as much oftener as their rules may require. Special meetings may be held on the call of the mayor, or on such other call as may be provided for by the rules. Seven (7) members shall constitute a quorum. It shall require a majority vote of all the mem-

bers elect to pass an ordinance. Wherever it is provided in this act that an ordinance shall be passed by a two-thirds vote the same shall be construed to mean two-thirds of all the members elect. [As amended, Acts 1895, p. 258. In force, March 11, 1895.] Burns' Supp. 1897, § 3918.

See note, *ante*, § 114.

555. President of council—City clerk—Election.—15. The council shall at its first meeting provided for in the last section choose from its number a presiding officer, and also a presiding officer *pro tem.*, who shall serve until noon of the second Monday in April in the succeeding year. The council shall elect the city clerk, who shall hold his office until removed by the council and until his successor is elected and qualified. The council shall by election fill all vacancies occurring in said office. R. S. 1894, § 3919.

556. Meetings public.—16. All meetings of the council shall be public. R. S. 1894, § 3920.

557. Duties of clerk.—17. The city clerk shall be the clerk of the common council. It shall be his duty to keep the files and papers thereof, to make and keep an accurate minute and journal of the proceedings, enter the ayes and noes on the passage of every ordinance and resolution, and on all other votes whenever requested to do so by two members. The city clerk shall also perform such other duties as are hereafter conferred upon him by this act. [As amended, Acts 1895, p. 258. In force, March 11, 1895.] Burns' Supp. 1897, § 3921.

See *post*, § 587.

Duties of clerk under general law of 1867.—See *ante*, § 86 and notes.

558. Ordinances—Passage—Rules—Signing.—18. All ordinances, orders, resolutions and motions for the government or regulation of such city, and all ordinances for the appropriation of money shall originate in the common council. No appropriation shall be made for the payment of money otherwise than by ordinance, specifying by items the amount thereof and the department for which such appropriation shall be made. The council may prescribe its rules. No ordinance, order or resolution shall become law or operative, until it has been passed, enrolled and attested by the clerk, and signed by the presiding officer thereof, and approved in writing by the mayor, or passed over his veto, as provided hereafter, and whenever the same may be necessary promulgated according to law. [As amended, Acts 1895, p. 258. In force, March 11, 1895.] Burns' Supp. 1897, § 3922.

See notes, *ante*, §§ 82, 84, 117, 117*a*, 118, 124.

559. Passage of ordinances.—19. No ordinance shall be passed on the same day, or the same meeting, that it is introduced except by unanimous consent. R. S. 1894, § 3923.

560. Publication of ordinances.—20. Every ordinance imposing a penalty or forfeiture for the violation thereof, shall, before

the same shall take effect, be published once each week for two weeks consecutively in some newspaper printed in the city: *Provided*, That in the case of insurrection, riot, pestilence, conflagration or other public necessity requiring immediate operation of such ordinance, it shall take effect as soon as the proclamation is made thereof by the mayor, and posted in five public places in each of the wards of such city: *Provided, further*, The common council shall have discretionary power to direct the publication of any ordinance in a daily newspaper, and the publication thereof for one day each in any two consecutive weeks in any daily paper shall be deemed sufficient to allow the same to take effect: *Provided*, That when no paper is published in such city, printed or written copies of such ordinances shall be posted up by the city clerk in at least five public places in each ward of such city for two weeks before the taking effect thereof: *Provided, further*, That whenever any city shall publish any of its ordinances in book or pamphlet form, such publication shall be of itself sufficient publication, and such ordinance or ordinances shall take effect two weeks from the date of publication appearing upon the said book or pamphlet. Any such publication in book or pamphlet form, if the same shall purport to be printed under the authority of the common council of such city, shall be presumptive evidence in all courts and places, of the ordinances therein contained and of the date of adoption, and that the same are properly signed, attested and recorded, and approved by the mayor. R. S. 1894, § 3924.

See notes, *ante*, §§ 117, 117*a*, 118, 124.

561. Approval of ordinances—Veto—Passage.—21. Every ordinance, order or resolution of the common council shall, immediately upon its enrollment, attestation and signature by the clerk and presiding officer thereof, be presented by the city clerk to the mayor, and a record of the time of such presentment kept by the clerk. If the mayor approves it he shall sign it, and it shall become a law. If he does not approve it he shall return it to the clerk, with his objections in writing, within ten days after receiving it, and the clerk shall present the same to the common council at its next meeting. It shall be the mayor's official duty to express, in writing, his approval or disapproval, as hereinbefore provided. If for any reason the mayor fails to discharge his duty within the time named, by approving or disapproving the same, in writing, the same shall be deemed equivalent to a disapproval, and in all cases of disapproval by the mayor the same shall not become a law unless the body in which the measure originated, within thirty days after the time named for the mayor's action, again pass the same by a two-thirds vote. R. S. 1894, § 3925.

562. Recording of ordinances.—22. All ordinances shall, within a reasonable time after their approval by the mayor, or their passage over his veto, be recorded in a book kept for that purpose by the city clerk. Such record shall include the signature of the presiding officer, attestation of clerk, and the mayor's written approval

or disapproval, and memorandum of its passage over his veto. Such record or certified copy thereof shall be presumptive evidence of the going into effect of such ordinance. On the passage of any ordinance or resolution by the council, the yeas and nays shall be taken and entered in full on the journal. R. S. 1894, § 3926.

See notes, *ante*, §§ 117, 117*a*, 118, 124.

B. POWERS AND DUTIES.

563. General powers of council.—23. The common council shall have power to enact ordinances for the following purposes: To provide a corporate seal, with appropriate device, for such city, to be affixed to all instruments or writings needing authentication. To fix the salaries or compensation of the various officers and employes of such city, except where a different provision is made in this act, upon this subject: *Provided*, That no member of the common council shall be allowed more than two hundred dollars for each year of his service as such member, nor shall any salary be changed after the election or appointment of a person to office, until his term expires or his office is vacated. To protect all city property, real and personal. To provide for the punishment of contempt and disorder in the rooms of the council and of the police court. To authorize a census of the city. To receive gifts, donations, bequests and public trusts, and to agree to conditions and terms accompanying the same, and bind the corporation to carry them out. To declare what shall constitute a nuisance, to prevent the same, require its abatement, authorize the removal of the same by the proper officers, and provide for the punishment of the person or persons causing the same, continuing or suffering the same to exist, and to assess the expenses of its removal against such person or persons, and to provide for collecting such expenses either by placing the same on tax duplicate or by suit. To regulate or prohibit the use of hand-organs or other instruments of any annoying character, or other music of itinerant performers in the streets, alleys or public places of such city. To authorize the cleaning and purification of water, and water-courses, and rivers by the board of public works, to prevent encroachment of injury to the banks thereof or the casting into the same of offal, dead animals, logs, rubbish, dirt or any impure liquids of any kind whatever. For the purpose of this paragraph, jurisdiction is hereby conferred upon said city for ten miles from the corporate limits thereof. To prohibit or regulate the location and management of starch factories, glue factories, renderies, tallow candleries, breweries, soap factories, tanneries, distilleries, livery stables, foundries, bone factories, slaughter-houses, and of all other establishments of which the business or trade may become noxious or injurious to the public property, comfort or health; to prohibit the erection of such buildings or the continuance of such noxious or injurious occupations therein whenever the public comfort or health requires it. For the purposes of this paragraph, such city is hereby

given jurisdiction for four miles from the corporate limits thereof. To prevent or regulate the use of fire-arms, fire-works, bon-fires, or other things or practices tending to endanger persons or property. To regulate or prohibit the running at large of cattle, horses, swine, fowls, sheep, goats, dogs or other animals; to authorize the impounding, keeping, sale and redemption of such animals, when found in violation of the ordinances in such cases provided. To prevent the deposit of any unwholesome substance, either on private or public property; compel its removal to designated points, and to require slops, garbage, ashes and other waste or unwholesome material to be removed to designated points or to require the occupants of premises to place them conveniently for removal. For the purposes of this paragraph, jurisdiction is given such city four miles from the corporate limits. To compel the occupants of any premises, buildings or out-houses situated in said city, or within four miles of the corporate limits thereof, when the same has become filthy or unwholesome, to abate or cleanse the same, and to authorize the same to be done by the proper public officers, and to assess the expense thereof against such property. To regulate or prevent the storage of gunpowder, tar, pitch, resin, coal oil, benzine, turpentine, hemp, cotton, nitro-glycerine, dynamite, giant powder, petroleum, gasoline or gas, or any product thereof, or any other explosive or combustible material, or any material which may seem dangerous. To establish, maintain and regulate the location and management of cemeteries or burial places within or without said city, and to provide for the sanctity of the dead; to regulate or prohibit the interment of bodies; to authorize the removal of bodies now or hereafter buried, or of cemeteries to some other proper place. For these purposes such city shall have jurisdiction for four miles from the city limits. To establish quarantine regulations. To authorize the removal or confinement of persons having infectious or pestilential diseases. For the purposes of this paragraph and the preceding paragraph, jurisdiction is given such city for four miles from its corporate limits. To regulate or prohibit the ringing of bells, crying of goods or sounding of steam whistles. To direct the location and regulate the management of all public markets and market places, whether established by the city or by private individuals; to prevent the offenses of regrating and forestalling. To regulate and require reports and records of births and deaths, and to make such requirements as may be deemed necessary to prevent the spread of contagious or infectious diseases. To authorize and require the inspection and condemnation, if unwholesome, and to regulate the sale of meats, vegetables, poultry, fish, butter, oleomargarine, cheese, lard and all other food or provisions. To regulate the selling, weighing, measuring of hay, wood, coal, coke and all other articles sold by weight or measure, and to require dealers to keep honest weights and measures, and to provide for their inspection and sealing. To authorize and require the inspection and licensing of steam boilers and elevators, and to prohibit their use when unsafe or dangerous, or without license. To define fire limits

in such city, and the character of buildings which are forbidden to be erected within such limits, and to prohibit the erection of buildings in such city without a license first obtained therefor, and to regulate the construction of buildings to prevent the spread of fire. To authorize and require the inspection of buildings and structures erected, or to be erected, or in process of erection. To authorize the license therefor to be revoked, and the condemnation thereof in whole or in part, when dangerous or insecure in the opinion of the department of public works, and to authorize the same to be taken down within a specified time by the owner thereof, or in default thereof to authorize the same to be taken down at the owner's expense; or in case of an emergency, to authorize the same to be taken down by the department of public works, without delay for the owner to do so. To compel persons about to undertake dangerous improvements to execute a bond of sufficient sureties, conditioned that the owner or contractor will pay all damages which may be sustained by any person or property from such work. To make all regulations which may be deemed expedient for the promotion of health or suppression of disease. To regulate the construction of chimneys, smoke-stacks, hearths, ovens; the erection of stoves and stove-pipes, boilers and apparatus used in buildings or other places, and to cause the same to be removed or made secure when the same is considered dangerous; to compel owners and occupants of houses and buildings to make scuttles in the roof thereof, with stairs or ladders leading to the same, and to compel the erection of fire escapes. To authorize and require the inspection of gas pipes, water pipes, plumbing, drainage, sewerage and electric wires on private property or elsewhere; to compel them to be repaired or made secure by the owner or occupant, and on failure of such owner or occupant to authorize or require the gas or electric current to be shut off from the same until such repairs are made. To regulate and prohibit the keeping of any lumber yard, and the placing or piling of any lumber, wood or other combustible material, within the fire limits. To establish and maintain a wharf or wharves, control and regulate the same, to fix the rates of wharfage and enforce the collection of the same, to regulate the landing of boats and water craft and the loading or unloading thereof, and to prohibit or regulate the dumping of material upon the bank or in any river, or the obstruction thereof. To prevent immoderate or careless driving or riding. To regulate the use of streets and alleys by vehicles, and designate the kind of conveyances and vehicles which may not use designated streets, which may have been improved, together with hours for the use of such streets by certain specified classes of vehicles. To prevent the incumbering of streets, alleys, squares, sidewalks and crossings with vehicles, horses or any other substance or material interfering with the free use of the same. To regulate the speed of horses, wheeled vehicles, cars and locomotives. To regulate and protect all bridges, culverts, tunnels, viaducts, aqueducts, sewers, canals and hydrants wholly or partly in said city, and to prohibit digging in such streets, alleys or public

places, or in any way injuring, disturbing or making holes in the surface thereof. To regulate the use of sidewalks and all structures, under or over the same, and to require the owner or occupant of premises to keep the sidewalk in front of the same free from snow and other obstructions, and prescribe hours for cleaning the same. To regulate and prevent the throwing or depositing of sweepings, dust, ashes, offal, dirt, garbage, paper, hand-bills, dirty liquids or any other material into any street, alley or public place. To regulate and prevent the use of streets, sidewalks and public places for signs, sign posts, awnings, awning posts, holes, horse troughs, steps, railings, entrances, racks, posting hand-bills and advertisements and display of goods, wares and merchandise. To regulate and prohibit the exhibition and carrying of banners, placards, advertisements or hand-bills in the streets, alleys or public places. To regulate and prevent the flying of flags, banners or signs across the streets or from houses. To regulate the numbering of houses and lots and compel the owners to renumber the same, or in default thereof to authorize and require the same to be done by the department of public works at the owner's expense, such expense to constitute a lien upon the property, and enforceable as provided in the ordinance. To regulate or change the names of streets and parks. To regulate the making of private connection with sewer, gas and water pipes, and to compel owners of property to bring such connections inside of the curb of streets before permanent improvement thereof, and in default of the owner making such connections, to authorize the city to do so at the owner's expense, and to make such expense a lien on the property and collectible in the same manner that expenses for sprinkling streets are collectible. To license, tax and regulate all coaches, hacks, carriages, drays and other vehicles of every kind kept and used within said city: *Provided*, That the revenue derived therefrom shall be applied only to the maintenance and repair of streets and alleys. To regulate, license, tax, restrain theatrical and all other exhibitions, shows or entertainments for which money is demanded or received within said city and for a distance of two miles outside of the corporate limits thereof: *Provided*, That lectures on scientific, historic, benevolent, artistic, religious or literary subjects and apparatus for the elucidation of the same, and specimens of fine art, shall not be deemed to be within this provision. To license, tax regulate or prohibit runners at railroad stations, or other places for stages, cars, public houses or other things or persons. To regulate the sale of all kinds of property at auction in the streets, stores, shops or elsewhere in the city, and to tax and license auctioneers. To license, tax, regulate and prohibit the supply, distribution and consumption of artificial and natural gas, of water and of electricity, and to fix the prices thereon. To license, tax, regulate, suppress and prohibit hawkers and itinerant dealers, peddlers and pawnbrokers, and to revoke such license at pleasure. To license, tax and regulate public hackmen, draymen, omnibus drivers, carters, cabmen, porters, expressmen, bill-posters and all other persons pursuing like

occupations and prescribe their compensation. To license, tax and regulate or prohibit all inns, taverns, hotels, restaurants, or other places used or kept for public entertainment. To license, tax and regulate the selling or giving away of any spirituous, vinous or malt liquors and to tax, license and regulate places where such liquors, or either of them, are manufactured or stored, or where such liquors, or either of them, are to be used on the premises when given away, sold, stored, or manufactured; but such licenses shall not exceed the amount provided by the laws of this state for other cities thereof. For the purpose of this section, jurisdiction is given such city for four miles from its corporate limits. To tax, license and regulate distilleries and breweries, and the depots or agencies established in said city of all breweries and distilleries. To regulate and license lumber yards, livery stables and public scales. To tax, license and regulate second-hand and junk stores, and to forbid their purchasing or receiving any article whatever from minors without the consent of their parents or guardians. To license and license [tax] all stores which do business on the installment plan. To license, tax, regulate and prohibit the keeping or harboring of dogs. To license, tax, regulate and prohibit dairies and the keeping of milch cows. To license, tax and regulate branch stores or establishments, and all other concerns established in said city for temporary business only; and to license, tax and regulate itinerary physicians and venders of medicine. To license, tax and regulate the sale of cigarettes.

To preserve peace and good order, prevent vices and immorality, quiet riots and dispel disorderly assemblages. To suppress gaming and gaming-houses and places of ill-fame or assignation, or houses kept for any immoral purpose; to prohibit and destroy any instruments and devices of gaming, and to restrain fraudulent practices. To license, tax, regulate, restrain or prohibit all tables, alleys, machines, devices or places of any kind for sports or games. To regulate the time and place of bathing in the rivers or public waters of such city; to direct the location and management of public bathhouses, to license the same or to require the same to be closed, if deemed expedient. To restrain and punish vagrants, mendicants, street beggars, common prostitutes, and their associates, thieves and criminals, or persons known and reputed to be such. For the purposes of the last five paragraphs, such city is given jurisdiction for four miles from the limits thereof. To prohibit cruelty to animals.

To keep open rivers, streams or water ways, prevent the waters thereof from pollution; jurisdiction for these purposes being given such city for ten miles from its corporate limits. To provide for change in the course of streams, rivers or water-ways, passing through or bordering upon the corporate limits thereof, and to authorize and exercise the right of the power of eminent domain, either within or without such city, for the purpose of securing a new course for such stream, river or water-way. To provide on what terms real estate in such

city may be drained by means of surface or under drains, over or across other real estate therein or within four miles thereof.

To secure the safety of citizens and others in the running of trains in or through such city; to require persons or corporations owning or operating railroads to fence their respective railroads, to construct cattle-guards, street crossings and viaducts and public roads, and to keep the same in repair and safe condition for persons on foot, in vehicles or otherwise; to keep flagmen at railroad crossings, and provide protection against injury to persons or property from the operation of said railroads; to authorize and require railroad companies to change the location, grade and crossings of their respective railroads; to compel them to raise or lower their railroad tracks to conform to any grade which may be established by such ordinance; to compel persons or companies owning or operating railroads to construct bridges, viaducts or tunnels, and approaches thereto, across their respective railroads or rights of way at street or alley crossings; to compel railroad companies to make and keep open and in repair ditches, drains, sewers and culverts along and under their respective tracks; to require railroad corporations or persons owning and operating railroads to keep gutters and street crossings clean along their rights of way; to prohibit the laying of any railroad track across any street or alley or public place without permission first obtained therefor from the department of public works, and to provide for the taking up and removing any track so laid without notice, and charge the expense thereof against the offending person or corporation; to require any person or company owning or operating any railroad to take up and change the location of any railroad track or switch heretofore or hereafter laid within the limits of the said city; to require railroads now occupying or that shall hereafter occupy any of the streets, alleys or other public places of the city to improve so much of such streets, alleys or other public places as is occupied by such tracks, and to the end of the cross ties on either side thereof, and where there are two or more tracks to require such railroads to improve also the space between said tracks and to cause such improvement to be made and assess the cost thereof against said railroad companies.

To regulate and protect, as otherwise herein provided, fire engines, hose, hook and ladders, and all other property and apparatus belonging to or used by the police or fire departments, and to prevent interference with the members of the police or fire departments while on duty. To authorize the closing of any street, alley or public place, or part thereof, whenever the public safety may require. To authorize the alienation and conveyance of any property, real or personal, belonging to such city: *Provided*, That no such property shall be sold until the same has been appraised by three disinterested freeholders of such city, appointed by the judge of the circuit court, in the county where such city is located, neither of said appraisers to be officers or employes of such city, and their sworn valuation in writing returned to the mayor. No sale or conveyance shall be made for a less sum

than said appraisement, and in case of real estate, only by a two-thirds vote of the common council: *Provided,* That where it is shown to the common council that any personal property does not exceed in value the sum of one hundred dollars the council may authorize the sale thereof without an appraisement, but no such sale shall be effectual until approved by the council. To establish, maintain and regulate pounds, market houses, market places, houses of refuge, pest houses, hospitals, dispensaries, engine houses and all other public city institutions. To appropriate by ordinance and pay a sum not exceeding one hundred dollars a month to any home for friendless women established and maintained in such city; or within the county in which such city is situate, and also to appropriate in like manner and pay to any other charitable institution established and maintained in such city or county such sum as, in the judgment of the common council, shall be necessary to enable such institution to provide for the sick and disabled of such city.

To regulate the building of party walls and partition fences, prescribe in what proportion adjoining owners shall bear the expense of the same, in what manner such expense shall be levied and collected, and to define the terms upon which partition walls already established may be used by adjoining owners. To carry out the objects of the corporation not hereinbefore particularly specified: *Provided,* That such ordinances are not inconsistent with the laws of the state.

To acquire, secure, purchase, maintain and regulate a public park or parks within the corporate limits of the city, or within four miles of such limits; and for such purpose power is given to condemn property as other property is condemned for public purposes; and to make such levy or appropriation and do such other acts as may be necessary to acquire, purchase, or secure such park or parks and maintain the same. For the purposes of this section jurisdiction is given such city for four miles from its corporate limits.

When jurisdiction is given by this act to such city beyond it[s] corporate limits, the same shall not extend to any point within the corporate limits of any other municipal corporation, except in matters relating to public health and pollution of water-courses. [As amended, Acts 1895, p. 258. In force March 11, 1895.] Burns' Supp. 1897, § 3927.

Powers of common council.—See *ante,* §§ 124, 404, notes.

Municipal powers—Mode of exercise—Municipal contracts—Municipal property, etc.—See *ante,* § 124, notes.

Legislative and ministerial powers—Police power.—See *ante,* § 124, note.

Actions—Statute of limitations, etc.—See *ante,* § 124, notes.

Ordinances—Enactment, amendment, repeal, validity, invalidity and construction of, etc.—See *ante,* §§ 117, 117*a*, 118, 124, notes.

Resolutions and rules of council.—See *ante,* §§ 116, 117, 117*a*, 118, 124, notes.

Special subjects—Powers of council to legislate concerning.—For special subjects under the general law over which council has power to legislate, and the decisions of the courts relating thereto, see *ante,* § 124, notes.

Slaughter-houses—Ordinances.—An ordinance prohibiting the maintenance of any slaughter-house within the city when authorized by statute can not be defeated by the

courts on the ground that it is unreasonable. Beiling v. City of Evansville, 144 Ind. 644.

The necessity or expediency of prohibiting slaughter-houses in a city is implied from an ordinance making that prohibition, without any provision for investigation into the character or condition of the slaughter-houses. Beiling v. City of Evansville, 144 Ind. 644.

Ordinances continued in force.—The ordinances enacted by the city of Evansville under its prior charter, which were in force upon the taking effect of this act, and which are not inconsistent with this act, are continued in force by this statute. Beiling v. City of Evansville, 144 Ind. 644.

Nuisance.—Where a common council is empowered to declare what shall constitute a nuisance, and to require its abatement and to assess the expenses of its removal against the person causing the same or suffering it to exist, the council can not declare that to be a nuisance which in fact is not. City of Evansville v. Miller, 146 Ind. 613; Bank v. Sarlls, 129 Ind. 201; Baumgartner v. Hasty, 100 Ind. 575.

Nuisance—Power of council to declare.—An ordinance which provides, "that any building, shed, out-house or structure of any kind that shall be partially destroyed by fire, or from any other cause, and shall be suffered by the owner thereof to remain in such condition after being notified by the department of public works to remove, repair or rebuild the same, shall constitute a nuisance," is as to such provisions void. City of Evansville v. Miller, 146 Ind. 613.

Viaducts—Bridges—Grade crossings, etc.—The legislature may delegate to municipal corporations the power to require railroads to construct viaducts, bridges, tunnels, etc., and to change grades, etc. Chicago, etc., R. Co. v. Nebraska, 170 U. S. 57; New York, etc., R. Co. v. Bristol, 151 U. S. 556; Wabash R. Co. v. Defiance, 167 U. S. 88; State v. Missouri Pacific R. Co , 33 Kan. 176.

C. MISCELLANEOUS.

564. Penalty for violation of ordinances.—24. In every ordinance which the common council shall pass, there may be imposed a penalty for the violation or non-performance thereof. This penalty may be either a forfeiture of money, or a fine or imprisonment, or both of the last two: *Provided*, That no penalty or fine shall exceed five hundred ($500) dollars, and no imprisonment shall exceed six months for one offense. R. S. 1894, § 3928.

See notes, *ante*, §§ 118, 211, *post*, §§ 1237, 1383.

565. Imprisonment.—25. The city council shall have power to provide by ordinance for the imprisonment of any person against whom a penalty, fine or cost for violation of any penal ordinance shall have been adjudged, until such fine, penalty or costs are fully paid or replevied; also, to compel the enforcement of manual labor by such defendant, and by persons sentenced to imprisonment, by the use of sufficient force and means. R. S. 1894, § 3929.

Penalty—Not a debt.—A penalty is not a debt in the sense of the constitution. See *ante*, § 12, note.

566. Executive and administrative functions.—26. Whenever any executive or administrative function shall be required to be performed by any ordinance or resolution of such common council, the same

shall be performed by the proper executive department and not by said council. No new department shall be created. Said ordinances shall designate the department which is to perform the duties thereunder; but if such designation is not made, either by statute, ordinance or resolution, the mayor shall assign such duties to the proper departments. The council shall not elect or appoint any person to any office or employment whatever except that of the city clerk. [As amended, Acts 1895, p. 258. In force March 11, 1895.] Burns' Supp. 1897, § 3930.

See note, *ante*, § 407.

D. INVESTIGATION AND IMPEACHMENT.

567. Investigating departments by council.—27. The common council shall have power to supervise and investigate all departments, officers and employes of the government of such city, and to examine into any charges preferred against the same, and into the affairs of any corporation, department or board in which the city may be interested, or with which it may have entered into a contract, or may be about so to do. It shall have power and access to all records thereto pertaining, and power to compel the attendance of witnesses, and the production of books, papers and other evidence, at any meeting of the body, or any committee thereof, and for that purpose may issue subpenas and attachments in any case of inquiry, investigation or impeachment, and cause the same to be served and executed in any part of the county where such city is located. If any witness shall refuse to testify as to any fact within his knowledge, or to produce any books or papers within his possession, or under his control, required to be used as evidence in any such case, the clerk of the body by whose authority such witness was subpenaed, if so directed by the body or committee holding the investigation, shall forthwith report the facts relating to such refusal to the circuit or superior courts in such county, or the judge thereof, and all questions arising upon such refusal, and also upon any new evidence not included in such first report (which new evidence may be offered either in behalf or against such witness), shall at once be heard by such court or judge. If the court or judge determine that the testimony or evidence required by such witness is competent and revelant [relevant], and material, and ought to be given or produced by the witness, the court or judge shall make an order requiring the witness to testify, or to produce books and papers, or both. In case of a refusal to comply with such order, the court or judge shall have power to commit the witness or otherwise punish him for contempt, as provided for in the laws governing contempt of court in this state. No witness shall be excused from testifying in any criminal proceeding, or in any investigation or inquiry before the council, or any committee thereof, or any officer of the city having the right to conduct the investigation, touching his knowledge of any offense committed against the provisions of this act, or of any ordinance passed in pursuance thereof, or continued in force by this act.

But such testimony shall not be used against him in any criminal prosecution whatever. R. S. 1894, § 3931.

See notes, *ante*, § 119.

568. Impeaching and removal of officers.—28. Whenever any written charges shall have been adopted by the council or any committee thereof, against any officer, employe or department of the corporation, except members of the council, the same shall be heard by the council, under such regulations as may be prescribed by ordinance. It shall require a two-thirds vote to impeach or remove an officer or employe. R. S. 1894, § 3932.

E. FINANCIAL.

569. Taxation.—29. The common council shall have the power to order and direct the levy of an annual tax not exceeding the rate of one dollar and thirty-five cents ($1.35) upon every one hundred dollars ($100) of valuation for any one year, as shown by the tax duplicate for the current year: *Provided, however*, That the common council may, in their discretion, for the purpose of paying existing obligations, increase the levy for the years 1893 and 1894 to the sum of one dollar and fifty cents on every one hundred dollars of valuation, and to manage the finances of the city, subject, however, to the powers and duties herein prescribed in respect to the several executive departments created by this act. The assessment of property and collection of taxes shall be made as now provided by law: *Provided*, That all real estate, within the limits of the city, not exempt from taxation by the laws of this state, shall be assessed at its fair cash value, without discrimination in the valuation of lands used for agricultural purposes within the limits of such city. R. S. 1894, § 3933.

See Taxation, R. S. 1894, chap. 108 (§ 8408 *et seq.*), and Burns' Supp. 1897, chap. 108 (§ 8411, *et seq.*), and Acts 1899, pp. 422, 430, 497, 516; see notes, *ante*, § 212, *et seq.*

570. Borrowing money.—30. The common council shall have power to borrow money to an amount not exceeding two per cent. (2 per cent.) of the taxable property of such city, as the same may appear on the tax duplicate of such city for the year in which such loan shall be effected: *Provided*, That the entire money borrowed shall not at any time exceed two per cent. (2 per cent.) of the taxable property of such city. Such loans may be made only for the purpose of procuring money to be used in the legitimate exercise of the corporate power of such city, and for the payment of legitimate corporate debts. R. S. 1894, § 3934.

See constitutional limitation, *ante*, § 39, and notes, and notes, *ante*, §§143, 411.

Constitutional and statutory limitations distinguished.—The rule which applies to a constitutional limitation is not usually applicable when the limitation is only statutory. When the limitations are imposed by the constitution it may not be within the power of the legislature to dispense with them by the creation of a ministerial commission whose findings shall be taken in lieu of the facts; but, when the limitations are imposed by the statute only, the legislature being the source of the limitation, may create a board

authorized to determine the questions of fact upon which the limitation depends, and its findings will be conclusive in favor of bona fide purchasers of bonds. Chilton v. Town of Gratton, 82 Fed. Rep. 873; Sherman Co. v. Simons, 109 U. S. 735; Lake Co. v. Graham, 130 U. S. 674.

When the limit of issue under the statute is to be ascertained from records or data which are peculiarly within the knowledge and control of the officers of the municipality, then the bonds will be valid in the hands of a bona fide holder. Chilton v. Town of Gratton, 82 Fed. Rep. 873.

571. Bonds—Interest—Sale.—31. Such ordinance for loans may authorize the issue of bonds or other city obligations, negotiable or not, bearing interest at a rate not to exceed six per cent., and running not to exceed thirty years. Such ordinances shall provide for the time and manner of advertising the sale of such bonds or other securities, and of the receipt of bids for the same, together with the mode and terms of sale. All duties with regard to the preparation, advertisement, negotiation and sale of such bonds or other securities shall be performed by the head of the department of finance. Said officer, after causing such bonds to be properly executed, shall deliver the same to the city treasurer, taking his receipt therefor, and upon the conclusion of the contract for the sale of such bonds or other securities shall certify to the treasurer the amount which the purchaser is to pay for the same, together with the name of the purchaser. And thereupon it shall be the duty of the treasurer to receive from the purchaser the amount so certified by the head of the department of finance, and to deliver the bonds or other securities to the purchaser taking his receipt therefor. The treasurer and the head of the department of finance shall thereupon each make a report of his proceedings to the mayor. [As amended, Acts 1895, p. 258. In force March 11, 1895.] Burns' Supp. 1897, § 3935.

572. Temporary loans.—32. Temporary loans may be authorized by ordinance of the common council in anticipation of the revenue of the city for the current and following year, and payable within that year, but the aggregate amount of such temporary loan in any fiscal year shall not exceed the amount of the city tax levy for the same year. No temporary or other loan upon the revenue of any current or succeeding year shall be made until all temporary loans upon the revenue of any preceding year shall have been fully paid. R. S. 1894, § 3936.

573. Refunding bonds.—33. The common council shall have power to authorize the issue and sale of refunding bonds, in order to raise money to take up any outstanding bonds of such city, or to exchange with the holders of such outstanding bonds. The same shall be governed by the provisions of the second preceding section, so far as the same are applicable. R. S. 1894, § 3937.

Refunding bonds.—See notes, *ante*, §§ 39, 143, 144, 157, 414, and *post*, §§ 1001, 1003, 1005.

574. Warrants—When not drawn.—34. No order or warrant shall be drawn against the funds of such city, in the hands of the

treasurer, or other officer, unless an appropriation has been made by ordinance of money for such purpose which is not exhausted, or unless the same shall be for a salary fixed by statute or ordinance, or for payment of any judgment, which such city is compelled to pay. R. S. 1894, § 3938.

575. Interest on bonds.—35. All bonds or other securities offered for sale, pursuant to the provisions of this act, may bear annual interest not exceeding six per cent. (6 per cent.), may run not longer than thirty years, and may contain an option allowing such city to redeem the same at earlier specified dates, in whole or in part, if so directed by the ordinance authorizing such issue. R. S.1894, § 3939.

576. Appropriations, tax levy, when continuous.—36. If the common council for any year shall fail to pass ordinances fixing the annual tax levy and appropriating money for the various executive departments by or before the first day of October in any year, then and in that case the appropriation made for such department or departments for the preceding year shall be deemed to be continued and renewed for the current year, and the tax levy for the preceding year continued. R. S. 1894, § 3940.

577. Boundaries—Conclusive evidence—Annexation.—37. The common council shall have power, by ordinance, to declare and define the entire corporate boundaries of such city, and such ordinance, properly certified, shall be conclusive evidence, in any court or proceeding, of the boundaries of such city, except as provided in the next section. Such ordinance defining the entire city boundary may include contiguous territory, whether platted or not, not previously annexed (and such annexation shall be binding, unless such newly annexed territory shall be within the limits of another town or city, in which case there may be an appeal, as hereinafter provided). Said common council may also, by separate ordinance, not purporting to define the entire boundaries of such city, annex contiguous territory, whether platted or not, to such city, and a certified copy of such ordinance shall be conclusive evidence in any proceeding that the territory therein described was properly annexed and constitutes a part of such city, except as provided in the next section. Immediately after the passage of every such ordinance as is provided for in this section, the same shall be published for at least two consecutive weeks in a daily newspaper of general circulation published in such city. R. S. 1894, § 3941.

See chapter 1, article 6, Annexation of Territory, *ante* §§ 253–255 and notes, and chapter 6, article 2, Annexation—Boundaries, *post*, §§ 1017–1048 and notes, and *ante*, § 418 and notes.

578. Remonstrance against annexation—Proceedings.—38. Whenever such territory is annexed to such city as provided in the foregoing section, whether by general ordinance defining the city boundaries, or by special ordinance for the purpose of annexing territory, and such territory so sought to be annexed is unplatted ground, or

lies within the corporate limits of any other town or city, an appeal may be taken from such annexation, by one or more owners of real estate, in the territory sought to be annexed, filing their remonstrance in writing against such annexation, together with a copy of such ordinance in the circuit or superior courts of the county where such territory is situate, within ten days after the last publication provided for in the preceding section, such written remonstrance or complaint shall state the reason why such annexation ought not in justice to take place. Notice of such proceedings by way of summons shall be served upon the proper officer of the city seeking to make annexation, and such city shall become defendant in such cause, and shall be required to appear and make answer as in other cases. The court shall thereupon proceed to hear and determine such appeal without the intervention of a jury, and shall give judgment upon the question of such annexation according to the evidence which either party may introduce relevant to the issue. If the court shall be satisfied upon the hearing that less than 75 per cent. of the resident freeholders of the territory sought to be annexed have remonstrated, and that the adding of such territory to the city will be for its interest, and will cause no manifest injury to the persons owning real estate in the territory sought to be annexed, he shall so find, and said annexation shall take place. If the court shall be satisfied that 75 per cent. or more of the resident freeholders in the territory sought to be annexed have remonstrated, then such annexation shall not take place, unless the court shall find from the evidence that the prosperity of such city and territory will be materially retarded and the safety of the inhabitants and property thereof endangered without such annexation. In case the court shall so find the annexation shall take place, notwithstanding the remonstrance. Such decision shall be final, and no appeal shall lie therefrom, nor shall the laws touching change of venue from the county apply. But changes of venue from the judge may be had as in other cases. Costs shall follow judgment. Pending such appeal, and during the time within which such appeal may be taken, such territory sought to be annexed shall not be deemed a part of the annexing city. Upon the determination of such appeal, the judgment shall particularly describe the ordinance upon which the appeal is based, and it shall be the duty of the county clerk to forthwith deliver a certified copy of such judgment to the clerk of such city, who shall record the same in the ordinance record, and make a cross reference to the page thereof upon the margin where such original ordinance was recorded In case the decision is adverse to such annexation, no further annexation proceedings for such territory shall be lawful for two years after the rendition of such judgment. [As amended, Acts 1895, p. 258. In force March 11, 1895.] Burns' Supp. 1897, § 3942.

See note, *ante*, § 419.

579. Part of city or town not to be annexed—Debts.—39. No such annexation shall be made, under the foregoing sections, of a part of the territory of any other incorporated town or city, but only of the whole corporate territory thereof. In case of such annexation, the two corporations shall be deemed to be consolidated, and the consolidated corporation shall be bound for all the debts and liabilities, and shall be the owner of all corporate property, franchises and rights of every nature, of both of such municipal corporations. R. S. 1894, § 3943.

580. Disannexing territory.—40. The common council shall have power by ordinance to disannex and throw out any territory forming a part of the corporate limits of such city, upon a petition of a majority of the freeholders resident therein, but such disannexation shall not relieve such territory from being taxed for the purpose of paying any city indebtedness, existing before such disannexation, nor the interest thereon, nor any new securities issued to refund such indebtedness, nor the interest thereon. R. S. 1894, § 3944.

ARTICLE 3.—EXECUTIVE OFFICERS AND DEPARTMENTS.

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EXECUTIVE.

581. Executive and administrative powers.—41. The executive and administrative authority of such city shall be vested in a mayor, city clerk, the departments hereinafter created, or referred to, and such other officers as may hereafter be appointed by virtue of this act. R. S. 1894, § 3945.

For powers and duties of executive and administrative officers under the general law of 1867, see *ante*, § 59, *et seq.*, and notes.

582. Mayor—Election—Term—Qualifications.—42. There shall be chosen at each general election, hereinbefore provided for, except the first, by the voters of said city, a mayor whose term of office shall commence at 12 o'clock, noon, on the Monday next after his election, and shall continue two years, or until his successor is elected and qualified, except as herein otherwise provided. No person shall be qualified for the office of mayor who has not been a citizen and resident of such city for three years previous to his election, and who is not at least twenty-five (25) years of age. R. S. 1894, § 3946.

583. Vacancy in office of mayor.—43. In case of a vacancy occurring in the office of mayor, from death, resignation or otherwise, more than six (6) months before a general election shall occur, it shall be the duty of the acting mayor to take official notice thereof, and within ten (10) days thereafter issue his proclamation calling for a special election by the voters of such city, at a date

therein named, not later than forty (40) days, nor earlier than twenty-five (25) days after issuance of such proclamation, to fill such vacancy or vacancies. Such special election shall be governed by the laws and regulations governing general elections. R. S. 1894, § 3947.

584. Acting mayor.—44. In case of a vacancy in the office of mayor from death, resignation or otherwise, or in case of disability on the part of the mayor to perform the duties of his office, the city comptroller shall perform the duties of acting mayor and be entitled to his salary for the time being: *Provided*, That during the time of performing such duties of acting mayor he shall not perform any duties as comptroller. R. S. 1894, § 3948.

585. Duties of mayor.—45. It shall be the duty of the mayor: To cause the ordinances of the city and the laws of the state to be executed and enforced. To communicate to the council at least once a year, a statement of the finances and general condition of city affairs, and also such information in relation to the same as he may be called upon to furnish from time to time. To make such recommendations in writing, by message to the council, as he may deem expedient. To call special meetings of the council, when the same shall be expedient. To perform such duties of an executive or administrative character as may be prescribed by law, and he shall be responsible for the good order and efficient government of the city. To fill, by appointment, vacancies in the office of the police judge. To appoint the heads of departments, as hereinafter created, who shall hold office until their successors are appointed and qualified: *Provided*, That the mayor may at any time suspend or remove from office any or all of such persons, whether appointed by him or his predecessors, by notifying them to that effect and sending a message to the council stating in writing his reasons for such removal. To sign all bonds, deeds and written contracts of the corporation, and all licenses issued pursuant to law by any department, and to revoke or suspend any such license. To approve or disapprove, in writing, within ten (10) days after receiving the same, every ordinance or resolution of the council, and he shall transmit to the body in which the same originated within such time a message, announcing such approval or veto. In case of a veto, he shall state in writing his reasons therefor, and such resolution or ordinance shall not become operative unless the same is passed over such veto, by a two-thirds vote of the common council: *Provided*, That in ordinances appropriating money or levying a tax or taxes, the mayor may approve or disapprove of the separate items of such appropriation or levy. In case of disapproval of any item or items, and approval of the remainder of the ordinance, so much of the same as is approved shall be law and operative and those items which are disapproved shall not become law and operative unless passed over his veto by a two-thirds vote as above provided. To call together the heads of departments, for consultation and advice upon the affairs of the city at least once a month, and to call on the heads of all departments for reports from the same, which it shall be

their duty to prepare and submit in writing. Records shall be kept of such meetings above provided for, and rules and regulations shall be adopted thereat for the administration of the affairs of the city departments, not inconsistent with any law or ordinance, which regulations shall prescribe a common and systematic method of ascertaining the comparative fitness of applicants for office, position and promotion, and of selecting, appointing and promoting those found to be best fitted, excepting the department of public safety, without regard to political opinions or services. To appoint, as often as he thinks proper, three competent persons to examine, without notice, the accounts of any department, officer or employe, and the money, securities and property of the city in their possession or charge, and report the result of such investigation. R. S. 1894, § 3949.

See notes, *ante*, § 426.

For powers and duties of mayor under the general law of 1867, see *ante*, § 80 and notes.

586. Salary of mayor.—46. The mayor of such city shall be paid the annual salary of four thousand dollars. R. S. 1894, § 3950.

587. City clerk—Deputies—Duties—Salary—Fees.—47. The clerk of such city shall be the clerk of the common council, and may appoint one or more deputies, at his own expense to assist him. He shall keep the records of the proceedings of said body. Said city clerk shall have charge of all the papers relating to the business of said common council, and shall prepare and keep an ordinance book, as elsewhere provided in this act, shall have charge of all documents and books, the keeping of which may be intrusted to him by statute or ordinance, shall keep the city seal, and shall perform all other duties prescribed by law or incident to his office. He shall receive a salary of fifteen hundred dollars ($1,500) per year for all such services, and shall not receive any other compensation, fee or perquisite, except for furnishing certified copies of the records in his possession, which shall be received as evidence in any proceeding, and for which the clerk shall receive like fees as paid to the county clerk for similar services. Said city clerk shall also be the clerk of the police court and of the department of public safety. Said clerk shall deliver over to his successor, as soon as the same shall have qualified for office, all documents, books and belongings of his office. The city clerk may be authorized by the common council to employ a deputy at a salary not to exceed twelve hundred dollars ($1,200) per year: *Provided*, That it is shown to the satisfaction of the council that such deputy is necessary. [As amended, Acts 1895, p. 258. In force March 11, 1895.] Burns' Supp. 1897, § 3951.

See *ante*, § 557.

For duties of clerk under general law 1867, see *ante*, §§ 86, 87, and notes.

DEPARTMENTS.

588. Departments established.—48. The following executive departments are hereby established in such city:

a. Department of finance.
b. Department of law.
c. Department of public works.
d. Department of public safety.
e. Department of collection.
f. Department of public health and charities.
g. Department of water-works.

No other executive or administrative departments shall be established in such city. Subordinate officers and employes not herein provided for shall be appointed by the heads of their respective departments. Each department shall have the power to prescribe rules and regulations not inconsistent with any statute or ordinance, or regulation established pursuant to section 45 of this act, for its own government, regulating the conduct of its officers, clerks and employes, the distribution and performance of its business, and preservation of books, records, paper and property under its control. Each department shall promptly furnish to the mayor or the common council any information which may be called for in relation to its affairs. The heads of said departments shall be appointed by the mayor. Each of said departments shall have power to designate and appoint, and at pleasure remove a person in such department as deputy or first assistant. All official business of the several departments shall be transacted at the offices thereof, and a continuous record or minute shall be kept at said offices respectively of such business. The officer or officers at the head of any department may appoint and remove any of his or their clerks and assistants, subject to any regulations adopted pursuant to section 45 of this act, and, unless otherwise fixed by ordinance, may fix their salaries: *Provided*, That after the expiration of thirty (30) days from the time when a new officer or officers shall have been appointed to the head of a department, he or they may remove clerks or assistants only upon filing in writing with the city clerk the reasons for any such removal, except that foremen, inspectors and laborers temporarily employed under the department of public works may be removed at any time at the pleasure of that department. All officers shall give bond as required by ordinance, except when otherwise provided herein. R. S. 1894, § 3952.

See note, *ante*, § 429.

589. Qualifications of heads of departments—Payment of moneys received.—49. No person shall be appointed as the head of any department, or as a member of any board herein provided for, unless he shall have been a resident and elector of such city for three years immediately prior thereto. No person who is paid a salary for his services from the city treasury shall receive to or for his own use, directly

or indirectly, any fees, perquisites of office, commissions, percentages, or money paid to him in his official capacity, unless specifically authorized in this act; but all fees, perquisites, percentages, commissions, and moneys so paid and received by or for any such officer or person shall be the property of the city, and shall be paid by him into the city treasury; and all moneys received for licenses or permits shall be paid into the treasury weekly without deduction by the officer or department receiving them, and every such officer or person who shall receive any fees, perquisites, percentages, or other moneys which belong to the city, and should be so paid into its treasury, shall before he shall be entitled to receive or be paid his salary, make, under oath, a detailed statement and return to the head of the department of finance in such form as he may prescribe, showing the aggregate amount of all moneys received by him since the last preceding statement and return, and shall produce a receipt showing the payment of such sum to the treasurer. The comptroller may require such officer or person to make such statement and return to him, if it be not made as herein provided, and examine such officer or person under oath touching the matter herein provided for. R. S. 1894, § 3953.

590. Estimates by departments.—50. It shall be the duty of each executive department, before the commencement of each fiscal year, to submit to the joint meeting of the heads of the departments and of the various boards hereinbefore provided for in section 45, an estimate of the amount of money required by their respective departments for the ensuing year, stating with as great particularity as possible each item thereof. The comptroller shall at the same time submit a statement or estimate of city expenditures for other purposes, for the ensuing year, over and above the moneys proposed to be used by the various executive departments, giving with as great particularity as possible each item thereof. After such meeting and reports and consultation, the city comptroller shall thereupon proceed to revise such estimates for the ensuing year, and the comptroller shall then prepare a report to the mayor of the various estimated amounts required in said comptroller's opinion for each executive department, and for other city expenses, together with an estimate of the necessary per cent. of taxes to be levied. The mayor shall at the next meeting of the common council present such report with such recommendations as he may see fit. It shall be the duty of the committee on finance of said common council thereupon to prepare an ordinance fixing the rate of taxation for the ensuing year, and also an ordinance making appropriations by items for the use of the various executive departments and other city purposes for the ensuing year. Said ordinance may reduce any estimated item for any executive department, from the figure submitted in the report of the city comptroller, but shall not increase the same unless recommended by the mayor. Such appropriation ordinance shall thereafter be promptly acted upon by the common council. If at any time after the passage of such ordinance an emergency shall

arise for further appropriations for the use of any department, as certified by such department as hereinbefore provided, or other purposes during the year, such additional appropriation may be made on the recommendation of the comptroller by a two-thirds vote of the council. R. S. 1894, § 3954.

591. Limit of power to bind city.—51. No executive department, officer or employe hereof shall have power to bind such city by any contract, agreement, or in any other way, to any extent beyond the amount of money at the time already appropriated by ordinance for the purpose of such department, and all contracts and agreements, expressed or implied, and all obligations of any and every sort beyond such existing appropriations, are declared to be absolutely void. Nothing herein contained shall be so construed as to prevent the proper department of the city, when authorized by ordinance, from making any contract for the lighting of such city and the inhabitants thereof for any period not exceeding five years; nor shall anything herein contained be so construed as to prevent any such department, officer or employe from issuing any bond authorized by this charter and provided for by ordinance. [As amended, Acts 1895, p. 258. In force March 11, 1895.] Burns' Supp. 1897, § 3955.

See note to § 432, *ante*.

592. Exceeding authority—Penalty.—52. Any city official who shall issue any bond, certificate or warrant for the payment of money which shall purport to be an obligation of such city, and be beyond the unexpended balance of any appropriation made for such purpose, or who shall attempt to bind such city by any contract, agreement, or in any other way, to any extent beyond the amount of money at the time already appropriated by ordinance for such purpose, and remaining at the time unexpended, shall be liable on his official bond to any person injured thereby, and shall be fined in any sum not more than one thousand dollars ($1,000), and imprisoned in the county jail not more than six months, either or both. This section shall not apply to any contract or bond authorized by law and provided for by an ordinance of the common council. [As amended, Acts 1895, p. 258. In force March 11, 1895.] Burns' Supp. 1897, § 3956.

A. DEPARTMENT OF FINANCE.

593. Comptroller—Appointment—Salary—Bond.—53. The city comptroller shall be at the head of the department of finance, and shall have an appropriate seal. He shall be appointed by the mayor. His salary shall be two thousand dollars ($2,000), which may be increased by ordinance to a sum not exceeding three thousand dollars ($3,000) per year, and shall give bond in the sum of five thousand dollars ($5,000). R. S. 1894, § 3957.

594. Duties of comptroller—Payment of salaries.—54. It shall be the duty of the comptroller to prescribe the form of reports and accounts

to be rendered to his department, and to have inspection and revision of the accounts of the several departments and trusts, to audit the accounts of the several departments and trusts, and all other accounts in which the city is concerned, and submit annually to the council, at the end of each fiscal year, a report of the accounts of the city, under oath, exhibiting the revenues, receipts and expenditures, the sources from which the funds and revenues are derived, which report shall be published in pamphlet form; to keep separate accounts for each specific item or appropriation made by the council to each department, and require all warrants to state specifically against which of said items the warrant is drawn. Each account shall be accompanied by a statement in detail, in separate columns, of the several appropriations, the amount drawn on each appropriation, the unpaid contracts charged against it, and the balance standing to the credit of the same. He shall not suffer any appropriation to be overdrawn or the appropriation for one item of expense to be drawn upon for any other purpose, or by any department other than that for which the appropriation was specifically made, except on transfer authorized by ordinances. He shall sign and issue all orders for money upon the city treasurer, and no moneys shall be paid out by the treasurer except upon such order. In case of stated salaries, fixed by law or ordinances, said comptroller shall issue orders therefor, but in all other cases he shall require a warrant to be presented to him from the head of the department under whose supervision the obligation has been incurred, or if not so incurred, then such warrant shall be drawn by the mayor. In no case shall the comptroller draw an order on the treasury unless there be at the time money in the treasury properly applicable to the payment thereof. The expenditures of the comptroller must be approved in writing by the mayor before any order is drawn therefor. To have charge of all books or papers pertaining to his department or entrusted to the same, and to turn the same over to his successor. If any warrant presented to the comptroller contain an item for which no appropriation has been made, or there shall not be a sufficient balance of the proper fund for the payment thereof, or which, for any other cause, should not be approved, he shall not approve the same, and shall notify the proper department of the facts; and if the comptroller shall approve any warrant contrary to the provisions hereof, he shall be individually liable for the amount of the same to the holder thereof, and to the extent of his bond; his sureties shall also be liable. Whenever a warrant is presented to him he shall have power to require evidence that the amount claimed is justly due, and, for that purpose, may summon before him any officer, agent or employe of any department of the city, or any other person, and examine him upon oath relative to such warrant or claim. Such persons so summoned shall be subject to the provisions of this act touching the examination of persons by the council, said comptroller having the same power as such body. To perform the duties elsewhere defined by this act with regard to the negotiation and sale of city securities,

and to keep a register of all bonds of the city and the transfer thereof, and an account of all outstanding securities. To manage and direct the finances and accounts of the city, and to make investments of city funds subject to the ordinances of the common council. To issue all city licenses of every nature whatever upon the presentation and surrender of the receipt of the treasurer, showing the payment of the license fee, and to collect comptroller's fees as fixed by ordinance. Said comptroller shall, once each week, pay to the treasurer the amounts collected by his department for the preceding week, specifying the source from which they have been derived, and the comptroller shall relinquish, in writing, to such city all fees which have been or may be collected. To prescribe the form and methods of keeping and rendering all city accounts, the form of accounts and pay-rolls to be used in the several departments and offices, the manner in which all salaries shall be drawn, and the mode by which all creditors, officers and employes shall be paid. All salaries shall be payable monthly. To furnish the treasurer statements of all appropriations made by the council before any warrant shall be drawn on account of the same, and to notify the mayor in case of any neglect or failure on the part of any officer or officers authorized to collect any moneys for and on account of such city in the performance of such duty or in depositing their collections in the treasury; and thereupon the mayor shall suspend such officer or officers and proceed against them by an action upon their official bond, or otherwise, as he may deem best. To carefully examine tax duplicates in the hands of the county auditor and city treasurer and see that they are properly made out, so far as the same relate to city taxes, and to see that the assessment of property is properly made out by the assessor so far as the same relates to city taxes, and to notify the treasurer of any omitted property which may come to his knowledge, and place the same upon the city tax duplicate. To examine the accounts of the city treasurer and make an annual settlement with him, charging to such treasurer the amount of all taxes and other assessments, entered on said duplicate, in favor of such city, together with all penalties, interest and other sums in addition to the amount of such tax, which it may be the duty, according to law, of such treasurer to collect in behalf of the city, and to credit him with all disbursements made on account of the lawful orders drawn on him by such comptroller. To draw orders on the treasury for miscellaneous city expenditures not made under the direction of any executive department, nor specifically fixed by law, as in the case of salaries: *Provided*, That no such order shall be drawn by such comptrollers unless the money properly applicable thereto has been appropriated by ordinance, and remains unexpended, and no liability shall accrue against such city, nor can any officer, agent or employe of such city bind the same, directly or indirectly, for any such miscellaneous expense without the written approval of the comptroller previously obtained and filed in the comptroller's office, nor in any case beyond the appropriation already made and remaining unexpended and available for such purpose. All

obligations in contravention of the preceding provisions are declared to be void for all purposes. It shall be the duty of the comptroller to to make out the necessary tax duplicates, copying the same from the county duplicate and assessment, as provided for in the act of the general assembly concerning taxation, approved March 6, 1891, and deliver the same to the city treasurer each year. The comptroller and his deputy are hereby empowered to administer oaths when necessary in matters pertaining to his official business, for which no charges shall be made. [As amended, Acts 1895, p. 258. In force March 11, 1895.] Burns' Supp. 1897, § 3958.

595. Deputy comptroller—Appointment—Salary.—55. The common council may by ordinance provide for the appointment of a deputy comptroller at a salary not exceeding the rate of one thousand dollars ($1,000) per year, the deputy to be appointed and removed at the pleasure of the comptroller, the comptroller to be responsible for the acts of his deputy. The comptroller and his deputy shall have power to administer oaths in connection with all matters relating to said office, for which no charge shall be made. [As amended, Acts 1895, p. 258. In force March 11, 1895.] Burns' Supp. 1897, § 3959.

B. DEPARTMENT OF LAW.

596. City attorney—Appointment—Bond—Duties—Salaries—Deputy.—56. The head of the department of law shall be the attorney and counsel of such city. He shall be appointed by the mayor, shall hold office as hereinbefore provided, and give bond with surety in the sum of five thousand dollars ($5,000), to be approved by the comptroller. He shall have the management, charge and control of the law business of such city and for each branch of its government, and prosecute all violations of city ordinances, shall be the legal adviser of all its departments and officers, shall draw up ordinances, leases, deeds, contracts or other legal papers for such city and its various departments when requested so to do by the proper officer, shall be the custodian of the papers properly appertaining to his office, and shall turn the same over to his successor in office. He shall conduct all legal proceedings authorized by this act, and all appeals of every nature whatsoever in which such city or the public shall have an interest, shall make all searches and abstracts of title required in opening, widening or changing any street, alley or public place, or required in any public work of any kind. He shall receive an annual salary of fifteen hundred dollars ($1,500.00) in full of his services. All fees, perquisites or other emoluments received by him, or payable to him, except for prosecuting violators of city ordinances, shall be collected by him for and in behalf of said city, and the same paid into the city treasury one [once] a week, said payment to be made under oath as to the amount received. Such attorney shall use all diligence to collect costs due such city, and all other fees or recoveries falling within the purview of his official duties. He shall employ a deputy, and also

such other assistants as he may be authorized to do by ordinance, and no other, and shall promptly commence all proceedings necessary or advisable for the protection or enforcement of the rights of such city or the public. He shall report to the mayor in writing all such matters as he may deem important, and to the department of finance all judgments for which the city shall be liable. No judgment against such city shall be enforceable except out of moneys appropriated for that purpose, but the common council and mayor may be compelled by mandamus proceedings to levy, collect and appropriate the necessary sum for the payment of any judgment, in which such legislative bodies may be sued collectively by their legal name, service of process being had on any member thereof, and all members shall be bound by such judgment. R. S. 1894, § 3960.

Powers and duties of city attorney.—For appointment, removal, etc., under general law of 1867, see *ante*, §§ 59, 59*a*, 96 and notes.

Authority of city attorney.—A city attorney who is charged by statute with the duty to prosecute and defend all suits for and against the city, in several controversies involving the same issues, may bind the city by an agreement that all the controversies shall abide the result of one test case. Bank of Commerce v. City of Louisville, 88 Fed. Rep. 398.

C. DEPARTMENT OF PUBLIC WORKS.

597. Board of public works—Appointment—Salaries—Bonds.—57. The department of public works shall have for its head a board of three members, to be appointed by the mayor, not more than two of whom shall be of the same political party. The mayor shall have the power at any time to remove any member of said board and to fill, by appointment, any vacancy occurring in said office. The person appointed to fill a vacancy shall hold the office, subject to removal by the mayor, until his successor is appointed by the mayor. Each member of said board shall receive a salary of at the rate of fifteen hundred dollars ($1,500) per year, which may be increased by ordinance to a rate not exceeding two thousand dollars ($2,000), and give bonds with sureties in the sum of five thousand dollars ($5,000), to be approved by the comptroller. Said board shall choose a chairman from its own number. No member of said board shall have any authority to act on behalf of the same, except pursuant to an order of the board, regularly made at a meeting of the same, at which meeting a majority of said board shall have been present. All actions of the board shall be recorded by the clerk thereof, together with a record of the vote of each member, where the vote is not unanimous. The board shall make rules governing the time and place for holding regular and called meetings, and for giving notice thereof. R. S. 1894, § 3961.

Rules.—See note, *ante*, § 438.

598. Clerk of board—Appointment—Salary—City engineer—Appointment—Salary—Bond.—58. Said board shall appoint a clerk at a salary of five hundred dollars ($500), which may be increased

by ordinance to not exceeding one thousand dollars ($1,000). The mayor shall also appoint a city civil engineer, and may remove him and fill all vacancies in said office. Said engineer shall be subject to the discretion of said board, and receive a salary of two thousand dollars ($2,000), and give bond in the sum of five thousand dollars ($5,000). R. S. 1894, § 3962.

For powers and duties of city engineer under general law 1867, see *ante*, § 91 and notes; Hirth v. City of Indianapolis, 18 App. 673.

599. Board of public works—Powers and duties.—59. The board of public works shall have the power to condemn, hire or purchase any real estate or personal property needed by such city for any public purpose, except when a different provision for purchase is made by this act: *Provided*, That when a sum of money more than two thousand dollars ($2,000) is required to be paid for the condemnation, hire or purchase of any real estate or personal property, the same shall not take place unless the condemnation, hire or purchase is specifically authorized by ordinance. To have charge of all property, real and personal, belonging to such city, and to care for the same except where the custody of such property is by this act placed under different control. To design, order and contract for and execute the improvement and repair of any property, real or personal, belonging to or used by such city, and the erection of all buildings for public purposes together with all fire cisterns, pounds and all other structures of any nature, needed for any public purposes. To approve the platting of all streets and alleys in any addition to such city, or within the corporate limits thereof, or within one mile outside such corporate limits, to require the same to correspond in width, and to be co-terminus with adjoining streets and alleys. No plat of any addition within said city or within one mile of the corporate limits thereof shall be entitled to record in the recorder's office in the county in which such city is located without such written approval indorsed thereon. To lay out, open, change, vacate, and fix or change the grade of any street, alley or public place within such city, and to design, order, contract for and execute the improvement or repair of any street, alley, wharf, or public place within such city. To repair, clean, light and sprinkle any street, alley, wharf or public place within such city which requires the same, in the opinion of such board. Said work to be done either by contract or otherwise, and to cause lamp posts or other lighting apparatus to be erected in the streets, alleys or public places of said city. To lay out, design, order, contract for and execute the construction, alteration and maintenance of all public drains and sewers within such city, and all drains or sewers without such city and within four miles thereof, which may be necessary to carry off the drainage of such city. To purchase or erect by contract or otherwise, and operate gas works, electric light works, street cars and other lines for the conveyance of passengers and freight, natural gas lines, telegraph and telephone lines, steam and power-houses

and lines, for the purpose of supplying such city, and the suburbs thereof, or to purchase or hold a majority of the stock of corporations organized for either of the above purposes:

Provided, That none of the powers conferred by this paragraph shall be exercised except pursuant to an ordinance specifically directing the same. To contract for the furnishing of gas, either natural or artificial, steam or electricity, light or power, to said city or the citizens thereof, by any company or individual, and in such contract to fix the prices to be charged for the same in such city, subject to ordinances of such city in relation to consumption by private consumers. To design, order, contract for and execute the erection of any culvert, bridge, way, viaduct, tunnel or aqueduct within such city, or to enter into a contract with any company or individual for the joint erection and maintenance by such company or individual and such city of any such structure. To authorize and empower by contract, telegraph, telephone, electric light, gas, steam or street car or railroad companies to use any street, alley or public place in said city, and to erect necessary structures therein, and to prescribe the terms and conditions of such use; to fix by contract the prices to be charged to patrons: *Provided,* That such contract shall in all cases be submitted by the board to the council of such city and approved by them by ordinance before the same shall take effect. To license the digging of any coal or the removal of any material from the surface or underneath the surface of any street, alley or public place in such city. To require bonds for damages and for the proper replacement of the street, and to refuse such license when the public interest requires it. To direct the removal of any or all structures in the street, alleys or public places of such city, and to remove the same at the expense of the person maintaining the same, on their failure to make such removal. To design, order, contract for and execute the erection of any levee within the limits of such city, or within four miles thereof. To change any water-course, natural or artificial, within such city, or within four miles thereof. To remove all dead animals, garbage, filth, ashes, dirt, rubbish or other offal from such city, either by contract or otherwise. To prepare a general uniform plan for the drainage and sewerage of such city, and extend the same from time to time, to make and keep a map of all sewer, gas, water, electric wire conduits in such city, public and private, showing the size, depth, inclination, location and date of construction of the same, and to record therein every change which may be made in the same, together with all new connections and improvements. To discharge all other duties of an executive character not falling within the sphere of some other executive department or imposed upon this department by ordinance. To fill or drain any section of ground within such city limits or within four miles of its corporate limits, whenever water has or may become so stagnant or noxious as to be injurious to the public health and comfort, at the owner's expense, the same to be a lien and collectible by foreclosure: *Provided,* That not to exceed ten (10) per cent. of the

value of such lot or land, as valued and assessed upon the tax duplicate for city purposes, shall be expended in filling up or draining the same in any one year. To construct urinals and fountains in public places. To fix, establish, change and keep a record of the grades of all streets, alleys and sidewalks. To contract for the furnishing of gas, either natural or artificial, water, steam or electricity, light or power of said city or the citizens thereof, by any company or individuals, and in such contract to fix the prices to be charged for the same in such city, subject to ordinances of such city in relation to the consumption by private consumers:

Provided, That all such contracts for the furnishing of gas, either natural or artificial, steam or electricity, light or power for said city, shall be approved by ordinance of the common council, before the same shall take effect: *And, provided further*, That the department of public works shall give notice that it will receive bids for such supplies at least three months before the expiration of any contract or contracts which are or may hereafter be in force, by publication in some daily newspaper in said city. [As amended, Acts 1895, p. 258. In force March 11, 1895.] Burns' Supp. 1897, § 3963.

See notes, *ante*, § 440.

Power over streets, alleys and bridges—Duties—Liabilities—Obstructions—Negligence—Actions—Damages.—See *ante*, § 218 and notes.

Plats—Dedication of streets—Prescription, etc.—See *ante*, § 218 and notes.

Opening and vacation of streets—Eminent domain, etc.—See *ante*, § 218 and notes.

Improvement of streets—Fixing and changing grade.—See *ante*, §§ 91, 218, 219, and *post*, §§ 1107–1135 and notes.

Sewers, drains, etc.—See *ante*, § 124, clauses 26 and 43 and notes, and *ante*, §§ 127 and 183 and notes; also, *post*, § 1090, *et seq.*, and notes.

Corporations occupying streets under municipal franchises—Duties and liabilities, etc.—See *ante*, § 218, notes.

Water-works—Contracts, ordinances, etc.—See *ante*, § 124, clause 26 and note, and clause 43 and note, and § 138, *et seq.*; *post*, §§ 1061–1089 and 1372, *et seq.*

Public lights—Gas and electricity.—See *ante*, § 124, clause 28 and notes, and *post*, § 1136, *et seq.*, and notes; also, *post*, § 1371, *et seq.*

Railroads—Occupation of streets, etc.—See *ante*, § 218 and notes, and *post*, § 1316, *et seq.*, and notes.

Street car companies—Occupation of streets, etc.—See *ante*, § 218 and notes, and *post*, § 1332 and notes.

Telegraph and telephone companies.—See *ante*, §§ 1 and 4 and notes, and § 218 and notes, and as to telephone companies, *post*, § 1380 and notes.

Municipal property—Purchase—Sale—Control of, etc.—See *ante*, § 124 and notes.

600. Streets—Repairs and cleaning—Cost—Contracts for work.—60. It shall be the duty of said department of public works to have general supervision over the streets and alleys of the city, and to keep the same in repair and to provide for cleaning the same. The cost of such repairs and of cleaning and sweeping such streets shall be paid out of the general fund. Nothing herein contained shall be so construed as to require the cost of any improvement of any street,

alley or sidewalk, or the cost of sprinkling the same as hereinafter provided, to be paid out of the general fund, except when the cost of such improvement shall exceed forty (40) per cent. of the value of the property to be assessed therefor, and then only in the manner and to the extent hereinafter provided. It shall be the duty of said department of public works, whenever any work ordered or undertaken by it is payable out of the general treasury of such city from funds belonging to such city, to cause said work to be done either by independent contract or by employes of said board as it may deem best; but whenever any work ordered or undertaken by said board is to be paid for in whole or in part by assessments, and is in the nature of the improvements of any street, alley or sidewalk, or is for the construction of any sewer or any other improvement of a general nature, then said board shall cause said work to be done by independent contract. [As amended, Acts 1895, p. 258. In force March 11, 1895.] Burns' Supp. 1897, § 3964.

601. Letting contracts for work—Notice.—61. Whenever said board shall order any work to be done which, either by order of said board or according to law, is to be performed by independent contract, said board shall prepare and place on file in the office of said department complete drawings and specifications of said work. Thereupon said board shall cause a notice to be published in one daily or weekly newspaper of general circulation published in such city, once each week for two weeks, informing the public and contractors of the general nature of the work, and of the fact that the drawings and specifications are on file in said office, and calling for sealed proposals for said work by a day not earlier than ten days after the last of said publication. The board may, in its discretion, fix a later day for receiving such sealed proposals, provided such date shall be mentioned in each of said notices. Said board shall, if a satisfactory bid be received, let such contract to the lowest and best bidder. Such board may, by order, impose further conditions upon bidders with regard to bonds and surety guaranteeing the good faith and responsibility of such bidders, or insuring the faithful completion of such work according to contract, or for keeping the same in repair for any length of time or for any other purpose. [As amended, Acts 1895, p. 258. In force March 11, 1895.] Burns' Supp. 1897, § 3965.

602. Expenses of board.—62. All the expenses incurred or authorized by such board of public works shall be payable out of the general funds of such city appropriated to the use of such board and available for the particular purpose, except where this act specifically directs that the same is to be paid for by assessments against property holders. R. S. 1894, § 3966.

Condemnation.

603. Appropriation of property — Notice — Remonstrance.—63. Whenever the board of public works shall desire to appropriate or

condemn for the use of such city any property, real or personal, or to open, change, lay out or vacate any street, alley or public place within such city, including proposed street or alley crossings of railways in cases where the proposed street or alley is to cross a railway, it shall adopt a resolution to that effect, describing the property which may be injuriously or beneficially affected, and shall cause notices of such resolution to be published in some daily newspaper of general circulation in such city once each week for two weeks. Such notice shall name a date, not earlier than ten days after the last day of publication, at which time such board will receive or hear remonstrances from persons interested in or affected thereby. Said board shall consider such remonstrances, if any, and thereupon take final action confirming, modifying or rescinding their original resolution. Such action shall be final and conclusive upon all persons. [As amended, Acts, 1895, p. 258. In force March 11, 1895.] Burns' Supp. 1897, § 3967.

For decisions on eminent domain, opening and vacation of streets, etc., under the general law of 1867, see *ante*, § 218, *et seq.*, and § 224, *et seq.*, and notes. See, also, constitutional law, *ante*, §§ 4 and 11 and notes.

604. List of owners of property affected.—64. Upon the final order being made, as provided in the preceding section, said board shall cause to be prepared a list or roll of all the owners or holders of property and valuable interests therein sought to be taken and to be injuriously affected, and in case of opening, laying out, change or vacation of any street, alley or public place in such city, or within four miles thereof, a list of the owners or holders of property or valuable interests therein to be beneficially affected by such work. Such list shall not be confined to the owners of property along the line of the proposed work, but shall extend to and include all property taken, benefited or injuriously affected. In addition to such list of names, the same shall show, with reasonable certainty, a description of such property to be taken or affected, whether beneficially or injuriously, belonging to such persons. No greater certainty in names and descriptions shall be necessary to the validity of any assessment than is required in the assessment of taxes. [As amended, Acts 1895, p. 258. In force March 11, 1895.] Burns' Supp. 1897, § 3968.

605. Damages and benefits.—65. Upon the completion of such list, said board shall proceed to award the damages sustained and to assess the benefits accruing to each piece of property on such list. When such assessments or awards are completed, said board shall cause a written notice to be served upon the owner of each piece of property, showing the amount of each assessment or award, by leaving a copy of the same at his last usual place of residence, in such city, or by delivering a copy to such owner personally. If such person be a non-resident, or his residence shall be unknown, then he shall be notified by publication in some daily newspaper of general circulation in such city once each week for three successive weeks.

Such notices shall also name a day, not earlier than ten (10) days after service of notice or after the last publication, as the case may be, on which said board shall receive or hear remonstrances from persons with regard to the amount of their respective awards or assessments. Persons not in such list of assessments or awards, and claiming to be entitled to the same, shall be deemed to have been notified of the pendency of the proceedings by the original notice of the resolution of the board. R. S. 1894, § 3969.

See note, *ante*, § 446.

606. Insane persons and infants.—66. In case any person having an interest in the land affected by such proceedings shall be of unsound mind or an infant, said board of public works shall certify the same to the city attorney, and said city attorney shall forthwith apply to the proper court and secure the appointment of a guardian for such infant or person of unsound mind; and thereupon said board shall give notice to such guardian, who shall thereupon appear and protect the interest of his ward: *Provided*, that if such infant or person of unsound mind already have a guardian, such notice may be served on such guardian. The requisites of notice to such guardian shall be the same as in the case of other notice. If there be a defect in the proceedings with respect to one or more interested persons, the same shall not affect such proceedings except so far as it may touch the interest or property of such person or persons, and shall not avail any other person concerned therein. In case of such defect, supplementary proceedings of the same general character as those heretofore prescribed may be had in order to supply the same. R. S. 1894, § 3970.

607. Remonstrance—Appeal.—67. Any person notified, or deemed to be notified, under the preceding sections, may appear before such board on the day fixed for hearing such remonstrances with regard to awards and assessments, and to remonstrate against the same. After such remonstrances shall have been received, said board shall thereupon either sustain or modify the awards or assessments in the cases of such remonstrances, but in no other case. Any person thus remonstrating who is aggrieved by the decision of the board, may, within twenty (20) days thereafter, take an appeal to the circuit or superior court in the county in which said city is located. Such appeal shall only affect the assessment or award of the person appealing. R. S. 1894, § 3971.

608. How appeal taken—Judgment final.—68. Such appeal may be taken by filing an original complaint in such court against such city within the time named, setting forth the action of said board of public works in respect to such assessment, and stating the facts relied upon and showing an error on the part of such board. Such court shall rehear the matter of such assessment *de novo*, and confirm, lower or increase the same as may seem just. In case such court shall reduce the amount of benefit assessed against the land of such property holder, or increase the award of damages awarded in his favor, the

plaintiff in such suit shall recover costs, otherwise not. The judgment of such court shall be final, and no appeal shall lie therefrom. R. S. 1894, § 3972.

609. Benefits—Liens—Assessment roll.—69. On the completion of such assessment roll by said board of public works, the same shall be forthwith delivered to the department of finance, and from that time the respective amounts of benefits therein assessed shall severally be liens, superior to all other liens except taxes, against the respective lots or parcels of land upon which they are assessed. Said department of finance shall at once prepare a duplicate of said assessment roll of benefits, the same to be known as the local assessment duplicate, and deliver the same to the treasurer. The duties of the treasurer and of the department of finance in respect thereto shall be the same as are hereinafter more specifically described with regard to assessments for street improvements. R. S. 1894, § 3973.

610. Assessments, when due—Foreclosure.—70. Said assessments of benefits shall be due and payable to the treasurer from the time of the delivery of said assessment duplicate to said treasurer. If not paid within sixty (60) days thereafter, the said city by its attorney shall proceed to foreclose said liens in a court of competent jurisdiction as mortgages are foreclosed, with similar rights of redemption, and have the same sold to pay such assessments. Such city shall recover costs, with a reasonable attorney's fee, and interest from the expiration of the sixty (60) days hereinbefore allowed for payment, at the rate of six per cent. (6 per cent.) per annum. In all cases where the party against whom the assessment is made is a resident of such city, demand for the payment of the same shall be made by delivering to him personally, or leaving at his last and usual place of residence, a notice of such assessment and demand for payment. R. S. 1894, § 3974.

See note, *ante*, § 451.

611. What damages city pays.—71. Said board of public works shall have the power to determine what, if any, part of the damages awarded shall be paid out of funds appropriated for the use of such board by the common council: *Provided*, That not more than two thousand dollars ($2,000) in damages shall be paid out of the city funds for any improvement or condemnation unless pursuant to an ordinance appropriating for the specific improvement or condemnation. All benefits assessed and collected by the treasurer shall be subject to draft, in the usual manner, upon certificate by the board of public works in favor of persons in whose favor damages have been awarded. Any surplus remaining above actual awards shall belong to such city. Said board may delay proceedings until such benefits have been collected. R. S. 1894, § 3975.

612. Damages—Payment.—72. It shall be the duty of the board of public works, upon the completion of their award of damages, or whenever any time for delay as above mentioned shall have expired,

to make out certificates for the proper amounts and in favor of the proper persons, upon the presentation of which to the head of the department of finance such person shall be entitled to a warrant on the city treasurer. Such certificates or vouchers shall, whenever practicable, be tendered actually to the persons entitled thereto, but where this is impracticable the same shall be kept for such person in the office of said board of public works, and the making and fixing of such certificate shall in all cases be deemed to be a valid and effectual tender to the person entitled thereto, and the same shall be delivered to him on request. In case of a dispute, or doubt as to which of the various persons said money shall be paid, said board shall make out such certificate in favor of the city attorney for the use of the persons entitled thereto, and said attorney shall thereupon draw the money and pay the same into court in a proper proceeding, requiring the various claimants to interplead and have their respective rights determined. In any case where an injunction is obtained because damages have not been paid or tendered, said board may tender such certificate for the amount thereof with interest from the time of entry upon the property, if any has been made, and all accrued costs, and thereupon the injunction shall be dissolved. The pendency of an appeal shall not affect the validity of a tender made under this section, but such city shall be entitled to proceed with its appropriation of the property in question. R. S. 1894, § 3976.

Street Improvements.

613. Improvement of streets and sidewalks—Order—Notice—Assessments—Liens—Payment.—73. The department of public works shall have authority to designate the kind of sidewalks that shall be laid in the city. It shall have the right to classify the same, and in ordering the improvement thereof it shall be sufficient to refer to the same by the name of the class designated. Whenever such department shall deem it necessary that any sidewalk should be made or repaired it shall make an order to that effect designating the kind of sidewalk to be made, or the character of the repairs required, and the property which the same fronts or abuts upon. It shall thereupon give notice of such resolution to be served upon the owner of the property abutting on such sidewalk by leaving a copy of the same at his last or usual place of residence, or by delivering a copy to such owner personally. If such person be a non-resident of the state, or his residence shall be unknown, then he shall be notified by publication in some newspaper of general circulation published once each week for two successive weeks. Such notices shall name a day not earlier than ten (10) days after service thereof, or after the last publication as the case may be, on which said board will hear remonstrances against the making of such sidewalk or such repairs. Such board shall thereupon hear such remonstrances and shall make such order as it may deem necessary, either rescinding, confirming or modifying said

previous order. Should said board finally determine upon the necessity for making such sidewalk or repairing the same, it shall on the day named so order and require the owner thereof to make the same within a time to be limited and fixed by the board not less than thirty days from the date of such order. Should such person at the end of such time have failed to complete said sidewalk or to have the same in actual process of completion to the satisfaction of the board, it shall proceed to have the same done by independent contract. It shall be lawful for said board at the beginning of each year, or at such other stated intervals as to it shall seem best, to advertise for bids for the making of all sidewalks within the city, notice of which shall be given in the manner prescribed for advertising for the improvements of streets and alleys. Said board may let the contract for making such sidewalks to the lowest and best bidder. When this is done it shall not be necessary for said board to advertise for bids for the building of each sidewalk, but it shall be lawful for said board, upon the failure of such owner to build said sidewalk within the time prescribed, to at once cause the same to be made by the person having the contracts for the sidewalks within the city. Upon the completion of said sidewalk said department shall cause to be prepared an assessment list, and shall notify such owner in the same manner as in this section above provided. Said notice shall fix a time and place when the owner may remonstrate against such assessment. On said day such owner may appear and remonstrate, and the board shall take final action, and shall assess such owner and such real estate for the cost of such improvement. On the completion of such assessment the same shall be forthwith delivered to the department of finance and said assessment shall be treated in like manner as assessments for street and alley improvements, but the owner of such property shall not be entitled to pay the same in ten (10) annual installments, but the same shall be payable in cash in like manner as street and alley improvements are paid by persons failing to take the ten (10) year installment plan. Such assessment shall be a lien on the abutting real estate from the time such assessment roll is delivered to the department of finance, and the rights and liabilities of the city, the contractor and the owner shall be as far as practicable the same as in the case of street and alley improvements, except as to paying therefor in installments. The common council shall have power to pass all ordinances necessary to carry out the provisions of this act in relation to the improvement of sidewalks not inconsistent with the provisions hereof.

Whenever the board of public works shall order the improvement of any street, alley or other public place in such city, in whole or in part, it shall adopt a resolution to that effect, setting forth a description of the place to be improved, and full details, drawings and specifications for such work. Notice of such resolution shall be published, remonstrances heard, said original resolution modified, confirmed or rescinded, in the same manner as heretofore more specifically provided by this act with regard to the condemnation of property and the open-

ing of streets. If such original resolution be confirmed or modified it shall be final and conclusive on all persons, unless, within ten days thereafter, two-thirds of all the resident freeholders upon such street or alley remonstrate against such improvement. In case of such remonstrance the improvement shall not take place, unless specifically ordered by an ordinance within sixty days thereafter, passed by a two-thirds vote of the council, and approved by the mayor. The word street or alley as used in this act, so far as the same relates to the improvements thereof, shall not be deemed to include any sidewalk, but the improvement of sidewalks shall be governed exclusively by the provisions hereinbefore set forth for the improvement of sidewalks, and by such ordinances as the common council shall pass in reference thereto. [As amended, Acts 1895, p. 258. In force March 11, 1895.] Burns' Supp. 1897, § 3977.

See note, *ante*, § 454.

For powers over streets, duties and liabilities, improvement of streets, etc., under the general law of 1867, and amendatory and supplemental laws, see *ante*, §§ 218–223 and notes, and *post*, §§ 1107–1135 and notes.

For constitutional provisions and decisions see *ante*, §§ 4 and 11 and notes.

614. Expense of improvements—How assessed.—74. If said board shall finally order such improvement and shall advertise for bids, and let the contract for the same, the cost of any street or alley improvement shall be estimated according to the whole length of the street or alley, or so much thereof to be improved as is uniform in the extent and kind of the proposed improvement per running foot, and the total cost thereof, exclusive of one-half the cost of street and alley intersections, shall be apportioned upon the lands or lots abutting thereon. The remaining one-half cost of street and alley intersections shall be apportioned upon the lands or lots abutting on the street or alley intersecting the street or alley under improvement for a distance to the street line of the first street parallel to the street or alley under improvement in either direction from the street or alley improved. Should a street or alley enter into and not cross the street or alley under improvement, then the assessment for the cost of one-half of said entering street or alley, measured to the center line of the street or alley under improvement, shall be made on the lots or lands abutting on said entering street or alley, for a distance to the street line of the first street parallel to the street or alley under improvement, and such last named assessment shall be made pro rata upon the lots or lands abutting on said street or alley. Such assessment shall be made without regard to the assessment for taxation, as hereinafter provided. Such city shall be liable to the contractor for the contract price of such improvement to the extent of the moneys actually received by such city from the assessments for such improvements hereinafter provided for, and the owners of property bordering on such street or alley shall be liable to the city for their proportion of the cost, exclusive of one-half the cost of street and alley intersections, in the ratio of the front line of

their land or lots, whether platted or not, owned by them, to the whole cost of the improvement of that part of the said street or alley on which said land or lots are located, and which is uniform in extent and quality of improvement. And the owners of lots or lands on the streets or alleys intersecting or entering into such street or alley shall be liable to the city for their proportion of the cost of improving the one-half of the street and alley intersections, in the proportion that their front line on said street or alley bears to the sum of the length of the front line of said lots or lands abutting on said street or alley for a distance, as provided above, from the street or alley under improvement. Said city shall have separate and several liens upon such lands or lots from the time the contract for such improvement is finally let, for the respective assessments against each lot or parcel of land: *Provided*, That when any such street or alley is occupied by the tracks of any railroad company, then so much of the cost of said improvement as said railroad company is liable for, shall be assessed against said railroad company, shall be a lien on its tracks and right of way from the time such contract is let, and shall be paid for by such railroad in cash. Such railroad company shall be liable to the contractor for the amount of its assessment and the contractor may recover said amount from such company and enforce the lien therefor in any court of competent jurisdiction. Nothing herein contained shall change or affect any contract heretofore made between the city and any street or other railroad company. *And, provided, further*, That when the assessment against any lot shall exceed forty (40) per cent. of the value thereof as assessed for taxation, then such lot shall only be assessed to an amount equal to forty (40) per cent. of its assessed value, and the remainder of the assessment against such lot shall be paid out of the treasury of such city. When a street extending along the side of any lot is improved, and such lot is less than twenty-five feet in width, then such lot may be assessed for an amount not exceeding forty (40) per cent. of the assessed value of twenty-five feet in width of such real estate. [As amended, Acts 1895, p. 258. In force March 11, 1895.] Burns' Supp. 1897, § 3978.

See notes, *ante*, § 455.

615. Assessments—Liens.—75. Lots or lands bordering on such street or alley shall be assessed and liable to such assessment primarily, and if not sufficient to pay for the same, then the lots or land shall be liable for a distance back from the front line along such street or alley of fifty feet, whether the same shall be owned by the same or different persons. In case said fifty feet shall not sell for enough to pay such assessment, then the ground for a distance of one hundred feet farther back shall be liable to sale; and in case of unimproved or unplatted ground, if said one hundred and fifty feet fail to sell for enough to pay the assessment, the whole of such land shall be liable to sale. This section shall be deemed to include the assessment, principal and interest, together with the cost of foreclosure and a reasonable

attorney's fee. The lien of the same shall have precedence over all liens except taxes. Any mistake in the description of property, or in the name of the owner, shall not vitiate such liens. R. S. 1894, § 3979.

See notes, *ante*, § 456.

616. Payment by installments.—76. Whenever said board of public works shall order the improvement of any street or alley, as provided in the preceding sections, the assessment for such improvement may, at the option of each property-holder, be payable in ten (10) annual installments, as follows: Ten (10) per cent. of the principal, together with all accrued interest on the entire assessment on or before the third Monday of April next succeeding the allowance of the final estimate on such work by said board, except where such estimate has been made between March 15 and October 1, of any year, in which case such first installment shall be payable on the first Monday of November next succeeding such estimate. The next payment on said assessment shall be six (6) months' interest on the unpaid principal, payable at the end of six months from the date upon which the first installment fell due. The next payment on said assessment shall be ten (10) per cent. upon the principal and six (6) months' interest on the unpaid principal, payable on or before the dates above mentioned, as the case may be, accruing one year after the first installment was payable, and so on, thereafter ten (10) per cent. of the original principal with six months' interest on the unpaid principal once each year, and six months' interest in alternate turn with each annual payment of principal and interest until the entire principal and interest has been paid. Interest not exceeding six (6) per cent. shall be specified by said board in the resolution for improvements, and shall commence from the date of the allowance of such final estimate. R. S. 1894, § 3980.

617. Certificate of engineer—Assessment roll—Notice—Remonstrance.—77. Whenever any such improvement is completed it shall be the duty of the civil engineer to certify said fact to the department of public works, together with his final estimate of the cost of such improvement. It shall thereupon be the duty of the board to prepare an assessment list assessing each parcel of real estate and any railroad company liable for any portion of such assessment for its proportion of such cost as hereinabove provided. When such assessment list is completed said board shall fix a time and place when and where objections to such assessment will be heard, and shall cause notice thereof to be given by publication in a newspaper of general circulation published and printed in such city once each week for two (2) successive weeks. Such notice shall name a day not earlier than ten (10) days after the last publication, on which said board will receive and hear remonstrances from persons with regard to their respective assessments. On the day named in such notice said board shall proceed to hear and determine such remonstrances and may

change, modify or confirm the same. Said assessment roll shall contain the names of the property holders and a description of the property assessed for such improvement, and shall contain the *pro rata* assessment against each piece of property. After hearing such remonstrances said department shall deliver such assessment roll as modified or confirmed to the department of finance. [As amended, Acts 1895, p. 258. In force March 11, 1895.] Burns' Supp. 1897, § 3981.

See note, *ante*, § 458.

618. Final estimate—Copy of assessment roll to treasurer.—78. Whenever the board of public works shall approve and accept the entire work under any contract and allow a final estimate therefor, it shall be the duty of the department of finance to forthwith deliver to the treasurer a certified copy of the assessment roll. Such duplicate assessment roll shall be known as the local assessment duplicate, and shall be appropriately prepared, showing the amount due on each piece of property, if paid in cash within the time limited, together with necessary columns, in which such assessment shall be extended, showing the amount of each installment, and when payable, whenever the same shall be paid in installments, together with the interest due at each spring and fall payment, until the same shall be fully paid. Said book shall also have appropriate columns in which payments may be properly credited, and also a place for the satisfaction of the lien by the treasurer. All assessments, whether payable in installments or not, shall be payable to the treasurer, whose duty it shall be to receive the same and give proper receipts therefor and enter the proper credit and satisfaction in said book or duplicate assessment roll. R. S. 1894, § 3982.

See notes, *ante*, § 459.

619. Agreement by persons paying by installments.—79. Whoever desires to exercise such privilege of payment by installment shall at any time before the expiration of thirty (30) days after the allowance of the final estimate aforesaid, enter into an agreement in writing, that in consideration of such privilege he will make no objection to any illegality or irregularity with regard to the assessment against his property and will pay the same as required by law with the specified interest. Such agreement shall be filed in the office of [the department of] finance. In all cases where such agreement has not been signed and filed within the time limited, the entire assessment shall be payable in cash without interest before the expiration of said thirty (30) days. After said thirty days, if not paid when due such total assessment shall bear interest at the rate of six per cent. (6 per cent.) from the date of the final estimate. Persons signing and filing the agreement within the time limited, and entitled to pay in installments, may nevertheless at any time after the expiration of the first year, pay up their entire assessment and stop the interest thereon, and be relieved

of the lien of the same, on condition that they at the time pay up all accrued interest, and also interest up to the time the next installment of interest is payable: *Provided*, That before such persons shall be entitled to make such prepayment they shall give notice in writing at the treasurer's office of their intention so to do, six months in advance of the time when such payment is made. R. S. 1894, § 3983.

See notes, *ante*, § 460.

620. Duty of treasurer.—80. It shall be the duty of the treasurer to receive the same, keep all accounts thereof, and give proper vouchers therefor. The department of finance shall charge the treasurer with the amounts of such assessments and interest as it accrues. The department of finance shall carefully keep a separate account of the fund arising from each particular improvement ordered by the board of public works pursuant to this act, and no proceeds arising from assessments for the improvement of any particular street or alley shall be diverted to the payment of any other improvement whatever. The proceeds shall in each case constitute a separate special fund for the payment of contractors for the particular work, upon the allowance of estimates by the board of public works, or for the security and payment of street improvement bonds, if any are issued, as hereinafter provided for such street or alley. R. S. 1894, § 3984.

See note, *ante*, § 461.

621. Street improvement bonds.—81. For the purpose of anticipating the collection of such assessments, the department of finance shall issue street improvement bonds, payable out of the funds actually paid to and collected by such city on such account, the proceeds of the same to be applied exclusively to the payment on the particular street or alley for the anticipation of whose assessment the same are issued. Said bonds shall bear the name of the street or alley for which they are issued. Separate bonds shall be issued for each separate lot or parcel of ground, but where several lots or parcels of ground on the same street are owned by one person, one bond may be issued for the entire assessment of such person. Said bonds shall bear interest at a rate not exceeding six per cent. per annum, and shall have coupons attached representing each installment of interest, or of principal and interest, as the same falls due. Said bonds shall be payable in installments as follows: Ten per cent. of the principal, together with all accrued interest on the same, on the third Monday of April next succeeding the allowance of the final estimate of such work by said board, except where such estimate has been made between March 15 and October 1 of any year, in which case such first installment shall be payable on the first Monday of November next succeeding such estimate; the next payment on such bonds shall be six months' interest on the entire principal, payable at the end of six months from the date upon which the first installments upon such bonds fell due; the next payment on such bonds shall be ten (10) per cent. of the origi-

nal principal and six months' interest on the unpaid principal payable on the dates above mentioned, as the case may be, accruing one year after the first installment was payable, and so on thereafter ten per cent. of the original principal with six months' interest on the unpaid principal once each year, and six months' interest on the unpaid principal in alternate turn with the annual payment of principal and interest until the entire principal and interest shall have been paid. In case any person shall exercise his right of prepayment of his assessment as hereinbefore provided, all liability shall thereupon cease as to the property, the assessment which is so paid, and the lien against such property shall be extinguished as rapidly as the treasurer shall collect funds, by reason of such prepayments, the same shall be applicable to the outstanding bonds in the order of their serial number, and interest thereon shall cease *pro tanto* from the time of such collection. It shall be the duty of the treasurer to pay to the person presenting any coupon for payment of any bond on which such prepayment will properly apply, of the amount applicable on such bond, and on demand by the holder of said bond shall pay the same. Said board may provide in its original resolution of improvement for the issue of such bonds directly to the contractor, in which case it shall be the duty of the department of finance, upon the allowance of the final estimate by the board of public works, to issue the same directly to the contractor. Otherwise they shall be issued and sold as other city bonds. Said bonds shall bear date as of the date of the allowance of the final estimate, and shall bear interest from said day. After the issue of said bonds no suit shall lie to enjoin the collection of any assessment, and the validity of the same shall not be questioned. Such bonds, when issued, shall transfer to the owner thereof all right, title and interest in and to the assessment and liens upon the respective lots and parcels of ground hereinbefore provided for, with full power to enforce the collections thereon by a foreclosure in any competent court of jurisdiction as mortgages are foreclosed, recovering reasonable attorney's fees and costs, and with the same right of redemption. [As amended, Acts 1895, p. 258. In force March 11, 1895.] Burns' Supp., 1897, § 3985.

See note, *ante*, § 462.

622. Failure to pay installment—All due.—82. Failure to pay any installment of principal or interest when the same is due shall bring all installments of principal yet unpaid forthwith due and payable. If such city shall fail to collect any unpaid assessments or installment thereon when due, no liability shall thereby accrue against such city, but the owner of the bonds hereinbefore provided for, or in the case no bonds have been issued, then the person to whom is due and owing the amount of such unpaid assessment for the performance of such work, shall have the right to proceed in any court of competent jurisdiction to foreclose the liens or unpaid assessments, recovering interest, costs and a reasonable attorney's fee, and to have the proceeds of sale

applied on his claim. It shall be the duty of the county clerk to certify to the city treasurer all satisfaction of assessment liens by such sale, and the treasurer shall enter the [same] of record. R. S. 1894, § 3986.

See notes, *ante*, § 463.

623. Change of levees and water-courses.—83. Whenever the board of public works shall order the erection or change of any levee, or the change of any water-course, natural or artificial, or the drainage of section of ground, it shall cause the necessary drawings and specifications to be prepared and filed in such office, and shall publish a notice of the resolution ordering the work to be done, shall hear remonstrances, modify, confirm or rescind their original resolutions, prepare a list of property-holders beneficially or injuriously affected by such work, advertise for bids for such work, let the same by contract, assess benefits and award damages, and in these and all other respects proceed in accordance with the provisions of this act relating to the appropriation of property and laying out of streets. R. S. 1894, § 3987.

624. Act governs levee assessments.—84. The provisions of this act for the liens of assessments, preparation of the duplicate assessment roll by the department of finance, delivery of such roll to the treasurer, the collection of assessments, right of election of property-holders to pay the same in installments, the issue of bonds to anticipate the same, and all other provisions with regard to street improvement assessments, shall govern in the matter of levee assessments so far as the same are applicable. R. S. 1894, § 3988.

625. Local sewers—Construction.—85. Whenever the board of public works shall order the construction of any local sewer or drain, it shall cause the necessary drawings and specifications for such work to be prepared and filed in such office; shall cause a notice of the adoption of the resolution ordering the work to be done to be published in some daily newspaper of general circulation in such city once each week for two weeks. Such notice shall name a date not earlier than ten days after the last day of publication, at which such board will receive or hear remonstrances from persons interested in or affected thereby. On the date set said board shall consider such remonstrances, if any, and thereupon take final action, confirming, modifying or rescinding their original resolution. Such action shall be final and conclusive upon all persons. If such original resolution be confirmed or modified, said board shall cause a notice to be published in some newspaper of general circulation in such city once each week for two weeks, informing the public and contractors of the general nature of the work, and of the fact that the drawings and specifications are on file in the office of the board, and calling for sealed proposals for such work by a day not earlier than ten days after the last of said publications. The board may, in its discretion, fix a later [day] for receiving such sealed proposals, providing such day shall be mentioned in each of these notices. Whenever such sewer or drain shall, from

its size and character, be intended and adapted not only for use by owners of abutting property along the line of such sewer or drain, but is also intended and adapted for receiving sewerage from collateral drains already constructed, or which may be constructed in the future, the board of public works shall prepare a map which will give thereon the exact course of proposed sewer and its appurtenances, and which will clearly show, by boundary lines, the total area or district to be drained and to be assessed for the construction of said sewer; shall prepare all necessary profiles, drawings and specifications for such work, which map, profiles, drawings and specifications shall be placed on file in the office of said board; shall publish a notice of the adoption of the resolution, ordering the work to be done, and shall describe in such resolution, and in such advertisement, the boundary lines of the district or area intended to be drained by such sewer and to be assessed for the cost of the same, and such publication of the adoption of said resolution shall constitute legal notice to all owners or holders of property, or persons having valuable interests therein within the bounds of the district, or area described, that such property in such district or area is to be assessed for the construction of said sewer. Such publication shall be made in some daily newspaper of general circulation in such city once each week for two weeks, and shall name a day not earlier than ten (10) days after the last day of publication, at which time the said board will receive or hear remonstrances from the persons interested in or affected by the construction of said sewer. On the date set, said board shall consider such remonstrance, if any, and thereupon take final action, confirming, modifying or rescinding their original resolution. Such action shall be final and conclusive upon all owners or holders of property, or persons having valuable interests therein, in the district, or area, intended to be drained and assessed for the construction of said sewer. Advertisements for bids shall be made in the same manner as for the construction of any local sewer or drain above provided for. [As amended, Acts 1895, p. 258. In force March 11, 1895.] Burns' Supp. 1897, § 3989.

See notes, *ante*, § 466.

Sewers, drains, etc., and construction of, under the general law. See *ante*, § 124, clauses 26 and 43 and notes, and §§ 127 and 183 and notes, and *post*, §§ 1090, *et seq.*, and notes, and 1107, *et seq.*, and notes.

626. Cost of sewers—Assessment.—86. Whenever any such sewer shall from its size and character be intended and adapted only for local use by the property holders along the line of the street or alley on which it is constructed, and in the opinion of such board is not intended or adapted for receiving sewage from collateral drains, then and in that case, the entire cost of said sewer shall be paid for by the holders of property abutting on the street, alley or public highway on which said sewer shall have been constructed. The cost of such sewer shall be estimated according to the total number of square feet of property abutting on the line of said sewer, and such cost shall be

apportioned on the lands or lots abutting thereon in proportion that their area bears to the total assessed area: *Provided*, That in making such assessments against any unplatted lands the depth of the same from the front line thereof shall not be assumed greater than two hundred (200) feet or less than the depth of the platted ground next adjoining such unplatted ground nearest to the center of the city. In case such unplatted ground borders upon two streets or alleys intersecting each other and assessments have already been made against such land for a sewer on one side, such assessment extending back for a distance as above described, then, and in that case, the assessment shall be made for a distance of only fifty (50) feet back from the line of the street or alley on which the sewer is located. [As amended, Acts 1895, p. 258. In force March 11, 1895.] Burns' Supp. 1897, § 3990.

See notes, *ante*, § 467.

627. General sewers—Costs—Assessment.—87. Whenever, in the opinion of such board, any sewer or drain ordered to be constructed, or any enlargement of one already constructed, shall, from its size and character, be intended and adapted not only for use by the abutting property holders along the line of said drain or sewer, but is also intended and adapted for receiving sewerage from collateral drains already constructed or which may be constructed in the future, then, in that case, such board shall make a division of the cost of such work. So much of said cost as shall be equivalent to the construction of an adequate local sewer not adapted to receive sewerage from collateral drains or sewers, shall be paid for exclusively by the abutting property holders in the same manner and to the same extent as local sewers are paid for by them. The excess of cost over and above what would be equivalent to the cost of a local sewer shall be assessed one-half against the city and paid out of the general fund, and one-half against each piece of property in the district or area to be drained, in the proportion its area bears to the total area of the district, including abutting property holders as well as the holders not situate on the line of such drain or sewer. [As amended, Acts 1895, p. 258. In force March 11, 1895.] Burns' Supp. 1897, § 3991.

628. Assessment roll—Notice—Remonstrance.—88. In making assessments against each lot or parcel of land, said board of public works shall, as soon as any contract has been let for the construction of any sewer or drain, make out an assessment roll with the names of property holders and descriptions of the property assessed for such proposed sewer or drain. Said department shall thereupon fix a time and place when and where objections to such assessment will be heard, and shall cause notice thereof to be given, and shall hear remonstrances thereon in like manner as in case of assessments for street improvements. The assessment roll, when completed according to these provisions, shall be delivered to the department of finance in the same manner as street improvement assessment roll, and the

treasurer and the department of finance shall thereupon discharge the same duties in respect thereto as are hereinbefore prescribed in relation to street improvement assessments. The provisions of this act in the relation to the payment of street improvement assessment by installment, and the issuance of bonds to anticipate the same, shall also apply to the payment of assessments for the construction of sewers, drains, levees, or for the change of any water-course, or the drainage of any section of ground. [As amended, Acts 1895, p. 258. In force March 11, 1895.] Burns' Supp. 1897, § 3992.

Sprinkling.

629. Sprinkling streets—Notice for bids—Remonstrance.—89. Whenever such board of public works shall order any street, alley or public place to be sprinkled it shall cause the necessary specifications be sprinkled it shall cause the necessary specifications for such work to be prepared and filed in such office, shall publish a resolution ordering the work to be done, shall hear remonstrances, modify, confirm or rescind their original resolution, shall advertise for bids and let the same by contract, as more specifically provided in this act with relation to the appropriation of property and the laying out of streets: *But provided*, That if two-thirds of all the property owners upon such street, alley or public place remonstrate against sprinkling the same, the same shall not be done unless specifically authorized by an ordinance within sixty (60) days thereafter, passed by a two-thirds vote of the council and approved by the mayor. [As amended, Acts 1895, p. 258. In force March 11, 1895.] Burns' Supp. 1897, § 3993.

630. Cost of sprinkling—Contracts.—90. The cost of such sprinkling shall be assessed pro rata against the property-holders along the line of such street, alley or public place as the cost of street improvements is assessed. That such city shall not be liable to pay for the sprinkling of any street or alley crossing, but the total cost of such sprinkling shall be paid for by the abutting property-holders. Such board may, at its option, embrace in one order or resolution, and also in one contract, any number of streets, alleys or public places for which the specifications for such sprinkling are uniform, or such board may include in one resolution and contract such streets as to which the specifications for sprinkling are not uniform: *Provided*, That such contracts and the bids therefor shall separately state the cost of sprinkling streets or alleys which are uniform, with regard to the specifications to such sprinkling. In such cases such board may accept part of such bid on one group of streets uniform in their specifications, and reject other parts of such bids on other groups of streets. [As amended, Acts 1895, p. 258. In force March 11, 1895.] Burns' Supp. 1897, § 3994.

See notes, *ante*, §§ 472–473.

631. Payment for sprinkling—Time of contract.—91. Unless otherwise provided by ordinance, the duties of the department of finance and the treasurer, the rights and liabilities of the contractor and the city in relation to such sprinkling shall be the same as in the case of street improvement assessments. Such assessments shall be payable on the first Monday in November of each year. The provisions of this act in relation to issuing bonds and paying in installments shall have no application to the cost of street sprinkling. The common council shall have power by ordinance to prescribe the manner in which the cost of street sprinkling shall be assessed and collected. The cost of such sprinkling shall be a lien on the abutting real estate from the time the contract thereof is entered into: *Provided*, That no contract for sprinkling shall be made to continue for a period of more than two years, unless the same shall be authorized and confirmed by resolution of the common council. *And provided, further*, That the department of public works may cause such sprinkling to be done directly by persons to be employed by it for such purpose, and may assess the cost thereof against the abutting property. An assessment list shall be made out, a time fixed for hearing objections thereto, and notice thereof given in the manner provided for assessments for street improvements. [As amended, Acts 1895, p. 258. In force March 11, 1895.] Burns' Supp. 1897, § 3995.

D. DEPARTMENT OF PUBLIC SAFETY.

632. Board of public safety—Appointment—Bonds.—Salaries.—92. The department of public safety shall be under the charge of a board of three commissioners, to be appointed by the mayor of such city as hereinbefore provided. No more than two of said commissioners shall be of the same political party. Said commissioners shall give bond to such city, to be approved by and filed with the department of finance, for the faithful performance of their duties respectively, as required by ordinance. Said board shall have the care, management, supervision, and exclusive control of all matters relating to the fire and police force, fire-alarm, telegraph, erection of fire-escapes, inspection of buildings and boilers, market places, and food sold therein, pounds and prisons. Said board shall have power to purchase all necessary supplies and apparatus, and make all repairs needed in its department, subject to the same provisions as herein prescribed for the exercise of similar powers by the department of public works. Said commissioners shall receive annual salaries of $400 each. R. S. 1894, § 3996.

Fire department and metropolitan police and fire department under the general law.—See *ante*, §§ 256, *et seq.*, 296, *et seq.*, and notes.

633. Rules for government of police—Quorum of board—Clerk.—93. Said commissioners shall adopt rules for the appointment of members to said fire and police forces, their regulation and duties sub-

ject, however, to the laws of the state and to the ordinances of the common council. Any two of said commissioners shall constitute a quorum. Said commissioners shall adopt rules and regulations with regard to the time of holding regular and called meetings, and of giving notice thereof. They shall elect one of their number as chairman, who shall hold such position as long as may be prescribed by the rules of said board. The city clerk shall act as clerk of the department of public safety, and shall record all of their proceedings in a book to be provided for that purpose, and copy all accounts and records of every kind pertaining to said department. They shall only act as a board, and no member thereof shall have the power to bind said board, or said city, except pursuant to a resolution of such board authorizing him to act in that behalf as its authorized agent. Said commissioners shall have the care and charge of all property of every kind pertaining to the fire and police force and to the market places, pounds and prisons of such city. [As amended, Acts 1895, p. 258. In force March 11, 1895.] Burns' Supp. 1897, § 3997.

634. Superintendent of police and other officers—Pay—Control of police—Fire districts.—94. Said commissioners shall appoint a superintendent of police, chief of the fire force and all other officers, members and employes of said fire and police forces, together with a market master, station-house keeper, and other officials necessary for such department of public safety. The annual pay of such appointees shall be fixed by ordinance of the common council, and it shall be lawful in such ordinance to grade the members of such forces and to regulate their pay not only by rank, but by their length of service. In default of any ordinance fixing the compensation for any members of such fire or police force, said commissioners shall have power to fix the same, subject to change by ordinance by said council. Said commissioners of public safety may also fix the number of members of said fire and police force, and the number of appointees for other purposes. Said commissioners of public safety shall, in like manner, divide such city into police precincts and fire districts. Said commissioners shall also have power to make and promulgate rules and regulations for the appointment of members of such forces and for their government: *Provided*, That said forces shall be as nearly as possible equally divided politically, and no member thereof shall be dismissed except for cause, as hereinbefore provided. The superintendent of police shall have exclusive direction and control of the police force, and the chief of the fire force shall have exclusive control and charge of such fire force, subject to the rules, regulations and orders of said department of public safety. In times of peril, danger, riot, extensive conflagration, disorder, or the apprehension thereof, said chief of the fire force and the superintendent of the police force shall, for the time being, be subordinate to the mayor and obey his orders and directions, anything to the contrary in this act, or in the ordinance of such city, or in the regulations or orders of such commissioners of public safety

to the contrary notwithstanding. The superintendent of the police force and the chief of the fire force shall be of opposite politics. [As amended, Acts 1895, p. 258. In force March 11, 1895.] Burns' Supp 1897, § 3998.

635. Members of fire and police force.—95. Every member of the fire and police force, and all other appointees of the commissioners of the public safety, shall hold office until they are removed by the board. They may be removed for any cause other than politics, and the written reasons for such removal shall be entered upon the records of such board. R. S. 1894, § 3999.

636. Removal of firemen and policemen.—96. On the conviction of a member of the said fire or police force for any criminal offense or neglect of duty, or of violation of rules, or neglect or disobedience of orders, or incapacity, or absence without leave, or conduct injurious to the public peace or welfare, or immoral conduct, or conduct unbecoming an officer, or other breach of discipline, said commissioners shall have power to punish the offending party by reprimand, forfeiture, suspension without pay, dismissal, or by reducing him to a lower grade and pay. R. S. 1894, § 4000.

637. Powers of policemen.—97. The officers and members of such police force shall possess all the common law and statutory powers of constables, except in relation to the service of civil process, and any warrant of search or arrest, issued by any judge, or magistrate, or justice of the peace of this state, may be executed in any part thereof by any member of said police force, subject to the laws of this state governing arrests and bail. The members of said police force shall have the exclusive power, and it shall be their duty to serve all process within such city issuing from the police force [court]. They shall be conservators of the peace in such city, and shall arrest without process all persons who within view commit any crime or misdemeanor contrary to the statutes of this state, or ordinances of such city, take them before the police court or judge of such city, or other officers having jurisdiction of the offense with which such person is charged, and retain them in custody until the cause of such arrest has been investigated, suppress all breaches of the peace within their knowledge, and authority is hereby given them to call to their aid the power of such city; to pursue and commit to jail all felons and persons guilty of misdemeanors or crimes in violation of the statutes of this state or of the ordinances of such city. They shall have the exclusive power, and it shall be their duty to serve all process issued by the common council, or any committee thereof pursuant to this act, or by any of the executive departments of such city. They shall attend upon the police court and assist the bailiff to preserve order in such court. R. S. 1894, § 4001.

For powers and duties of city marshal, police officers, constables, etc., under the general law of 1867, see *ante*, § 95 and notes.

638. Policemen to convey prisoners.—98. The members of the police force, under the direction of the superintendent thereof, shall

convey prisoners to and from the county jail or station-houses of such city for the arraignment or trial in the police court, or to the house of correction, work-house, reform school, county jail or other place of punishment or imprisonment, under judgment, sentence, order, process of such court. R. S. 1894, § 4002.

639. Detail of police—Special policemen.—99. Said commissioners shall have power, on application of any person or corporation, if deemed expedient, to detail regular patrolmen of the police or fire force, or appoint and swear any additional number of special policemen or firemen to do special duty at any place within such city, upon such person or corporation paying for the use of such city the same rate per diem of service on such detail or special duty as is paid to the regular members of the force. Such special patrolmen shall be subject to the superintendent and such special firemen to the chief of the fire force. They shall obey the rules and regulations of their respective departments, conform to its discipline and orders, and wear such dress or badge as the commissioners may direct, and shall, during the term of their appointment, possess all the powers, privileges and duties of regular patrolmen or firemen. Such persons so appointed may be removed at any time by said commissioners without notice and without assigning any cause. Said commissioners may, also, upon emergency or apprehension of riot, tumult, mob or insurrection, pestilence or invasion, appoint as many special patrolmen as may be desirable, to be paid the same rate per day and possess the same powers, privileges and duties as members of the regular force, and be subject to the same ordinances, regulations and orders. Such patrolmen and firemen shall wear badges, furnished by their respective departments. Such commissioners may also detail members from the regular forces for the use of the department of health, or any department of the city government. R. S. 1894, § 4003.

640. Powers of commissioners and superintendents.—100. Said commissioners and superintendents of fire and police are authorized to administer oaths to any person summoned in any proceeding authorized by this act, or to take any depositions under the rules, regulations, or orders of said department of public safety. R. S. 1894, § 4004.

641. Duty of police force—Powers.—101. It is hereby made the duty of said police force, at all times within such city, and the members thereof are specially empowered to preserve peace, prevent crime, detect and arrest offenders, suppress riots, mobs and insurrections, disperse unlawful and dangerous assemblages, and assemblages which obstruct the free passage of public streets, sidewalks, parks and places, protect the right of persons and property, guard the public health, preserve order at elections and public meetings, direct the movement of teams and vehicles in streets, alleys or public places, remove all nuisances in public streets, parks or highways, arrest all street beggars, provide proper police assistance at fires, assist, advise and protect strangers and travelers in public streets or at railroad stations, carefully

observe and inspect all places of business under license, or required to have the same, all houses of ill-fame or prostitution, and houses where common prostitutes resort or reside, all lottery or policy shops, all gambling houses, cock pits, dance houses, resorts, and to suppress and restrain all unlawful or disorderly conduct or practices, enforce and prevent the violation of all ordinances and laws in force in such city. The superintendent of police and each captain in his precinct shall possess the power of supervision and inspection over all pawnbrokers, venders, junk shop keepers, cartmen, expressmen, dealers in second-hand merchandise, intelligence offices and auctions, and any member of such force may be authorized by the superintendent to exercise the same powers, by authority in writing. Said superintendent or any captain may, by written authority, when in search of stolen property, of evidence, or of suspected offenders, to examine the books, business, or premises of any of the persons named in this section, and to examine property in whosesoever possession the same shall be. R. S. 1894, § 4005.

642. Gaming houses.—102. If any member of such force, or if any two or more householders in such city, shall report in writing, under his or their signature, to the superintendent of police, that there is good grounds (and stating the same) for believing that any house, room or premises within such city is kept or used as a common gaming-house, room or premises for therein playing for wagers of money at any game of chance, or to be kept for lewd or obscene purposes of amusement, or for the deposit or sale of lottery tickets or policies, it shall be lawful for said superintendent to authorize any member or members of said police force, in writing, to enter the same, who shall forthwith arrest all persons there found offending against law, and seize all instruments of gaming, or lottery tickets, and deliver the same to the superintendent, who shall destroy them. R. S. 1894, § 4006.

643. Duty on making arrest.—103. Whenever any arrest has been made by any member of such police force, it shall be the duty of the officer in making the arrest to forthwith bring the person arrested before the police court, or court having jurisdiction thereof, to be dealt with according to law. If the arrest is made during the hours when such court is not in session, or if the judge is not holding court, such offender shall be detained in the city prison until there shall be an opportunity for such hearing at the earliest practicable time, or until he shall have given bond for his appearance. And no person shall be detained longer than twenty-four hours without such examination, except where Sunday intervenes, in which case no person shall be detained longer than forty-eight hours. Any person or corporation who shall interfere with said commissioners of public safety, or their appointees in the legal discharge of their duties, shall, upon conviction, be fined not more than one thousand dollars ($1,000), to which may be added imprisonment for not more than ninety (90) days. R. S. 1894, § 4007.

644. Not to interfere in politics.—104. It shall be unlawful for

said commissioners of public safety, or any persons appointed by them or their predecessors, or holding any position on said fire or police force, to solicit any person to vote at any election for any candidate, or to challenge any voter, or in any manner attempt to influence any elector at such election, or to be a delegate or candidate for delegate to any political convention, or to solicit for any candidate for, or delegate to such convention, or to be a member of any political committee. Any person violating the provisions of this section shall be fined in any sum not exceeding five hundred dollars, to which may be added imprisonment for a period not exceeding six months. R. S. 1894, § 4008.

645. Bonds of appointees.—105. Said commissioners shall have power, subject, however, to city ordinances, to adopt rules regulating the giving of bond by any appointees or class of appointees in such department for faithful performance of official duty. R. S. 1894, § 4009.

646. Insurance fund.—106. Said commissioners may at any time draft an ordinance and submit the same to the common council, who shall have power to enact the same like other ordinances, for the creation, management and distribution of a police insurance fund, or of a firemen's insurance fund, together with a provision for retaining a per cent. of each appointee's salary, for the creation of such fund, and prescribing the conditions of its investment and who shall be entitled to the benefits thereof. R. S. 1894, § 4010.

See *post*, §§ 1476, *et seq.*, and 1493, *et seq.*

E. DEPARTMENT OF COLLECTION.

647. City treasurer—Appointment—Salary—Oath—Bond.—107. The city treasurer shall be at the head of the department of collection, he shall be appointed by the mayor and may be removed by the mayor. His salary shall be at the rate of two thousand dollars ($2,000) per year. It shall be his duty to receive and disburse all money and revenues belonging to such city, or received and collected by virtue of this act, or by virtue of the ordinance made in pursuance of it. He shall keep accurate accounts in such manner as shall be directed by the common council of all moneys by him received and disbursed, and perform such other services as may be required of him by ordinances not inconsistent with this act. Before entering upon his duties every such treasurer shall take an oath of office, and give a bond payable to such city, with freehold security to the satisfaction of the common council, in a penalty to be prescribed by it, and not less than the estimated amount of all taxes, including delinquent, to be levied and collected for municipal purposes in such city for the current year, conditioned for the faithful performance of his duties as such treasurer, and the faithful keeping and paying over and accounting for all money and property that may come into his hands as such treasurer. R. S. 1894, § 4011.

See *ante*, § 490, and *post*, §§ 1412, 1414 and notes. For treasurer's duties under the general law of 1867, see *ante*, §§ 97–103, *post*, § 1060, and notes.

648. Account of moneys—Reports.—108. The treasurer shall keep an account of all moneys received by him and shall report to the comptroller for all amounts received or collected by him belonging to such city, which amounts shall at once be available for the city use. R. S. 1894, § 4012.

649. Salary and fees for treasurer—Deputy.—109. Said treasurer shall, in addition to his annual salary of two thousand dollars ($2,000) receive three (3) per centum for the collection of delinquent taxes. Such treasurer may appoint a deputy who shall receive a salary at the rate not exceeding one thousand dollars ($1,000) per year. [As amended, Acts 1895, p. 258. In force March 11, 1895.] Burns' Supp. 1897, § 4013.

650. Receiving unlawful compensation—Penalty.—110. Any treasurer or deputy treasurer who shall directly or indirectly ask or receive any compensation from such city other than that expressly allowed by this act, or who shall fail to account for and pay over to such city all interest, compensation or reward received by him directly or indirectly for the use, loan or deposit of any money belonging to such city, shall be liable to be fined in any sum not exceeding five thousand dollars ($5,000), to which may be added imprisonment not exceeding one year. Any councilman of such city who shall propose any appropriation for such treasurer or deputy or either of them, shall be subject to the same penalty previously mentioned in this section. R. S. 1894, § 4014.

F. DEPARTMENT OF HEALTH AND CHARITIES.

651. Board of health and charities—Appointment—Salary—Duties.—111. The department of health and charities shall be under the control of three commissioners, who shall be practicing physicians, not more than two of whom shall be of the same political party, to be appointed by the mayor as hereinbefore provided. Said commissioners shall each receive a salary of one hundred dollars ($100) per year. Said commissioners shall have charge of all matters relating to public health and the enforcement of laws in relation thereto; shall have charge of the city hospital, city dispensary and all other city charities. They shall keep a record of their proceedings. Said commissioners shall appoint a superintendent of the city hospital and city dispensary, who shall have control and management thereof. Said commissioners shall elect one of their number registrar of vital statistics, who shall be secretary and executive officer of their board, and shall attend to the proper registration of births, marriages and deaths, and such other statistical information as the department may require. Said registrar of vital statistics shall receive for his services the sum of three hundred dollars in addition to his salary as health commissioner. Said health commissioners shall nominate for appointment by the department of public safety, as special sanitary officers, skilled and competent persons for live stock and meat inspectors and food inspectors,

whose duty it shall be to inspect all live stock, meat and food offered for sale for human food in such city, and to attend the public markets and carefully watch over the same and prevent the selling, or offering to sell, for human food, any and all articles unfit for use, and said commissioners is [are] hereby authorized to require from the department of public safety special detail of policemen or firemen to execute orders of such department of public health whenever needed. Said department of public safety shall detail policemen who shall be constantly subject to the orders of such department of health. In case of disagreement as to the number or duration of service of such details of firemen and policemen, between said two departments, the mayor shall decide the question. R. S. 1894, § 4015.

652. To prepare ordinances.—112. Said health commissioners are hereby authorized and directed to prepare ordinances for the protection of public health, for securing the proper registration of births, marriages and deaths, and such other statistical information as the department may require, with penalties for their violation; for the removal and burial of the dead, the maintenance of an ambulance services for the speedy removal of the sick and needy persons, for the efficient regulation and management of the city hospital and city dispensary as may seem to them desirable, and the destruction or the fumigation of infected property or premises, for the registration of plumbers and the inspection of plumbing and house drainage in all buildings, both public and private, erected after the passage of this act, and in all buildings, both public and private, erected prior thereto wherein changes in or additions to the plumbing or drainage are to be made, for the appointment of an inspector of plumbing and house drainage, who shall be a practical plumber, who shall be required to pass an examination as to his qualifications by a board of three practical plumbers doing business and residing in such city, said board to be selected by the health commissioners of such city. Such ordinances shall be submitted to the council for passage as other ordinances. R. S. 1894, § 4016.

ARTICLE 4.—POLICE COURT.

SEC.		SEC.	
653.	Police court—Officers.	661.	Officers not to receive fees.
654.	Seal of court—Change of venue.	662.	Salary of police judge.
655.	Police judge—Appointment—Removal—Term—Bond—Sessions—Jurisdiction.	663.	Clerk of court—Bond—Duties.
656.	Jurisdiction of police courts—Punishment—Appeals.	664.	Bailiff of court—Bond—Duties.
657.	Rules—Oaths—Appeals.	665.	Salary of bailiff.
658.	Judge *pro tem.*—Docket fee.	666.	Prosecuting attorney—Duties.
659.	Failure to pay fine—Imprisonment.	667.	Witness fees.
660.	Vacancy in office of police judge.	668.	Warrants—Service.
		669.	Arrest—Duty of policemen.
		670.	Duty of mayor until act takes effect.

JUDICIAL.

653. Police court—Officers.—113. The judicial power of such city shall be vested in a police court. The officers thereof shall be one judge,

a clerk, and a bailiff. The style of such court shall be: "The police court of the city of ———," according to the name of such city. Said court shall be a court of record, and all its judgments, decrees, orders and proceedings shall have the same force and effect as those of the criminal or circuit courts, except that no judgment shall be a lien on the real estate otherwise than is provided by taking transcript, and the same shall be enforced in the same manner as liens by transcripts from justices of the peace in similar cases. R. S. 1894, § 4017.

654. Seal of court—Change of venue.—114. The police judge shall provide, at the expense of the city, a seal for such court, which shall contain on the face the words: "The police court of ———, Indiana," the blank to be filled with the name of the city. A description of such seals, together with an impress thereof, shall be spread on the records of such court. No change of venue shall be taken from such court, but any defendant may take a change of venue from the judge thereof as is now provided by law relating to criminal and circuit courts. R. S. 1894, § 4018.

655. Police judge—Appointment—Removal—Term—Bond—Sessions—Jurisdiction.—115. The police judge shall be appointed by the mayor of such city. He shall be an attorney at law of good standing and reputation. He may be removed by the mayor, and his removal shall take effect upon the appointment and qualification of his successor. Before entering upon the discharge of his duties, he shall execute a bond, payable to such city, in the penal sum of five thousand dollars ($5,000), with good and sufficient freehold security, to be approved by the mayor and filed in the office of the city comptroller, conditioned for the faithful and honest discharge of the duties of his office. He shall hold daily sessions of the police court, Sundays excepted, at a place within such city, provided and designated by the common council. He shall have and exercise within such county in which such city is located the powers and jurisdiction now or hereafter conferred upon justices of the peace in all felonies, crimes and misdemeanors, except as otherwise herein provided. He shall have and exercise within such city, the powers and jurisdiction now conferred on mayors, except as otherwise herein provided. He shall have exclusive jurisdiction of all violations by the ordinances of such city. He shall also have such further and additional jurisdiction as is in the next section provided. [As amended, Acts 1895, p. 258. In force March 11, 1895.] Burns' Supp. 1897, § 4019.

656. Jurisdiction of police courts—Punishment—Appeals.—The police court of said city shall have original concurrent jurisdiction with the circuit courts of the state in all cases of petit larceny and in all other cases of felonies and misdemeanors where the punishment fixed by law can not exceed a fine of one thousand dollars ($1,000) and imprisonment in the state prison not more than three years.

On the trial of any person in said court for the violation of any law of this state, the judge or jury trying the case shall, upon conviction, have the power to assess a fine not exceeding one thousand dollars

($1,000), with imprisonment in the state prison not exceeding three years, and disfranchisement for any determinate period, or to assess a fine not exceeding one thousand dollars ($1,000), to which may be added imprisonment in the county jail, work-house, or other lawfully designated place of confinement, for a term not exceeding one year, with disfranchisement as above provided.

Appeals may be taken from the judgment of this court, to the circuit court of the county within ten (10) days from the rendition thereof, upon filing a bond as required by law. [As amended, Acts 1895, p. 258. In force March 11, 1895.] Burns' Supp. 1897, § 4020.

See notes, *ante*, § 524.

657. Rules—Oaths—Appeals.—117. Such judge shall have full power and authority to make and adopt rules and regulations for conducting the business of said court not repugnant to the laws of this state, and shall have all powers incident to the court of record in relation to the attendance of witnesses, the punishment of contempts, and enforcement of its orders, and to issue commissions for taking depositions in cases pending in said court. He shall have full authority to administer oaths and to give all necessary certificates for the authentication of the records and proceedings of said court in the matter of changes of venue, and in the trial of any person charged with the violation of any law of this state. Such court shall be governed, as far as may be, by the law, rules, practices and pleadings relating to criminal courts, except where herein otherwise provided, and in the trial of any person charged with the violation of any ordinance of such city, such court shall be governed, as far as may be, by the laws, rules, practice and pleadings now in force relating to mayors' courts, except where herein otherwise provided. Appeals shall be from the judgment of said court in criminal cases to the criminal circuit court and in civil cases to the superior or circuit courts in the same manner that is now provided for the appeals from the mayor's court. R. S. 1894, § 4021.

658. Judge pro tem.—Docket fee.—118. In case of the temporary absence or inability of the police judge to act, he shall appoint any reputable practicing attorney to preside in his absence, and such judge pro tem. shall have and possess all the powers and rights, and perform and exercise all of the duties of judge of such court as fully and completely as the police judge appointing him. It shall be the duty of such judge to tax, for the use and benefit of such city, a docket fee of five dollars ($5) in each case where a defendant is adjudged guilty of a violation of any law of this state or ordinance of such city, which docket fee shall be collectible in the same manner as other costs are collected; and no other fees whatever shall be taxed against a defendant except as herein provided for: *Provided, however*, That nothing herein shall prevent the taxing and collection of the penalties and fees now provided by law in case of the collection of judgments on execution, levy and sale of personal property, but such

penalties and fees when collected shall be for the use and benefit of such city. R. S. 1894, § 4022.

659. Failure to pay fine—Imprisonment.—119. Any person having been adjudged guilty of a violation of an ordinance of said city and committed therefor may be discharged by such court or judge after said defendant has been imprisoned, in addition to the term of imprisonment, if any, adjudged against him as a part of the sentence, one day for every dollar of such fine and cost, if it appear to such court or judge that such defendant is unable to pay or replevy such fine and cost, but an execution may issue against the property of the defendant, as in the case of other judgments. In no such case, however, shall the city be liable to any person for costs or fees. R. S. 1894, § 4023.

660. Vacancy in office of police judge.—120. In the case of a vacancy in the office of police judge, the mayor shall appoint a successor, who shall hold such office during the unexpired term of his predecessor. R. S. 1894, § 4024.

661. Officers not to receive fees.—121. The police judge, clerk of the police court, or the bailiff thereof, shall not receive any fee, or other compensation whatever than their respective salaries. R. S. 1894, § 4025.

662. Salary of police judge.—122. The salary of the police judge shall be at the rate of one thousand five hundred dollars ($1,500) per year, payable monthly, as the salaries of other city officers are paid. [As amended, Acts 1895, p. 258. In force March 11, 1895.] Burns' Supp. 1897, § 4026.

663. Clerk of court—Bond—Duties.—123. The city clerk shall be the clerk of the police court. Before entering upon the discharge of his duties he shall execute a bond payable to such city in the penal sum of five thousand dollars ($5,000), with good and sufficient resident freehold sureties, subject to the approval of the mayor, which bond shall be filed with the city comptroller. Such clerk shall have full power to administer oaths; he shall issue all process of said court, affix the seal of the court thereto, and attest the same. He shall keep a true, correct and complete record and docket of all cases and persons arrested and brought before the said court, how tried and disposed of, and of the fees, fines, penalties, forfeitures, judgments, executions, decrees and orders had therein, in the same manner, as nearly as may be, as such records are kept by the clerks of the criminal courts. He shall collect, prosecute and receive payment of all such fees, fines, penalties and forfeitures, and all judgments and executions and all moneys whatever accruing or to be paid in for the use of said city from the enforcement of any of the laws thereof. At the close of each day's session of such court, he shall make out and deliver to the police judge a written report of all cases in which he has received or collected any moneys during said day, and shall forthwith pay over all such moneys to said judge, and take his receipt therefor. R. S. 1894, § 4027.

664. Bailiff of court—Bond—Duties.—124. The bailiff of such

police court shall have the powers of a constable, and shall be a police officer of such city, designated and assigned to such court by the superintendent of police of such city. He shall give bond, payable to such city, in the penal sum of one thousand dollars ($1,000), with sufficient freehold surety, to be approved by the mayor, conditioned upon the faithful and honest discharge of his duties, which bond shall be filed in the office of the comptroller. It shall be his duty to be present at the sessions of such court, maintain order therein, and perform all other ordinary court duties, subject to the order of the court. He shall have and exercise the powers and duties of a constable, as now prescribed by law, except as herein otherwise provided. He shall take charge of all executions issued by the police court, and shall see to the collection of the same. He shall keep, in books to be furnished him by the comptroller, a full and accurate account and docket of all executions which may come into his hands, showing the names of the defendants, date and number of the execution, amount of fines, fees or penalties imposed, and the disposition of such execution. He shall make out and deliver a written report to the clerk of the police court, every Tuesday of each week, of all moneys collected by him during the week, giving the names of the defendants, number of executions, amount of fines, fees or penalties collected, and forthwith pay such moneys to such clerk, taking his receipt therefor. R. S. 1894, § 4028.

665. Salary of bailiff.—125 The salary of the bailiff of the police court shall be fixed by the police board of such city in any sum not exceeding $800 per annum, payable as other salaries of other police officers are paid. R. S. 1894, § 4029.

666. Prosecuting attorney—Duties.—126. The prosecuting attorney of the judicial circuit in which said city is located shall prosecute all cases in said court for violation of the laws of this state, and shall be entitled to receive the same fees therefor as is [are] now provided in cases of such prosecutions before the justices of the peace, and the city attorney shall prosecute all cases of violation of the ordinances of such city, and he shall be entitled to receive the same fees therefor as are allowed such circuit prosecutor. R. S. 1894, § 4030.

667. Witness fees.—127. Witness fees in all cases in such police court shall be taxed and collectible only when claimed or demanded by the witnesses at the time of the trial. And no witness shall be allowed more than one fee for any one day's attendance, nor shall any witness fee be taxed in any case in favor of any member of the police force of such city. All witness fees when collected and received by the police judge shall be paid by him to such witness upon his demand and his receipting upon the proper docket for such fee, and if not claimed in six months, said fee shall be turned into the treasury. R. S. 1894, § 4031.

668. Warrants—Service.—128. All warrants or other process issued by the police court shall be directed to the superintendent of police or any member of the police force of such city, which shall be executed, served and returned. R. S. 1894, § 4032.

669. Arrest—Duty of policemen.—129. It shall be the duty of the members of the police force of such city to cause all persons arrested by them for a violation of any ordinance of such city, or any law of the state, to be taken before such police court for trial or examination as the case may be. R. S. 1894, § 4033.

670. Duty of mayor until act takes effect.—130. From the taking effect of this act until Monday, April 3, 1893, the mayor of the city shall act as police judge and perform all the duties thereof, as required by this act. In case of the mayor's inability to be present and hold said court, he may in writing appoint any reputable attorney of said city judge *pro tem.* to hold the same, who, before entering upon the discharge of such duty, shall take an oath to faithfully serve as such judge *pro tem.* Such judge *pro tem.* shall receive a salary at a rate of six dollars and fifty cents ($6.50) per day, to be paid as the salary of other officers is paid, upon the certificate of the mayor that the services have been rendered. The mayor may revoke such appointment at any time. R. S. 1894, § 4034.

ARTICLE 5.—DEPARTMENT OF WATER-WORKS.

SEC.
671. Water-works trustees—Appointment—Salary—Bond.
672. By-laws.
673. Water rents.
674. Surplus rents.
675. Reports by trustees—Deposit of money.
676. Moneys kept separate—Orders.
677. Contracts for works and buildings.
678. Investigation of books and papers.
679. No charge for water for fires.
680. Attachments to pipes.
681. Notice of letting work.
682. Bond of contractor—Trustees not to be interested.
683. Tax to pay for water-works.
684. Lien of taxes.
685. Jurisdiction beyond city limits.

G. DEPARTMENT OF WATER-WORKS.

671. Water-works trustees—Appointment—Salary—Bond.—131. The department of water-works shall have for its head a board of three trustees, to be appointed, as hereinbefore provided, by the mayor, not more than two of whom shall be of the same political party. The mayor shall have the power to remove at any time, any member of said board, and to fill, by appointment, any vacancy occurring in said board. Each member of said board shall receive a salary at the rate of five hundred dollars ($500) per year, which may be increased by ordinance of the common council to any sum not exceeding seven hundred dollars ($700) per year. Each of said trustees shall, before entering upon the duties of his office, give bond in the sum of five thousand dollars ($5,000), to be approved by the city comptroller; said bond shall be for the faithful performance of their duties and strict accounting for all funds that shall come into their hands. The said trustees shall manage, conduct and control the water-works of such city, furnish a supply of water, collect water rents, appoint all necessary officers and agents, determine the amount of salaries of the

officers and agents, and remove any of said appointees at any time. The regular employes and appointees of said department shall be taken, as nearly as may be, equally from the two leading political parties. [As amended, Acts 1895, p. 258. In force March 11, 1895.] Burns' Supp. 1897, § 4035.

672. By-laws.—132. Said trustees shall be authorized to make such by-laws and regulations as they deem necessary for the safe, economical and efficient management and protection of the water-works, and such by-laws and regulations shall have the same validity as ordinances, when not repugnant thereto, or to the constitution and laws of the state. R. S. 1894, § 4036.

673. Water rents.—133. For the purpose of paying the expenses of managing and operating the water-works, the trustees of the water-works shall have power to assess and collect, from time to time, a water rent of sufficient amount, and in such manner as they may deem most equitable upon all tenements and premises supplied with water, and from manufacturing establishments and railroad shops, and for the supply of boilers, locomotive engines, and for all other purposes tending to increase the income of the works. R. S. 1894, § 4037.

674. Surplus rents.—134. Should there be any surplus money after paying the expenses of operating the water-works, the same may be applied to the repair, enlargement or extension of the works, or of the reservoirs, the payment of the interest of any loan made for their construction, or for the creation of a sinking fund for the liquidation of the debt. R. S. 1894, § 4038.

675. Reports by trustees—Deposit of money.—135. The trustees of the water-works shall make monthly reports to the common council and city comptroller of the receipts and disbursements of money belonging to the water-works, and an annual report of the condition of the same, and all money collected for water-works purposes, they shall cause to be deposited weekly with the treasurer of the city, and the receipt therefor shall be by such collectors deposited with said trustees, or their authorized agent. R. S. 1894, § 4039.

676. Moneys kept separate—Orders.—136. All moneys so deposited shall be kept a separate and distinct fund, subject to the order of said trustees; and all orders drawn by said trustees on the treasurer of the city or town shall be signed by at least two of the trustees and countersigned by the clerk of the water-works. R. S. 1894, § 4040.

677. Contracts for works and buildings.—137. Said trustees shall be authorized to make contracts for the erection of water-works buildings and construction of setting basins and other appendages, and the enlargement and repairs thereof; for the purchase of machinery, and the manufacture and laying down of pipe; for the furnishing and supplying with connections of all necessary fire hydrants for fire department purposes, and for keeping the same in repair, and for all other purposes necessary to the full and efficient management and construc-

tion of the water-works, and such contracts as shall be subject to the ratification by [of] the common council. R. S. 1894, § 4041

678. Investigation of books and papers.—138. The common council of such city in which water-works are or may be situated, or in process of construction, shall be authorized to appoint a committee of investigation of all books and papers, together with all matters pertaining to the management of the water-works, at least once a year, and oftener, if necessary by reason of any neglect of duty or malfeasance on the part of any officer of the works; and any officer of the works found by said committee so offending shall be liable to removal from office. R. S. 1894, § 4042.

679. No charge for water for fires.—139. No change [charge] shall be made by the trustees of the water-works for supplying water for the extinguishment of fires, or for furnishing and supplying connections for fire department purposes, or for the cleansing of market houses, or for the use of any public buildings belonging to such city, or for flushing out sewers, or other sanitary purposes. R. S. 1894, § 4043.

680. Attachments to pipes.—140. All attachments of whatever nature made to the water pipes or other fixtures belonging to the water-works and intended for public use, shall be subject to the same supervision, rules and regulations as are made for the protection of such water-works against the abuse, destruction and inordinate or unnecessary use or waste of water; or the trustees may make general or special rules and regulations for such purposes. R. S. 1894, § 4044.

681. Notice of letting work.—141. Said trustees, before entering into any contract for work to be done, shall cause two weeks' notice to be given in one or more daily newspapers of general circulation within the city that proposals will be received by the trustees for performing the work, or the several parts of the same, specified in said notice; and the trustees shall contract with the lowest bidder, if, in their opinion, said lowest bidder can be depended on to do the work with ability, promptness and fidelity, which contract shall be subject to ratification of the common council, as heretofore provided; but if such be not the case, said trustees may give the contract to the next lowest bidder, or decline to contract, and re-advertise; or if no daily newspaper be published in such city, then such notice shall be published three weeks consecutively in a weekly newspaper of general circulation within such city. R. S. 1894, § 4045.

682. Bond of contractor—Trustees not to be interested.—142. Said trustees shall require bonds to be given with good and sufficient security for the faithful performance of the work; but no member of said board of trustees shall in anywise, either directly or indirectly, be interested in any such work to be contracted for. Such bond shall be submitted to the common council for approval. R. S. 1894, § 4046.

683. Tax to pay for water works.—143. For the purpose of paying the principal and interest on the money borrowed for the erection and completion of any water-works, or for the extension and improve-

ment of such works, or for the purpose of rebuilding or repairing such water-works, a tax of sufficient amount shall be assessed on all the taxable property of the city, and collected each and every year in the usual manner of levying and collecting taxes in the city: *Provided*, The additional special tax hereby authorized shall not, in any year, exceed fifty cents on each one hundred dollars of taxable property, and one dollar on each poll. R. S. 1894, § 4047.

684. Lien of taxes.—144. The said tax, when levied and assessed, shall be a lien upon the property upon which it is levied, and charged against the owners thereof, and shall be placed on the city duplicate in a separate column thereof, and be collected as other taxes. R. S. 1894, § 4048.

685. Jurisdiction beyond city limits.—145. The jurisdiction of any such city owning water-works, shall extend, for the purposes of preventing and punishing any pollution of the water, ten miles beyond the corporation limits: *Provided*, If any person owning a water-power or mill property within the limits herein prescribed, in the use or management of which any stream is polluted to such an extent that the water thereof is thereby rendered unfit for the use of such city purposes, such property or water-power may be condemned for the benefit of such city, but before the same is done such mill property shall be appraised by three disinterested freeholders of the county in which said property is situated, one of whom shall be selected by such trustees, one by the owner of such property, which two shall select a third Said appraisers shall appraise such property at its fair cash value, and upon the tender of the same by the city, and refusal by the mill-owner to accept the value appraised as aforesaid, such business may be enjoined in any court of competent jurisdiction. R. S. 1894, § 4049.

ARTICLE 6.—SCHOOL TRUSTEES—TAXATION—WHARFMASTER.

SEC.
686. School trustees—Appointment—Oath—Bond—Compensation—Duties.
687. Reports of moneys received.
688. Taxation—Duplicate—When taxes are due.
689. Wharfmaster—Appointment—Bond—Salary—Duties.
690. Laws repealed—Evansville charter.

SCHOOL TRUSTEES.

686. School trustees—Appointment—Oath—Bond—Compensation—Duties.—146. The mayor of such city shall appoint, as hereinbefore provided, three school trustees. Not more than two of the members of said board shall be of the same political party. Each member shall hold his office until he is removed by the mayor: *Provided*, That said mayor shall have power to dismiss but one member of said board each year, except for neglect of duty or disability. All vacancies in said office shall be filled by appointment by the mayor. Said trustees shall constitute the school board of such city, and before en-

tering upon the duties of their office each shall take an oath faithfully to discharge the duties of the same. They shall meet within five days after the first member is appointed under this act, and organize by electing one of their number president, one secretary, and one treasurer. The treasurer, before entering upon the duties of his office, shall execute a bond to the acceptance of the county auditor of the county in which said city is situated, conditioned as in ordinary official bonds, with at least two sufficient freehold securities, who shall not be members of said board, in a sum not less than double the amount of money which may come into his hands within any one year by virtue of his office. The president and secretary shall each give a like bond with like sureties, to be approved by the said county auditor, in any sum not less than one-third of the amount of the said treasurer's bond. The said board of school trustees shall at the end of one year from the date of the first organization under this act, and annually thereafter, reorganize their board, and execute their bonds for the ensuing year. Said trustees shall receive for their services such compensation as the common council of such city may, by ordinance provide. Said trustees shall perform all of the duties and have all of the powers not inconsistent with this act, conferred by the general laws of this state upon the city school boards. Upon the request of said school board the common council of such city may in its discretion appropriate a portion of the general tax collected by such city for the support of the common schools within such city. R. S. 1894, § 4050.

687. Reports of moneys received.—147. Said school board shall make a detailed report to the comptroller of such city on the first Monday in July of each year of all moneys received and disbursed by it during the year ending on said day. R. S. 1894, § 4051.

TAXATION.

688. Taxation—Duplicate—When taxes are due.—148. The laws of the state of Indiana concerning the assessment of property for taxation and the collection of taxes, the sale of property for delinquent taxes, the enforcement of the lien by foreclosure, or other proceedings, so far as the same are not in conflict with this act, shall apply to such city; and for the purpose of enforcing the collection of delinquent taxes and conferring and giving title to property and quieting title to property that may have been sold for taxes, and foreclosing the lien of the city for taxes where property has been offered for sale for three successive years for delinquent taxes without bidders, such city shall have the same powers that the state and county have by law for such purposes, and the comptroller and treasurer of such city shall perform the same duties respectively in relation thereto as may now by law be performed by county auditors and treasurers, and the city attorney shall perform the same duties now required of the prosecuting attorney with reference to the enforcement of the lien of said city for taxes. It shall be lawful for said city,

or the proper department, officer or employes thereof, when specifically authorized by ordinance so to do, to purchase for and in the name of said city any property that shall be offered for sale for non-payment of taxes, and on the purchase of such property such city shall have all the rights that are now or that may hereafter be given to other purchasers of property at delinquent tax sales: *Provided*, That the city comptroller shall deliver the city tax duplicate for each year to the city treasurer of such city on or before the first day of September of each year; that the city taxes shall become due on the first day of September of each year, and all of said taxes remaining due and unpaid on the first day of December of said year shall become delinquent on said day: *Provided, further*, That the common council may of its own discretion, by ordinance provide for the payment of such city taxes in two installments, and may provide the time when such installments shall be paid and when the same shall become delinquent. City taxes shall be a lien on real estate from and after September first of each year. [As amended, Acts 1895, p. 258. In force March 11, 1895.] Burns' Supp. 1897, § 4052.

WHARFMASTER.

689. Wharfmaster—Appointment—Bond—Salary—Duties.—149. The mayor shall appoint one wharfmaster, who shall serve until he is removed by the mayor; the mayor shall fill all vacancies in said office. The wharfmaster shall file a bond in the sum of one thousand dollars with surety, to be approved by the mayor; said bond shall be conditioned for the faithful discharge of his duties. His salary shall be at the rate of six hundred dollars per year. He shall collect all wharfage due the city, pay the same into the city treasury at least once a week, and make weekly reports of his collections to the comptroller, and perform all duties that may be required of him by ordinance. R. S. 1894, § 4053.

690. Laws repealed—Evansville charter.—150. All laws and parts of laws coming in conflict with this act be and the same are hereby repealed, especially an act granting to the citizens of the town of Evansville in the county of Vanderburgh, a city charter approved January 27, 1847. R. S. 1894, § 4054.

Note—**Extension and amendment of street car franchises, etc.**—The act of 1891 (R. S. 1894, §§ 5477, 5478, 5479), applicable to city of Evansville when passed, prohibiting extension and amendment of street car or other franchises for use of streets, was, perhaps, impliedly repealed by the foregoing act. It has since been expressly repealed. See Acts 1899, p. 71.

CHAPTER 4.

CITIES OF MORE THAN THIRTY-FIVE THOUSAND.

ART.
1. INCORPORATION AND OFFICERS.
2. LEGISLATIVE—COMMON COUNCIL.
3. EXECUTIVE AND JUDICIAL OFFICERS AND DEPARTMENTS.
4. WATER-WORKS TRUSTEES.

ARTICLE 1.—INCORPORATION AND OFFICERS.

SEC.
691. Cities governed by this act.
692. Elective officers—Election—Terms.
693. Old officers, powers continued.
694. Vacancies.
695. Notice to officers elected.
696. Oaths of officers—Bonds.
697. Officers not interested in contracts.
698. Purchase of claims by officers.

[Acts 1893, p. 202. In force March 3, 1893.]

691. Cities governed by this act.—1. That all cities of this state which had a population of more than thirty-five thousand and less than forty-nine thousand inhabitants, as shown by the last preceding United States census, shall, on and after the first Tuesday in May, 1894, be governed by the provisions of this act. Any city falling within the scope of this act shall be, and continue to be, the same legal corporation as heretofore, subject to the same liabilities heretofore incurred, and possessing the same rights which have heretofore accrued. All by-laws, ordinances and regulations, not inconsistent with this act, shall remain and continue in full force until altered or repealed by the common council in conformity with the provisions of this act, but all by-laws, ordinances and regulations inconsistent with this act are hereby abolished. R. S. 1894, § 4055.

See note, *ante*, § 382.

Charter—Rules of construction.—The charter or statute by which a municipal corporation is created or governed is its organic law, and the rules applicable to the interpretation of constitutions may be used in the construction thereof. Newcomb v. City of Indianapolis, 141 Ind. 451.

For rules of construction, see *ante*, § 45, general note.

Incorporation and organization.—For decisions relating to incorporation and organization under the general law of 1867, see *ante*, § 46, notes.

Organization of municipal corporation—Validity of tested by quo warranto.—See *ante*, § 46, notes.

Incorporation—Presumption as to—Prescription—Judicial notice of.—See *ante*, § 46, notes.

Amendments—Repeal, etc.—The charter of a municipal corporation may be amended or repealed at the pleasure of the legislature. Special charters may be amended by either general or special act. See *ante*, § 46, notes and cases.

Municipal powers—Sovereign—Legislative—Judicial—Not liable for exercise or non-exercise of.—See *ante*, § 46, notes.

Municipal corporation defined.—See *ante*, § 46, notes.

692. Elective officers—Election—Terms.—2. The elective officers of such cities shall be a mayor, city clerk and councilmen, as hereinafter provided. The elections of such cities shall be held as hereinafter provided: On the first Tuesday in the month of May for the election of mayor, clerk and councilmen, and the first election hereafter for such officers shall be held in such cities on the first Tuesday in May, A. D. 1898, and the said officers shall hold their respective offices until the first Tuesday in May, 1901, when the second election of such officers shall be held, and the elections thereafter shall be held biennially on the first Tuesday in May, and such officers so elected shall hold their offices respectively for two years, and until their successors are elected and qualified. Such elections shall be held in conformity to and in accordance with the election laws of this state, and with the laws for the making out of certificates and memoranda of the result, and the delivery of the list of voters and the tally papers, the assemblage of inspectors or judges of elections as a board of canvassers, and the duties of such board in reference to state elections: *Provided*, That such board in city elections shall assemble in the room of the council of such city on the day following such election at 10 o'clock A. M. The duties of the county clerk in reference to such state election shall be performed by the clerk of such city. All special elections in such city shall be governed by the same provisions. The laws of this state in reference to contests after state elections and all other matters shall be applicable to such city elections as far as they are adapted to the same. [As amended, Acts 1897, p. 197. In force March 6, 1897.] Burns' Supp. 1897, § 4056.

City officers—Legislature can not appoint.—See *ante*, § 59, notes.

Nature of office—Salaries—Allowances, etc.—See *ante*, § 59, note.

Officers—Duties—Liabilities.—See *ante*, § 59, note.

Election of officers—Validity of—Quo warranto.—See *ante*, § 59, note.

Officers—Jurisdiction of—Injunction—Mandamus.—See *ante*, § 59, note.

Removal of officers.—See *ante*, § 59, note.

Mayor—Under general law.—See *ante*, § 80, note.

Councilman.—And other officers, under general law, see *ante*, §§ 59-68.

Municipal elections.—See *ante*, § 61, *et seq.*, notes.

693. Old officers, powers continued.—3. On and after the first Tuesday of May, 1894, the common council, mayor, city clerk and all other city officers and employes, shall possess the powers conferred by this act and no others. Until then they shall have the power now and heretofore conferred by law. All officers created by the statutes of the state or ordinances of the city heretofore in force, in conflict with this act are hereby abolished on and after said first Tuesday in May, 1894, except as herein otherwise provided, but until that time the officers filling the same shall continue in office and have and pos-

sess the powers and perform the duties now and hereafter conferred by law, and the members of the common council of such city heretofore elected shall hold their offices until the first Tuesday of May, 1894: *Provided, however,* They shall not be removed from office except by impeachment, as provided herein. In case such city, prior to the taking effect of this act, shall have commenced, by its proper officers, any proceedings or undertakings of a public nature which was [were] lawfully commenced or undertaken, the same shall not be interrupted by the passage of this act, but it shall be taken up and carried forward by the proper officer or department as prescribed by this act, except that in case of public improvements of any sort, whether of sewers, streets, alleys, levees, public buildings, or any other matter of an executive nature, in which a contract has not at the time of the passage of this act been actually let and entered into, the executive department having charge of such matter shall not be bound, unless it so elects, by the previous proceedings, but may review the whole subject and modify, change or rescind all orders previously made in that behalf. The present officers of such city shall surrender the custody of all property, records and documents of every nature whatsoever, to the appropriate officer or department entitled to the possession of the same under this act. R. S. 1894, § 4057.

See notes to *ante*, § 59, *et seq.*

694. Vacancies.—4. In the event of a vacancy occurring in any elective office of said city from death, resignation or other cause, except mayor, it shall be the duty of the acting mayor within ten days of such time to fill such vacancy by appointment for the unexpired term, subject to the approval of the council. R. S. 1894, § 4058.

695. Notice to officers elected.—5. The city clerk shall forthwith, after the execution of the certificate of election by the board of inspectors of elections of said office, as hereinbefore provided, notify every person so elected of the time when he must qualify, either by personal service or leaving copy at his usual place of residence, and shall make return of such service and file the same in his office. R. S. 1894, § 4059.

696. Oaths of officers—Bonds.—6. Every elective officer of such city shall, before entering upon the duties of his office, take and subscribe an oath, to be indorsed on the back of his certificate of election, and every appointive officer shall likewise take such oath, to be indorsed on the back of his certificate of appointment, before some officer authorized to administer the same, to support the constitution of the United States and the constitution of the state of Indiana, and to faithfully and honestly discharge all his official duties, such oath to be filed with the city clerk. Each of said officers, except the mayor and members of the common council, shall likewise execute a bond with surety, to be approved by the mayor, payable to such city in such penal sum as said council may enact by ordinance covering such cases, conditioned for the faithful performance of the duties of his office, and the

payment of all moneys received by him as such officer to the proper person, such bond to be filed with the head of the department of finance. Any person who shall not file his oath, or oath and bond, as the case may be, with the proper officer, within ten days after the beginning of the term for which he is elected or appointed, shall be deemed to have refused to serve, and shall forfeit to the city the sum of ten dollars ($10), recoverable in a civil action, and the office shall be deemed to be vacant: *Provided*, That in case of such default a member-elect of the council may, within thirty days from the date of his election, present his excuse therefor in writing to the body to which he is elected, and any other officer may, within the same time, present his excuse in writing to the council, and if such excuse is accepted, may be relieved from such penalty, and on taking such oath and giving such bond may assume the duties of his office. R. S. 1894, § 4060.

See note, *ante*, § 113.

697. Officers not interested in contracts.—7. No member of the council, nor any other officer, clerk or deputy, or employe of such city shall, either directly or indirectly, be a party to, or in any manner interested in any contract or agreement, either with such city, for any matter, cause or thing, or by which any liability or indebtedness is in any way or manner created or passed upon, authorized or approved by said council, or either of them, or by any officer, board, clerk, deputy or employe of such city. Any contract in contravention of the foregoing provisions shall be absolutely void. Whoever shall knowingly violate the provisions of this section shall be fined not more than one thousand dollars ($1,000), to which may be added imprisonment for any period not exceeding one year. R. S. 1894, § 4061.

See *ante*, § 122, and *post*, § 1420 and notes.

698. Purchase of claims by officers.—8. No councilman, or other officer, clerk, deputy or employe of such city shall purchase, either directly or indirectly, any bond, order, claim or demand whatever against such city, during his continuance in office or employment for any less sum than the amount specified therein; and any bond, order, claim or demand so purchased by any such person, in contravention of the foregoing provision, shall be forfeited to such city, and no action shall ever be maintained thereon. Gifts and the acquirements of equitable interests shall be deemed to be within the meaning and scope of the provisions of this section. R. S. 1894, § 4062.

ARTICLE 2—LEGISLATIVE—COMMON COUNCIL.

SEC.
699. Legislative authority.
700. Wards—Change of boundaries.
701. Councilmen—Election—Terms.
702. Qualifications of councilmen.
703. Expulsion of councilmen.
704. Meetings of council—Quorum.
705. Mayor to preside.
706. Meetings public.
707. City clerk—Duty.
708. Appropriation ordinances—Signing.

SEC.
709. Passage of ordinances.
710. Publication of ordinances.
711. Approval of ordinances—Veto.
712. Recording of ordinances.
713. Powers of council generally.
714. Penalties imposed.
715. Imprisonment.
716. Executive and administrative duties.
717. Investigating departments.
718. Impeachment—Removal.
719. Taxation.
720. Loans—Limit.
721. Bonds—Issue and sale.
722. Temporary loans.
723. Refunding bonds.
724. Warrants—When not to issue.
725. Interest.
726. Continuation of appropriations and tax levy.
727. Boundaries and annexation.
728. Remonstrance—Proceedings.
729. Parts of cities or towns not to be annexed.
730. Disannexation of territory.

699. Legislative authority.—9. The legislative authority of the city shall be vested in a common council. R. S. 1894, § 4063.

For decisions and interpretation of statutes relating to the powers of the common council under the general law of 1867, see notes to *ante*, §§ 114–211.

700. Wards—Change of boundaries.—10. The wards of such city shall remain in number and boundaries the same as now existing until such time as the same may be changed as hereinafter provided. The common council shall have power to readjust and fix the boundaries of the wards of such city, but shall make such wards of as nearly equal population and of as compact and contiguous territory as practicable. Such readjustment or fixing the boundaries of such wards shall not occur oftener than once in a period of six years, unless the same is made necessary by the annexation of new territory, in which case the same may be done at any time by ordinance passed by a two-thirds vote by the common council, but such new territory may be added to any existing ward or wards by ordinance of the council. R. S. 1894, § 4064.

Creation of wards—Judicial notice of existing wards.—See *ante*, § 53.

701. Councilmen—Election—Terms.—11. Each ward shall elect two councilmen at the city election hereinbefore provided for, whose terms of office shall commence at 12 o clock noon on the first Tuesday of May following such election, and shall continue until their successors are elected and qualified, as hereinbefore provided. [As amended, Acts 1897, p. 197. In force March 6, 1897.] Burns' Supp. 1897, § 4065.

702. Qualifications of councilmen.—12. No person shall hold the office of councilman from any ward unless he is at the time of his election a resident and voter thereof; a removal of residence from such ward shall vacate his office. [As amended, Acts 1897, p. 197. In force March 6, 1897.] Burns' Supp. 1897, § 4066.

703. Expulsion of councilmen.—13. The council shall have the power to expel any of its own members for violation of official duty, and to declare the seat of any member vacant by reason

of his disability to perform the duties of his office. The council may adopt its own rules to govern such cases, but a two-thirds vote shall be required to expel a member or vacate his seat under this section. R. S. 1894, § 4067.

See note, *ante*, § 119.

704. Meetings of council—Quorum.—14. The members of the common council shall hold their first regular meeting on the second Tuesday of May, 1894, at 7:30 o'clock P. M., in the council chamber. The council shall thereafter meet not less than once a month, and as much oftener as their rules may require. Special meetings may be held on the call of the mayor, or on such other call as may be provided for by rules. A majority of all the members elect shall constitute a quorum. It shall require a majority vote of all the members elect to pass an ordinance. Wherever it is provided in this act that an ordinance shall be passed by a two-thirds vote, the same shall be construed to mean two-thirds of all the members elect. R. S. 1894, § 4068.

705. Mayor to preside.—15. It shall be the duty of the mayor to preside at all meetings of the common council, and in his absence for any cause, the council shall choose a presiding officer *pro tem.* from their members. R. S. 1894, § 4069.

See note, *ante*, § 114.

706. Meetings public.—16. All meetings of the council shall be public. R. S. 1894, § 4070.

707. City clerk—Duty.—17. The city clerk shall be the clerk of the common council. It shall be his duty to keep the files and papers thereof, to make and keep an accurate minute and journal of the proceedings, to enter the ayes and noes on the passage of every ordinance and resolution in full, and on all other votes whenever requested to do so by two members. R. S. 1894, § 4071.

See *post*, § 742.

For duties of city clerk under general law of 1867, see *ante*, §§ 86, 87 and notes.

708. Appropriation ordinances—Signing.—18. All ordinances, orders, resolutions and motions for the government or regulation of such city, and all ordinances for the appropriation of money, shall originate in the common council. No appropriation shall be made for the payment of money, otherwise than by ordinance, specifying by items the amount thereof and the department for which such appropriation shall be made. The council may prescribe its own rules. No ordinance, order or resolution shall become law, or operative, until it has been signed by the presiding officer thereof, and approved in writing by the mayor, or passed over his veto, as provided in this act, and whenever the same may be necessary, promulgated according to law. R. S. 1894, § 4072.

709. Passage of ordinances.—19. No ordinance shall be passed

on the same day, or the same meeting, that it is introduced except by unanimous consent. R. S. 1894, § 4073.

See notes, *ante*, §§ 117, 117*a*, 118, 124.

710. Publication of ordinances.—20. Every ordinance imposing a penalty or forfeiture for the violation thereof, shall, before the same shall take effect, be published once each week for two weeks consecutively in some newspaper printed in the city: *Provided*, That in case of insurrection, riot, pestilence, conflagration or other public necessity requiring immediate operation of such ordinance, it shall take effect as soon as proclamation is made thereof by the mayor, and posted in five public places in each of the wards of such city: *Provided, further*, The common council shall have discretionary power to direct the publication of any ordinance in a daily newspaper, and the publication thereof for one day each in any two consecutive weeks in any daily paper shall be deemed sufficient to allow the same to take effect: *Provided*, That when no paper is published in such city, printed or written copies of such ordinance shall be posted up by the city clerk in at least five public places in each ward of such city for two weeks before the taking effect thereof: *Provided, further*, That whenever any city shall publish any of its ordinances in book or pamphlet form, such publication shall be of itself sufficient publication, and such ordinance or ordinances shall take effect two weeks from the date of publication appearing upon the said book or pamphlet. And such publication in book or pamphlet form, if the same shall purport to be printed under the authority of the common council of such city, shall be presumptive evidence in all courts and places, of the ordinances therein contained and of the date of adoption, and that the same are properly signed, attested and recorded, and approved by the mayor. R. S. 1894, § 4074.

See notes, *ante*, §§ 82, 84, 117, 117*a*, 118, 124.

711. Approval of ordinances—Veto.—21. Every ordinance, order or resolution of the common council shall, immediately upon its enrollment, attestation and signature by the clerk, be presented by him to the mayor, and a record of the time of such presentment kept by the clerk. If the mayor approves it he shall sign it, and it shall become a law. If he does not approve it he shall return it to the clerk, with his objections in writing, within ten days after receiving it, and the clerk shall present the same to the common council at its next meeting. It shall be the mayor's official duty to express, in writing, his approval or disapproval, as hereinbefore provided. If for any reason the mayor fails to discharge his duty within the time named, by approving or disapproving the same, in writing, the same shall be deemed equivalent to a disapproval, and in all cases of disapproval by the mayor the same shall not become a law unless the body in which the measure originated, within thirty days after the time named for the mayor's action, again pass the same by a two-thirds vote. R. S. 1894, § 4075.

712. Recording of ordinances.—22. All ordinances shall, within a reasonable time after their approval by the mayor, or their passage over his veto, be recorded in a book for that purpose kept by the city clerk. Such record shall include the signature of the presiding officer, attestation of clerk, and the mayor's written approval or disapproval, and memorandum of its passage over his veto. Such record or certified copy thereof shall be presumptive evidence of the going into effect of such ordinance. On the passage of any ordinance or resolution by the council, the yeas and nays shall be taken and entered in full on the journal. R. S. 1894, § 4076.

See notes, *ante*, §§ 117, 117*a*, 118, 124.

713. Powers of council generally.—23. The common council shall have power to enact ordinances for the following purposes: To provide a corporate seal, with appropriate device, for such city, to be affixed to all instruments or writings needing authentication. To fix the salaries or compensation of the various officers and employes of such city, except where a different provision is made in the act, upon this subject: *Provided*, That no member of the common council shall be allowed more than one hundred and fifty dollars ($150) for each year of his service as such member, nor shall any salary be charged after the election or appointment of a person to an office, until his term expires or his office is vacated. To protect all city property, real and personal. To provide for the punishment of contempt and disorder in the rooms of the council and of the police court. To authorize a census of the city. To receive gifts, donations, bequests and public trusts, and to agree to conditions and terms accompanying the same and bind the corporation to carry them out.

PUBLIC COMFORT AND HEALTH.

To declare what shall constitute a nuisance, to prevent the same, require its abatement, authorize the removal of the same by the proper officers, and provide for the punishment of the person or persons causing, continuing or suffering the same to exist, and to assess the expenses of its removal against such person or persons, and to provide for collecting such expenses either by placing the same on tax duplicate or by suit. To regulate or prohibit the use of hand-organs or instruments of any annoying character, or other music of itinerant performers, in the streets, alleys or public places of such city. To authorize the cleaning and purification of water and water-courses, by the board of public works, to prevent encroachment or injury to the banks thereof or the casting into the same of offal, dead animals, logs, rubbish, dirt or impure liquids of any kind whatever. For the purposes of this paragraph, jurisdiction is hereby conferred upon said city for ten miles from the corporate limits thereof. To regulate the location and management of starch factories, glue factories, renderies, tallow candleries, bone factories, soap factories, tanneries, foundries, slaughter-

houses, breweries, distilleries, livery stables, and of all other establishments of which the business or trade may become noxious or injurious to public comfort or health; to prohibit the erection of such buildings or the continuance of such noxious or injurious occupations therein whenever the public comfort or health requires it. For the purpose of this paragraph, such city is hereby given jurisdiction for four miles from the corporate limits thereof To prevent or regulate the use of fire-arms, fire-works, bon-fires, or other things or practices tending to endanger persons or property. To regulate and prohibit the running at large of cattle, horses, swine, fowls, sheep, goats, dogs or other animals; to authorize the impounding, keeping, sale and redemption of such animals, when found in violation of the ordinances in such cases provided. To prevent the deposit of any unwholesome substance, either on private or public property; compel its removal to designated points, and to require slops, garbage, ashes, and other waste or unwholesome material to be removed to designated points, or to require the occupants of premises to place them conveniently for removal. For the purpose of this paragraph, jurisdiction is given such city four miles from the corporate limits. To compel the occupants of any premises, buildings or out-houses situated in said city, or within four miles of the corporate limits thereof, when the same has become filthy or unwholesome, to abate or cleanse the same, and to authorize the same to be done by the proper public officers, and to assess the expense thereof against such property. To regulate or prevent the storage of gunpowder, tar, pitch, resin, coal oil, benzine, turpentine, hemp, cotton, nitro-glycerine, dynamite, giant powder, petroleum, gasoline or gas, or any product thereof, or any other explosive or combustible material, or any material which may seem dangerous. To regulate the location and management of cemeteries or burial places within or without such city, and to protect the same and to provide for the sanctity of the dead; to regulate or prohibit the interment of bodies; to authorize the removal of bodies now or hereafter buried, or of cemeteries to some other proper place. For these purposes such city shall have jurisdiction for four miles from the city limits. To establish quarantine regulations. To authorize the removal or confinement of persons having infectious or pestilential diseases. For the purpose of this paragraph and the preceding paragraph, jurisdiction is given such city for four miles from its corporate limits. To regulate or prohibit the ringing of bells, crying of goods or sounding of steam whistles. To direct the location and regulate the management of all public markets and market places, whether established by the city or by private individuals; to prevent the offenses of regrating and forestalling. To regulate and require reports and records of births and deaths, and to make such requirements as may be deemed necessary to prevent the spread of contagious or infectious diseases. To authorize and require the inspection and condemnation, if unwholesome, and to regulate the sale of meats, poultry, fish, butter, oleomargarine, cheese, lard, vegetables and all other food or provisions. To regulate the

selling, weighing, measuring of hay, wood, coal, coke and all other articles sold by weights and measures, and to require dealers to keep honest weights and measures, and to provide for their inspection and selling. To authorize and require the inspection and licensing of steam boilers and elevators, and to prohibit their use when unsafe or dangerous, or without license. To define fire limits in such city, and the character of buildings which are forbidden to be erected within such limits, and to prohibit the erection of buildings in such city without a license first obtained therefor, and to regulate the construction of buildings to prevent the spread of fire. To authorize and require the inspection of buildings and structures erected, or to be erected, or in the process of erection. To authorize the license therefor to be revoked, and the condemnation thereof in whole or in part, when dangerous or insecure in the opinion of the department of public works, and to authorize the same to be taken down within a specified time by the owner thereof; or in default thereof to authorize the same to be taken down at the owner's expense; or in case of an emergency, to authorize the same to be taken down by the department of public works, without delaying for the owner to do so. To compel persons about to undertake dangerous improvements to execute a bond of sufficient sureties, conditioned that the owner or contractor will pay all damages which may be sustained by any person or property from such work. To make all regulations which may be deemed expedient for the promotion of health or suppression of disease. To regulate the construction of chimneys, smoke-stacks, hearths, ovens; the erection of stoves and stovepipes, boilers and apparatus used in buildings or other places, and to cause the same to be removed or made secure then considered dangerous; to compel owners and occupants of houses and buildings to make scuttles in the roof thereof with stairs or ladders leading to the same, and to compel the erection of fire escapes. To authorize and require the inspection of gas pipes, water pipes, plumbing, drainage, sewage and electric lines or wires on private property or elsewhere; to compel them to be repaired or made secure by the owner or occupant, and on failure of such owner or occupant to do so, to authorize or require the gas or electric current to be shut off from the same until such repairs are made. To regulate and prohibit the keeping of any lumber yard and the placing or piling of any lumber, wood or other combustible material within the fire limits.

STREETS.

To prevent immoderate or careless driving or riding. To regulate the use of streets and alleys by vehicles, and designate the kind of conveyances and vehicles which may not use designated streets, which have been improved, together with hours for the use of such streets by certain specified classes of vehicles. To prevent the incumbering of streets, alleys, squares, sidewalks and crossings with vehicles, horses or any substance or material interfering with the free use of the

same. To regulate the speed of horses, wheeled vehicles, cars and locomotives. To regulate and protect all bridges, culverts, tunnels, viaducts, aqueducts, sewers, canals and hydrants wholly or partly in said city, and to prohibit digging in such streets, alleys or public places, or in any way injuring, disturbing or making holes in the surface thereof. To regulate the use of sidewalks and all structures, in, under or over the same, and to require the owner or occupant of premises to keep the sidewalks in front of the same free from snow and other obstructions, and prescribe hours for cleaning the same. To regulate and prevent the throwing or depositing of sweepings, dust, ashes, offal, dirt, garbage, paper, hand-bills, dirty liquids or any other material into any streets, alley or public places. To regulate and prevent the use of streets, sidewalks and public places for signs, sign posts, awnings, awning posts, holes, horse troughs, steps, railings, entrances, racks, posting hand-bills and advertisements, and display of goods, wares and merchandise. To regulate and prohibit the exhibition or carrying of banners, placards, advertisements or hand-bills on the streets, alleys, or public places. To regulate and prevent the flying of flags, banners, or signs across the streets or from houses. To regulate the numbering of houses and lots, and compel the owners to renumber the same, or in default thereof to authorize and require the same to be done by the department of public works at the owner's expense, such expense to constitute a lien upon the property, and enforceable as provided in the ordinance. To regulate or change the name of streets and parks. To regulate the making of private connection with sewer, gas, and water pipes, and to compel owners of property to bring such connections inside of the curb of streets before permanent improvement thereof, and in default of the owners making such connections, to authorize the city to do so at the owner's expense, and to make such expense a lien on the property, and collectible in the same manner that expenses for sprinkling streets are collectible.

OCCUPATIONS.

To regulate, license and tax street cars, telephone and telegraph companies; the use of coaches, hacks, drays, and all other vehicles for the transportation of passengers, freight or other articles to or from points within said city, for hire or pay. To regulate, license, tax, restrain or prohibit theatrical and all other exhibitions, shows or entertainments for which money is demanded or received: *Provided*, That lectures on scientific, historic, benevolent, artistic, religious or literary subjects and apparatus for the elucidation of the same, and specimens of fine art, shall not be deemed to be within this provision. To license, tax, regulate or prohibit runners at railroad stations and other places for stages, cars, public houses or other things or persons. To regulate the sale of all kinds of property at auction in the streets, stores, shops or elsewhere in the city, and to [license auctioneers. To] license, tax, regulate and prohibit the supply, distribution

and consumption of artificial and natural gas, of water and of electricity, and to fix the prices thereof. To license, tax, regulate, suppress and prohibit hawkers and itinerant dealers, peddlers and pawnbrokers, and to revoke such license at pleasure. To license, tax and regulate public hackmen, draymen, omnibus drivers, carters, cabmen, porters, expressmen, bill posters and all other persons pursuing like occupations, and to prescribe their compensation. To license, tax, regulate or prohibit all inns, taverns, hotels, restaurants, or other places used or kept for public entertainments. To license, tax and regulate the selling or giving away of any spirituous, vinous or malt liquor; and to tax, license and regulate places where such liquors, or either of them, are manufactured or stored, or where such liquors, or either of them are to be used on the premises where given away, sold, stored or manufactured; but such licenses shall not exceed the amount provided by the laws of this state for other cities thereof. For the purpose of this section, jurisdiction is given such city for four miles from its corporate limits. To tax, license and regulate distilleries and breweries, and the depots or agencies established in said city of all breweries and distilleries. To regulate and license lumber yards, livery stables and public scales. To tax, license and regulate second-hand and junk stores and to forbid their purchasing or receiving from minors any article whatever without the consent of their parents or guardians. To license, tax, regulate and prohibit the keeping or harboring of dogs. To license, tax, regulate and prohibit dairies and keeping of milch cows. To license, tax and regulate wheeled vehicles: *Provided*, That the funds derived therefrom shall be applied only to the maintenance and repair of streets and alleys. To license, tax and regulate branch stores or establishments, and all other concerns established in said city for temporary business only.

MORALS.

To preserve peace and good order, prevent vice and immorality, quiet riots and dispel disorderly assemblages. To suppress gaming and gaming-houses and places and houses of ill-fame or assignation, or houses kept for any immoral purposes; to prohibit and destroy any instruments and devices of gaming and to restrain fraudulent practices. To license, tax, regulate, restrain or prohibit all tables, alleys, machines, devices or places of any kind for sports or games. To regulate the time and place of, restrain or prohibit bathing in the rivers or public waters of such city, to direct the location and management of public bath-houses, to license the same or to require the same to be closed if deemed expedient. To restrain and punish vagrants, mendicants, street beggars, common prostitutes and their associates, thieves and criminals or persons known or reputed to be such. For the purposes of the last five paragraphs, such city is given jurisdiction for four miles from the limits thereof. To prohibit cruelty to children or animals.

DRAINAGE.

To keep open rivers, streams or water-ways, prevent the waters thereof from pollution; jurisdiction for these two purposes being given such city for ten miles from its corporate limits. To provide for change in the course of streams, rivers or water-ways, passing through or bordering upon the corporate limits thereof, and to authorize the exercise of the power of eminent domain, either within or without such city, for the purposes of securing a new course for such streams, river or water-way. To provide on what terms real estate in such city may be drained or sewered by means of surface or under drains, or sewers, over and across other real estate therein or within four miles thereof, whether within or without the limits of another municipal corporation, and to provide the methods of assessing the property benefited thereby and collecting such assessment to pay for the costs and uses thereof.

RAILROADS.

To secure the safety of citizens and others in the running of trains in or through such city; to require persons or corporations owning or operating railroads to fence their respective railroads, to construct cattle-guards, street crossings and viaducts and public roads, and to keep the same in repair and safe condition for persons on foot, in vehicles or otherwise; to construct and maintain gates, and to keep flagmen at railroad crossings and to provide protection against injury to persons or property from the operation of said railroads; to authorize and require railroad companies to change the location, grade and crossings of their respective railroads, to compel them to raise or lower their railroad tracks to conform to any grade which may be established by such ordinance; to compel persons or companies owning or operating railroads to construct bridges, viaducts or tunnels, and approaches thereto, across their respective railroads or rights of way at street or alley crossings; to compel railroad companies to make and keep open and in repair ditches, drains, sewers, and culverts along and under their respective tracks; to require railroad corporations or persons owning or operating railroads to keep gutters and street crossings clean along their right of way; to prohibit the laying of any railroad track across any street or alley or public place without permission first obtained therefor from the department of public works, and to provide for the taking up and removing any track so laid without notice, and charge the expense thereof against the offending person or corporation; to require any person or company owning or operating any railroad to take up and change the location of any railroad track or switch heretofore or hereafter laid within the limits of said city. To regulate and protect, except as otherwise herein provided, fire engines, hose, hook and ladders, and all other property or apparatus belonging to or used by the police or fire department, and to prevent interference with the members of the police or fire departments while on duty. To authorize the closing of any street, alley or public

place, or part thereof, whenever the public safety may require. To authorize the alienation and conveyance of any property, real or personal, belonging to such city: *Provided*, That no such property shall be sold until the same has been appraised by three disinterested freeholders of such city, appointed by the judge of the circuit court, in the county where such city is located, neither of said appraisers to be officers or employes of such city, and their sworn valuation in writing returned to the mayor. No sale or conveyance shall be made for a less sum than such appraisement, and in the case of real estate, only by a two-thirds vote of the common council. To regulate pounds, market-houses, market places, houses of refuge, pest-houses, hospitals, dispensaries, engine-houses and all other public city institutions.

MISCELLANEOUS.

To regulate the building of party walls and partition fences, prescribe in what proportion adjoining owners shall bear the expense of the same, in what manner such expense shall be levied and collected and to define the terms upon which partition walls already established may be used by adjoining owners. To carry out the objects of the corporation, not hereinbefore particularly specified: *Provided*, That such ordinances are not inconsistent with the laws of the state. R. S. 1894, § 4077.

Powers of common council.—See *ante*, §§ 124, 404, notes.

Municipal powers—Mode of exercise—Municipal contracts—Municipal property, etc.—See *ante*, § 124, notes.

Legislative and ministerial powers—Police power.—See *ante*, § 124, note.

Actions—Statute of limitations, etc.—See *ante*, § 124, note.

Ordinances—Enactment, amendment, repeal, validity, invalidity and construction of, etc.—See *ante*, §§ 117, 117*a*, 118, 124, notes.

Resolution and rules of council.—See *ante*, §§ 116, 117, 117*a*, 118, 124, notes.

Special subjects—Powers of council to legislate concerning.—For special subjects under the general law over which council has power to legislate, and the decisions of the courts relating thereto, see *ante*, § 124, notes.

714. Penalties imposed.—24. In every ordinance which the common council shall pass, there may be imposed a penalty for the violation or non-performance thereof. This penalty may be either a forfeiture of money, or a fine or imprisonment, or both of the last two: *Provided*, That no penalty or fine shall exceed five hundred dollars, ($500) and no imprisonment shall exceed six (6) months for one offense. R. S. 1894, § 4078.

See notes, *ante*, §§ 118, 211, and *post*, §§ 1237, 1383.

715. Imprisonment.—25. The city council shall have power to provide by ordinance for imprisonment of any person against whom a penalty, fine or cost for violation of any penal ordinance shall have been adjudged, until such fine, penalty and costs are fully paid or replevied;

also, to compel the enforcement of manual labor by such defendant, and by persons sentenced to imprisonment, by the use of sufficient force and means. R. S. 1894, § 4079.

Penalty—Not a debt, in the sense of the constitution. See *ante*, § 12, note.

716. Executive and administrative duties.—26. Whenever any executive or administrative function shall be required to be performed by any ordinance or resolution of such common council, the same shall be performed by the proper executive department, and not by said council. No new department shall be created. Said ordinance shall designate the department which is to perform the duties thereunder; but if designation is not made, either by statute or ordinance or resolution, the mayor shall assign such duties to the proper department. R. S. 1894, § 4080.

See note, *ante*, § 407.

INVESTIGATION AND IMPEACHMENT.

717. Investigating departments.—27. The common council shall have power to supervise and investigate all departments, officers and employes of the government of such city, and to examine into any charges preferred against the same, and into the affairs of any corporation, department or board in which the city may be interested, or with which it may have entered into a contract, or may be about so to do. It shall have power of access to all records thereto pertaining, and power to compel the attendance of witnesses, and the production of books, papers and other evidence, at any meeting of the body, or any committee thereof, and for that purpose may issue subpenas and attachments in any case of inquiry, investigation or impeachment, and cause the same to be served and executed in any part of the county where such city is located. If any witness shall refuse to testify as to any fact within his knowledge, or to produce any books or papers within his possession, or under his control, required to be used as evidence in any case, the clerk of the body by whose authority such witness was subpenaed, if so directed by the body or committee holding the investigation, shall forthwith report the facts relating to such refusal to the circuit or superior court in such county, or judge thereof, and all questions arising upon such refusal, and also upon any new evidence not included in such first report which new evidence may be offered either in behalf or against such witness, shall be heard by such court or judge. If the court or judge determine that the testimony or evidence required by such witness is competent and relevant and material, and ought to be given or produced by the witness, the court or judge shall make an order requiring the witness to testify, or to produce books and papers, or both. In case of a refusal to comply with such order, the court or judge shall have power to commit the witness or otherwise punish him for contempt, as provided for in the laws governing contempt of court in this state. No witness shall be

excused from testifying in any criminal proceeding, or in any investigation or inquiry before the council, or any committee thereof, or any officer of the city having the right to conduct the investigation, touching his knowledge of any offense committed against the provisions of this act, or of any ordinance passed in pursuance thereof, or continued in force by this act. But such testimony shall not be used against him in any criminal prosecution whatever. R. S. 1894, § 4081.

See note, *ante*, § 119.

718. Impeachment—Removal.—28. Whenever any written charges shall have been adopted by the council or any committee thereof, against any officer, employe or department of the corporation, except members of the council, the same shall be heard by the council, under such regulation as may be prescribed by ordinance. It shall require a two-thirds vote to impeach or remove an officer or employe. R. S. 1894, § 4082.

FINANCIAL.

719. Taxation.—29. The common council shall have the power to order and direct the levy of an annual tax not exceeding the rate of one dollar and twenty-five cents ($1.25) upon every one hundred dollars ($100) of valuation for any one year, as shown by the tax duplicate for the current year, and to manage the finances of the city, subject, however, to the powers and duties herein prescribed in respect to the several executive departments created by this act. The assessment of property and collection of taxes shall be made as now provided by law: *Provided*, That all real estate, within the limits of such city, not exempt from taxation by the laws of this state, shall be assessed at its fair cash value, without discrimination in the valuation of lands used for agricultural purposes within the limit of such city. R. S. 1894, § 4083.

See Taxation, R. S. 1894, ch. 108 (§ 8408, *et seq.*), and Burns' Supp. 1897, ch. 108 (§ 8411, *et seq.*), and Acts 1899, pp. 422, 430, 497, 516. See *ante*, § 212, *et seq.*, and notes.

720. Loans—Limit.—30. The common council shall have power to borrow money to an amount not exceeding two per cent. (2 per cent.) of the taxable property of such city, as the same may appear on the tax duplicate of such city for the year in which such loan shall be effected: *Provided*, That the entire money borrowed shall not at any time exceed two per cent. (2 per cent) of the taxable property of such city, except for the issue and sale of refunding bonds, as hereinbefore provided. Such loans may be made only for the purpose of procuring money to be used in the legitimate exercise of the corporate powers of such city, and for the payment of legitimate corporate debts. R. S. 1894, § 4084.

See constitutional limitation, *ante*, § 39 and notes, and §§ 143, 411 and notes.

721. Bonds—Issue and sale.—31. Such ordinance for loans may authorize the issue of bonds or other city obligation, negotiable or not, bearing interest at a rate not exceeding six per cent., and running not to exceed thirty years. Such ordinance shall provide for the time and manner of advertising the sale of such bonds or other securities, and of the receipt of bids for the same, together with the mode and terms of sale. All duties with regard to the preparation, advertisement, negotiation and sale of such bonds or other securities shall be performed by the head of the department of finance. Said officer, after causing such bonds to be properly executed, shall deliver the same to the city treasurer, taking his receipt therefor, and upon the conclusion of the contract for the sale of such bonds or other securities shall certify to the treasurer the amount which the purchaser is to pay for the same, together with the name of the purchaser. And thereupon it shall be the duty of the treasurer to receive from the purchaser the amount so certified by the head of the department of finance, and to deliver the bonds or other securities to the purchaser, taking his receipt therefor. The treasurer and head of the department of finance shall thereupon each make a report of his proceedings to the mayor. R. S. 1894, § 4085.

722. Temporary loans.—32. Temporary loans may be authorized by ordinance of the common council in anticipation of the revenue of the city for the current and following year, and payable within that period, but the aggregate amount of such temporary loan in any fiscal year shall not exceed the amount of the city tax levy for the same year. No temporary or other loan upon the revenue of any current or succeeding year shall be made until all temporary loans upon the revenue of any preceding year shall have been fully paid. R. S. 1894, § 4086.

723. Refunding bonds.—33. The common council shall have power to authorize the issue and sale of refunding bonds, in order to raise money to take up any outstanding bonds of such city, or to exchange with the holders of such outstanding bonds. The same shall be governed by the provisions of the second preceding section, so far as the same are applicable. R. S. 1894, § 4087.

Refunding bonds, see *ante*, §§ 39, 143, 144, 157, 414, and *post*, §§ 1001, 1003, 1005 and notes.

724. Warrants—When not to issue.—34. No order or warrant shall be drawn against the funds of such city, in the hands of the treasurer, or other officer, unless an appropriation has been made by ordinance of money for such purpose which is not exhausted, or unless the same shall be for a salary fixed by statute or ordinance, or for the payment of some judgment, which such city is compelled to pay. R. S. 1894, § 4088.

725. Interest.—35. All bonds or other securities offered for sale, pursuant to the provisions of this act, may bear annual interest not exceeding six per cent. (6 per cent.), may run not longer than thirty years, and may contain an option allowing such city to redeem the

same at earlier specified dates, in whole or in part, if so directed in the ordinance authorizing such issue. R. S. 1894, § 4089.

726. Continuation of appropriations and tax levy.—36. If the common council for any year shall fail to pass ordinances fixing the annual tax levy and appropriating money for the various executive departments by or before the first day of October in any year, then and in that case the appropriations made for such department or departments for the preceding year shall be deemed to be continued and renewed for the current year, and the tax levy for the preceding year continued. R. S. 1894, § 4090.

ANNEXATION.

727. Boundaries and annexation.—37. The common council shall have power, by ordinance, to declare and define the entire corporate boundaries of such city, and such ordinance, properly certified, shall be conclusive evidence, in any court or proceeding, of the boundaries of such city, except as provided in the next section. Such ordinance defining the entire city boundary may include contiguous territory, whether platted or not, not previously annexed, and such annexation shall be binding, unless such newly annexed territory shall be within the limits of another town or city, in which case there may be an appeal, as hereinafter provided. Said common council may also, by separate ordinance, not purporting to define the entire boundaries of such city, annex contiguous territory, whether platted or not, and whether in the limits of an incorporated town or not to such city; and a certified copy of such ordinance shall be conclusive evidence in any proceeding that the territory therein described was properly annexed and constitutes a part of such city, except as provided in the next section. Immediately after the passage of every such ordinance as provided for in this section, the same shall be published for at least two consecutive weeks in a daily newspaper of general circulation published in such city. R. S. 1894, § 4091.

See chapter 1, article 6, Annexation of Territory, *ante* §§ 253–255 and notes, and chapter 6, article 2, Annexation—Boundaries, *post*, §§ 1017–1048 and notes, and *ante*, § 418 and notes.

728. Remonstrance—Proceedings.—38. Whenever such territory is annexed to such city, as provided in the foregoing section, whether by general ordinance defining the city boundaries, or by special ordinance for the purpose of annexing territory, and such territory so sought to be annexed is unplatted ground, or lies within the corporate limits of any other town or city, an appeal may be taken from such annexation, by one or more resident freeholders, in the territory sought to be annexed, filing their remonstrance in writing against such annexation, together with a copy of such ordinance, in the circuit or superior courts of the county where such territory is situated, within ten days after the last publication provided

for in the preceding section; such written remonstrance or complaint shall state the reason why such annexation ought not in justice to take place. Notice of such proceedings by way of summons shall be served upon the proper officer of the city seeking to make annexation, and such city shall become defendant in such cause, and shall be required to appear and answer as in other cases. The court shall thereupon proceed to hear and determine such appeal without the intervention of a jury, and shall give judgment upon the question of such annexation according to the evidence which either party may introduce, relevant to the issue. If the court should be satisfied upon hearing that less than 75 per cent. of the resident freeholders of the territory sought to be annexed have remonstrated, and that the adding of such territory to the city will be for its interest and will cause no manifest injury to the persons owning real estate in the territory sought to be annexed, he shall so find, and said annexation shall take place. If the court shall be satisfied that 75 per cent. or more of the resident freeholders in the territory sought to be annexed have remonstrated, then such annexation shall not take place, unless the court shall find from the evidence that the prosperity of such city and territory will be materially retarded and the safety of the inhabitants and property thereof endangered without such annexation. In case the court shall so find the annexation shall take place. Notwithstanding the remonstrances such decision shall be final, and no appeal shall lie therefrom; nor shall the laws touching change of venue from the county apply, but changes of venue from the judge may be had as in other cases. Costs shall follow judgment. Pending such appeal, and during the time within which such appeal may be taken, such territory sought to be annexed shall not be deemed a part of the annexing city. Upon the determination of such appeal, the judgment shall particularly describe the ordinance upon which the appeal is based; and it shall be the duty of the county clerk to forthwith deliver a certified copy of such judgment to the clerk of such city, who shall record the same in the ordinance record, and make a cross reference to the page thereof upon the margin where such original ordinance was recorded. In case the decision is adverse to such annexation, nó further annexation proceedings for such territory shall be lawful for two years after the rendition of such judgment. R. S. 1894, § 4092.

See note, *ante*, § 419.

729. Parts of cities or towns not to be annexed.—39. No such annexation shall be made, under the foregoing sections, of any part of the territory of any other incorporated town or city, but only of the whole corporate territory thereof. In case of such annexation, the two corporations shall be deemed to be consolidated, and the consolidated corporation shall be bound for all the debts and liabilities, and shall be the owners of all corporate property, franchises and rights of

every nature, including all taxes of both of such municipal corporations. R. S. 1894, § 4093.

730. Disannexation of territory.—40. The common council shall have power by ordinance to disannex and throw out any territory forming a part of the corporate limits of such city, upon a petition of a majority of the freeholders resident therein; but such disannexation shall not relieve such territory from being taxed for the purpose of paying any city indebtedness, existing before such disannexation, nor the interest thereon, nor any new securities issued to refund such indebtedness, nor the interest thereon. R. S. 1894, § 4094.

ARTICLE 3.—EXECUTIVE AND JUDICIAL OFFICERS AND DEPARTMENTS.

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EXECUTIVE.

731. Executive and administrative authority.—41. The executive and administrative authority of such city shall be vested in a mayor, city clerk, the departments hereinafter created, or referred to, and such other officers as may hereinafter be appointed by virtue of this act. R. S. 1894, § 4095.

For powers and duties of executive and administrative officers under the general law of 1867, see *ante*, § 59, *et seq.*, and notes.

732. Mayor—Election—Qualification—Term—City clerk.—42. There shall be chosen at each general election, hereinbefore provided for, by the voters of said city, a mayor, a city clerk, each of whose terms of office shall commence at 12 o'clock, noon, on the Thursday next after their election, and shall continue two years, or until his respective successor is elected and qualified, except as herein otherwise provided. No person shall be qualified for the office of mayor who has not been a citizen and resident of such city for three years previous to his election, and who is not at least twenty-five (25) years of age. R. S. 1894, § 4096.

733. Vacancy in office of mayor.—43. In case of a vacancy occurring in the office of mayor, from death, resignation or otherwise, more than six months before a general election shall occur, it shall be the duty of the acting mayor to take official notice thereof, and within ten (10) days thereafter issue his proclamation calling for a special election by the voters of such city, at a date therein named, not later than forty (40) days, nor earlier than twenty-five (25) days after the issuance of such proclamation, to fill such vacancy or vacan-

cies. Such special election shall be governed by the laws and regulations governing general elections. R. S. 1894, § 4097.

734. Acting mayor.—44. In case of a vacancy in the office of mayor from death, resignation or otherwise, or in case of disability on the part of the mayor to perform the duties of his office, the city comptroller shall perform the duties of acting mayor and be entitled to his salary for the time being: *Provided,* That during the time of performing such duties of acting mayor he shall not perform any duties as comptroller. R. S. 1894, § 4098.

735. Duties of mayor—Bond.—45. It shall be the duty of the mayor, to cause the ordinances of the city and the laws of the state to be executed and enforced; to communicate to the council at least once a year, a statement of the finances and general condition of city affairs, and also such information in relation to the same as he may be called upon to furnish from time to time; to make such recommendations in writing, by message to the council, as he may deem expedient; to call special meetings of the council, when he shall deem the same expedient; to perform such duties of an executive or administrative character as may be prescribed by law, and he shall be responsible for the good order and efficient government of the city; to fill, by appointment, vacancies for unexpired terms in all the elective offices, except that of mayor; to appoint the heads of departments, as hereinafter created, who shall hold office until their successors are appointed and qualified: *Provided,* That the mayor may at any time suspend or remove from office any or all of such persons, whether appointed by him or his predecessors, by notifying them to that effect and sending a message to the council stating in writing his reasons for such removal; to sign all bonds, deeds and written contracts of the corporation, and all licenses issued pursuant to law by any department, and to revoke or suspend any such license; to approve or disapprove, in writing, within ten (10) days after receiving the same, every ordinance or resolution of the council, and he shall transmit to the body in which the same originated within such time a message announcing such approval or veto; in case of a veto, he shall state in writing his reasons therefor, and such resolution or ordinance shall not become operative unless the same is passed over such veto, by a two-thirds vote of the common council: *Provided,* That in ordinances appropriating money or levying a tax or taxes, the mayor may approve or disapprove of the separate items of such appropriation or levy. In case of disapproval of any item or items, and approval of the remainder of the ordinance, so much of the same as it [is] approved shall be law and operative, and those items which are disapproved shall not become law and operative unless passed over his veto by a two-thirds vote as above provided. To call together the heads of departments, except of assessment and collection, for consultation and advice upon the affairs of the city at least once a month, and to call on the heads of all departments for reports from the same, which it shall be their duty to prepare and submit in writing. Records shall be kept of such meetings as above

provided for, and rules and regulations shall be adopted thereat for the administration of the affairs of the city departments, not inconsistent with any law or ordinance, which regulations shall prescribe a common and systematic method of ascertaining the comparative fitness of applicants for office, position and promotion, and of selecting, appointing and promoting those found to be best fitted; to appoint, as often as he thinks proper, three competent persons to examine without notice the amounts [accounts] of any department, officer or employe, and the money, securities and property of the city in their possession or charge, and report the result of such investigation. He shall be the conservator of the peace, and as such shall have within the city limits the powers conferred upon justices of the peace, for that purpose, and shall perform such other duties as the nature of his office and the interests of the city shall require. He may take and certify under the seal of the city the proof and acknowledgment of deeds and other instruments in writing which shall be good in any court in this state without further authentication; he may also take and certify depositions and affidavits, and the same shall have a like force and effect as if taken by justices of the peace; he shall hold a city court every day, Sunday excepted, at a place to be furnished by the common council. While sitting as such court he shall have exclusive jurisdiction of all prosecutions for violation of the by-laws and ordinances of the city; he shall have within the limits of said city the jurisdiction and powers of a justice of the peace in all matters civil and criminal arising under the laws of this state, and for crimes and misdemeanors his jurisdiction shall be co-extensive with the county in which such city is situated: *Provided*, That in trials before him he shall have power to adjudge imprisonment with hard labor as a part of his sentence not exceeding thirty days in the city or county prison. In all actions in the city judges' or mayor's court either party may have a trial by jury and a change of venue to a justice of the peace in such city, and an appeal to a court of competent jurisdiction under the same restrictions and in the same manner as from justices' court, except in cases where the mayor has exclusive jurisdiction no change of venue shall be allowed. The same rules of pleading and practice shall be observed in the city judges' or mayor's court that are in the justices' court. The mayor shall give bond, payable to the state of Indiana, in any penal sum not less than three thousand dollars, to be approved by the clerk of the circuit court, with freehold security, conditioned for the faithful performance as mayor and all other duties herein required, and file the same with the clerk of the circuit court within the time directed by law for justices of the peace. All [fines and penalties collected by him shall be paid to the comptroller of the city within one month after the same shall have been received by him in the kind of a fund so received, except when otherwise directed by acts prescribing the duties and powers of justices of the peace, in which case he shall pay all fines in the same manner

and under the same restriction that justices of the peace are required to do.] R. S. 1894, §4099.

See note, *ante*, § 426.

For powers and duties of mayor under the general law of 1867, see *ante*, § 80 and notes.

For city court, under said general law, see *ante*, § 262 *et seq.* and notes.

736. Mayor's court—Fees—Absence—Who to act.—46. The mayor or city judge shall keep a docket as justices of the peace do, and in case of the absence of such mayor or city judge, for the space of five days or more, or of inability in consequence of sickness or other causes, for a like period, shall, prior to such departure in the first case and at the expiration of five days in the last case (if his inability continue) deposit, or cause to be deposited, his docket with any justice of the peace within said city, and such justice shall, during such absence or inability, be vested with, and exercise all the judicial powers and authority of said mayor or city judge, and be entitled to his fees and emoluments therefor, the mayor or city judge shall be entitled to the same fees as justices of the peace. In case of a vacancy in the office of mayor or city judge, by death, resignation, or otherwise, the council shall cause his docket to be placed in the hands of some justice of the peace in said city, who shall act as, and have all the judicial powers and authority of such mayor or city judge, until the vacancy can be supplied, as provided by law, and the official bonds of such justice shall embrace all his official acts in such capacity: *Provided*, That all fees herein provided for the mayor or city judge shall be paid to such mayor or city judge for the use and benefit of such city, which fees the mayor or city judge shall pay into the comptroller's office, once in every three months, for the benefit of the general funds of the city. The mayor or city judge shall draw no salary from the city treasury until he shall have filed with the comptroller a relinquishment and transfer to such city of all taxable fees allowed him by law in all cases. R. S. 1894, § 4100.

737. Suits by city.—47. Whenever any suit shall be instituted by such city it shall not be necessary to aver its corporate organization, or the publication of its by-laws or ordinances, unless the same is contradicted by affidavit. R. S. 1894, § 4101.

See notes, *ante*, §§ 82–84.

738. Suits against corporations.—48. In all prosecutions against any railroad or other incorporated company for the violation of any ordinance of the common council of any city, a summons may issue against the company and may be served on the president, superintendent, secretary, treasurer, station agent or general agent, and upon the trial of the cause, judgment may be rendered against the railroad company for such penalty as may be adjudged, or the conductors or other agents of the company guilty of the violation, may be arrested by warrant, and may be proceeded against personally as in other cases. R. S. 1894, § 4102.

739. Actions on ordinances.—49. All actions brought to recover any penalty or forfeiture incurred under this act or ordinance made in pursuance thereof, shall be brought in the corporate name of such city, the process in every such action shall be a warrant and the person named in such warrant shall be arrested and retained in custody or under reasonable recognizance until the next sitting of the city court, and it shall not be necessary to file with the affidavit or complaint a copy of the ordinance, or section thereof, charged to have been violated, but it shall be sufficient to recite in the affidavit or complaint the number of the section charged to have been violated, with the date of its adoption; nor shall it be necessary to copy any part of the affidavit or complaint or other pleadings in the record of the cause: *Provided*, That the mayor shall note upon his docket the parties to the action, the title to the cause, the filing of the complaint or affidavit, the issuing and return of process and the judgment and proceedings had in the cause, and the satisfaction of judgment when paid. R. S. 1894, § 4103.

See *ante*, §§ 82 and 84 and notes.

740. Commitment for failure to pay judgment.—50. If the penalty or forfeiture in which judgment is obtained is not paid or replevied, the defendant may be committed, for any period not exceeding thirty days, to the work-house of such city, or if such city has no work-house then to the county prison of the county in which such city is situated, and in the latter case it shall be the duty of the person having charge of such prison to receive such defendant, and obey the judgment of the city judge's or mayor's court in reference to him or her, and in default of payment or replevy of such judgment and costs the defendant, unless a female, may be adjudged and required to pay the same by manual labor in said work-house or county prison, or on the street or other public works of such city, under the control of the department of public works of such city, for which labor such defendant shall be allowed on such judgment and costs seventy-five cents per day. It shall be the duty of said department of public works, or such officer as the department of public works may direct, to work such defendant not less than six nor more than ten hours per day, according to the season, and each evening return him to the custody of the keeper of such prison or work-house. Upon the full payment, as aforesaid, of the judgment and costs, such defendant shall be fully discharged. And such department of public works is hereby authorized and required to perform all the duties herein prescribed and to use all proper means thereto; and the common council is hereby vested with full authority to pass by-laws and ordinances for the purpose of compelling the enforcement of such manual labor by such defendant, by the use of sufficient force and means as they may deem right and proper. If any prisoner is required to work upon the streets or other public works of the city as a part of his punishment, then such city shall pay to the county the fees now allowed to sheriff for boarding

prisoners, while such prisoner is confined in the county prison or jail, and such defendant may, at any time, replevy and pay such judgment and costs; and in case he has performed labor under such judgment, he shall be entitled to a credit for the same amount of labor performed, and the balance may be paid or replevied as aforesaid. R. S. 1894, § 4104.

741. Salary of mayor.—51. The mayor of such city shall be paid an annual salary of twenty-five hundred dollars ($2,500), which may be increased by ordinance to any amount not exceeding three thousand dollars ($3,000), and he shall receive no other compensation whatever. R. S. 1894, § 4105.

742. City clerk—Duties—Salary—Deputy.—52. The clerk of such city shall be the clerk of the common council and may appoint one or more deputies at his own expense to assist him. He shall keep the records of the proceedings of said body. Said city clerk shall have charge of all the papers relating to the business of said common council, shall prepare and keep an ordinance book, as elsewhere provided in this act, shall have charge of all documents and books, the keeping of which may be intrusted to him by statute or ordinance, shall keep the city seal, and shall perform all other duties prescribed by law or incident to his office. He shall receive a salary at the rate of fifteen hundred dollars per year, which may be increased by ordinance to a rate not exceeding two thousand dollars ($2,000) for all such services, and shall not receive any other compensation, fee or perquisite, except for furnishing certified copies of the records in his possession, which shall be received as evidence in any proceeding, and for which the said clerk shall receive like fees as paid to the county clerks for similar services. Said clerk shall deliver over to his successor, as soon as the same shall have qualified for office, all documents, books and belongings of his office. The city clerk may be authorized by the common council to employ a deputy at a salary not to exceed one thousand dollars ($1,000) per year: *Provided*, That it is shown to the satisfaction of the council that such clerk is necessary. R. S. 1894, § 4106.

For duties of clerk under general law of 1867, see *ante*, § 86 and notes.

DEPARTMENTS.

743. Departments established.—53. The following executive departments are hereby established in such city:

a. Department of finance.
b. Department of law.
c. Department of public works.
d. Department of public safety.
e. Department of assessment and collection.
f. Department of public health and charities.

No other executive or administrative departments shall be estab-

lished in such city. Subordinate officers and employes not herein provided for shall be appointed by the heads of their respective departments. Each department shall have power to prescribe rules and regulations not inconsistent with any statute or ordinance, or regulation established pursuant to section 45 of this act, for its own government, regulating the conduct of its officers, clerks and employes, the distribution and performance of its business, and preservation of books, records, paper and property under its control. Each department shall promptly furnish to the mayor or the common council any information which may be called for in relation to its affairs. The heads of said departments, except the department of assessment and collection, shall be appointed by the mayor. The departments of public works, public safety and public health and charities shall have power to designate and appoint, and at pleasure to remove, a clerk for said departments, who shall keep a continuous record or minute of all official business in said several departments, and whose salary shall not exceed one thousand dollars ($1,000) per annum, to be fixed by the heads of such departments. In case such heads of such departments fail to agree upon and make such appointment within five (5) days from the commencement of their terms of office, it shall be the duty of the mayor to designate and appoint such clerk, and the clerk so appointed by the mayor may be by him removed at pleasure, but not by such departments. In the event that one clerk shall not be sufficient to do the work of all such departments, the council may authorize the appointment of such additional clerks as may be necessary, not exceeding one for each of such departments: *Provided*, That after the expiration of thirty (30) days from the time when a new officer or officers shall have been appointed to the head of a department, he or they may remove clerks or assistants only upon filing in writing with the city clerk the reasons for any such removal, except that foremen, inspectors and laborers temporarily employed under the department of public works may be removed at any time at the pleasure of the department. All officers shall give bond as required by ordinance, except when otherwise provided herein. R. S. 1894, § 4107.

See note, *ante*, § 429.

744. Qualifications of heads of departments—Report of moneys received.—54. No person shall be appointed as the head of any department, or as a member of any board herein provided for, unless he shall have been a resident and elector of such city for three years immediately prior thereto. No person who is paid a salary for his services from the city treasury shall receive to or for his own use, directly or indirectly, any fees, perquisites of office, commissions, percentages, or money paid to him in his official capacity, unless specially authorized in this act; but all fees, perquisites, commissions, percentages, and moneys so paid and received by or for any such officer or person shall be the property of the city, and shall be paid by him into the city treasury; and all moneys received for licenses or permits shall be

paid into the treasury weekly without deduction by the officer or department receiving them, and every such officer or person who shall receive any fees, perquisites, percentages, or other moneys which belong to the city, and should be so paid into its treasury, shall, before he shall be entitled to receive or be paid his salary, make, under oath, a detailed statement and return to the head of the department of finance in such form as he may prescribe, showing the aggregate amount of all moneys received by him since the last preceding statement and return, and shall produce a receipt showing the payment of such sum to the treasurer. The comptroller may require any such officer or person to make such statement and return to him, if it be not made as herein provided, and examine such officer or person under oath touching the matter herein provided for. R. S. 1894, § 4108.

745. Estimates by heads of departments.—55. It shall be the duty of each executive department, before the commencement of each fiscal year, to submit to the joint meeting of the heads of the departments and of the various boards hereinbefore provided for in section 45, an estimate of the amount of money required for their respective departments for the ensuing fiscal year, stating with as great particularity as possible each item thereof. The comptroller shall at the same time submit a statement or estimate of city expenditures for other purposes, for the ensuing year, over and above the moneys proposed to be used by the various executive departments, giving with as great particularity as possible each item thereof. After such meeting and reports and consultation, the city comptroller shall thereupon proceed to revise such estimates for the ensuing year, and the comptroller shall then prepare a report to the mayor of the various estimated amounts required in said comptroller's opinion for each executive department, and for other city expenses, together with an estimate of the necessary per cent. of taxes to be levied. The mayor shall at the next meeting of the common council present such report with such recommendations as he may see fit. It shall be the duty of the committee of finance of said common council thereupon to prepare an ordinance fixing the rate of taxation for the ensuing year, and also an ordinance making appropriations by items for the use of the various executive departments and other city purposes for the ensuing year. Said ordinance may reduce any estimated item for any executive department, from the figures submitted in the report of the city comptroller, but shall not increase the same unless recommended by the mayor. Such appropriation ordinance shall thereafter be promptly acted upon by the common council. If at any time after the passage of such ordinance an emergency shall arise for further appropriations for the use of any department, as certified by such department as hereinbefore provided, or other purposes during the year, such additional appropriation may be made on the recommendation of the comptroller by a two-thirds vote of the council. R. S. 1894, § 4109.

746. Contracts—When bind city.—56. No executive department,

officer or employe thereof, shall have power to bind such city by any contract, agreement, or in any other way, to any extent beyond the amount [of money] at the time already appropriated by ordinance for the purpose of such department, and all contracts and agreements, express or implied, and all obligations of any and every sort, beyond such existing appropriations, are declared to be absolutely void. R. S. 1894, § 410.

See note, *ante*, § 432.

747. Issuing illegal warrants—Penalty.—57. Any city official who shall issue any bond, certificate or warrant for the payment of money which shall purport to be an obligation of such city, and be beyond the unexpended balance of any appropriation made for such purpose, or who shall attempt to bind such city by any contract, agreement, or in any other way, to any extent beyond the amount of money at the time already appropriated by ordinance for such purpose, and remaining at the time unexpended, shall be liable on his official bond to any person injured thereby, and shall be fined in any sum not more than one thousand dollars ($1,000), and imprisoned in the county jail not more than six months, either, or both. R. S. 1894, § 4111.

Department of Finance.

748. Comptroller—Appointment—Salary—Deputy.—58. The city comptroller shall be at the head of the department of finance, and shall have an appropriate seal. He shall be appointed by the mayor. His salary shall be two thousand dollars ($2,000), which may be increased by ordinance to a sum not exceeding three thousand dollars ($3,000) per year. The comptroller may appoint a deputy, for whose acts he shall be responsible, having an annual salary of eight hundred dollars ($800), which may be increased by ordinance to a sum not exceeding one thousand dollars ($1,000). The comptroller and his deputy are hereby authorized and empowered to administer oaths in all matters relating to his office. R. S. 1894, § 4112.

749. Duties of comptroller.—59. It shall be the duty of the comptroller to prescribe the form of reports and accounts to be rendered to his department, and to have the inspection and revision of the accounts of all other departments and trusts. To audit the accounts of the several departments and trusts, and all other accounts in which the city is concerned, and submit annually to the council at the end of each fiscal year a report of the accounts of the city, under his oath, exhibiting the revenues, receipts and expenditures, the sources from which the revenues and funds are derived, which report shall be published in pamphlet form. To keep separate accounts for each specific item or appropriation made by the council to each department, and require all warrants to state specifically against which of said items the warrant is drawn. Each account shall be accompanied by a statement in detail, in separate columns of the several

appropriations, the amount drawn on each appropriation, the unpaid contracts charged against it, and the balance standing to the credit of the same. He shall not suffer any appropriation to be overdrawn or the appropriation for one item of expense to be drawn upon for any other purpose, or by any department other than that for which the appropriation was specifically made, except on transfers authorized by ordinances. He shall sign and issue all orders for money upon the city treasury, and no moneys shall be paid out by the treasurer except upon such order. In case of stated salaries fixed by law or ordinance, said comptroller shall issue orders therefor, but in all cases he shall require a warrant to be presented to him from the head of the department under whose supervision the obligation has been incurred, or if not so incurred, then such warrant shall be drawn by the mayor. In no case shall the comptroller draw an order on the treasury unless there be at the time money in the treasury properly applicable to the payment thereof. The expenditures of the comptroller must be approved in writing by the mayor before any order is drawn therefor. To have charge of all books or papers pertaining to his department or entrusted to the same, and to turn the same over to his successor. If any warrant presented to the comptroller contain an item for which no appropriation has been made, or there shall not be a sufficient balance of the proper fund for the payment thereof, or which for any cause should not be approved, he shall not approve the same, and shall notify the proper department of the facts. And if the comptroller shall approve any warrant contrary to the provisions hereof, he shall be individually liable for the amount of the same to the holder thereof, and to the extent of his bond; his sureties shall also be liable. Whenever a warrant shall be presented to him, he shall have power to require evidence that the amount claimed is justly due, and for that purpose may summon before him any officer, agent or employe of any department of the city, or any other person and examine him upon oath relative to such warrant or claim. Such persons so summoned shall be subject to the provisions of this act, touching the examination of persons by the council, said comptroller having the same power as such body. To perform the duties elsewhere defined by this act with regard to the negotiation and sale of city securities, and to keep a register of all bonds of the city and the transfers thereof and an account of all outstanding securities. To manage and direct the finances and accounts of the city, and to make investments of city funds, subject to the ordinances of the common council. To issue all city licenses of every nature whatever upon the presentation and surrender of the receipt of the treasurer showing the payment of the license fee and to collect comptroller's fees as fixed by ordinance. Said comptroller shall once each week pay to the treasurer the amounts collected by his department for the preceding week, specifying the source from which they have been derived, and the comptroller shall relinquish, in writing, to such city all fees which have been or may be collected. To prescribe the forms and methods of keeping and ren-

dering all city accounts and pay-rolls to be used in the several departments and offices, the manner in which all salaries shall be drawn, and the mode by which all creditors, officers and employes shall be paid. All salaries shall be payable once in three months. To furnish the treasurer statements of all appropriations made by the council before any warrant shall be drawn on account of the same, and to notify the mayor in case of any neglect or failure on the part of any officer or officers authorized to collect moneys for or on account of the city, in the performance of such duty or in depositing their collections in the treasury; and thereupon the mayor shall suspend such officer or officers, and proceed against them by an action upon their official bond or otherwise, as he may deem best. To carefully examine the tax duplicates in the hands of the county auditor and county treasurer, and see that they are properly made out so far as the same relate to city taxes, and to see that the assessment of property is properly made out by the assessor so far as the same relates to city taxes, and to notify the county auditor of any omitted property that may come to his knowledge. To examine the accounts of the treasurer and make an annual settlement with him, charging to such treasurer the amount of all taxes and other assessments, entered upon said duplicate, in favor of such city, together with all penalties, interest and other sums in addition to the amount of such tax, which it may be the duty, according to law, of such treasurer to collect in behalf of the city, and to credit him with all disbursements made on account of lawful orders drawn on him by such comptroller. To draw orders on the treasury for miscellaneous city expenditures, not made under the direction of any executive department, nor specifically fixed by law as in the case of salaries: *Provided*, That no such order shall be drawn by such comptroller, unless the money properly applicable thereto has been appropriated by ordinance, and remains unexpended, and no liability shall accrue against such city, nor can any officer, agent or employe of such city bind the same directly or indirectly for any such miscellaneous expense without the written approval of the comptroller previously obtained and filed in the comptroller's office, nor in any case beyond the appropriation already made and remaining unexpended and available for such purposes. All obligations in contravention of the preceding provisions are declared to be void for all purposes. R. S. 1894, § 4113.

Department of Law.

750. City attorney—Appointment—Bond—Salary—Duties.—60. The head of the department of law shall be the attorney and counsel of such city. He shall be appointed by the mayor. He is to give a bond in the sum of five thousand dollars ($5,000), to be approved by the comptroller. He shall receive an annual salary of not less than fifteen hundred dollars ($1,500) nor more than twenty-five hundred ($2,500) in full for all services, said salary to be fixed by the

common council. He shall have the management, charge and control of the law business of such city and for each branch of its government, and prosecute all violators of city ordinances; shall draw up ordinances, leases, deeds, contracts or other legal papers for such city and its various departments when requested to do so by the proper officer, shall be the custodian of the papers properly appertaining to his office, and shall turn the same over to his successor in office. He shall conduct all legal proceedings authorized by this act, and all appeals of every nature whatsoever in which such city or the public shall have an interest; shall make all searches and abstracts of title required in opening, widening or changing any street, alley or public place. All fees, perquisites or other emoluments received by him, or payable to him, including prosecuting violators of city ordinances, shall be collected by him for and in behalf of such city, a careful account kept thereof, and the same paid into the city treasury once a week, said payment to be made under oath as to the amount received. Such attorney shall use all diligence to collect costs due such city, and all all other fees or recoveries falling within the purview of his official duties. He may employ a deputy, and also such other assistants as he may be authorized to do by ordinance, and not other, and shall promptly commence all proceedings necessary or advisable for the protection or enforcement of the rights of such city or the public. He shall report to the mayor in writing all such matters as he may deem important, and to the department of finance all judgments for which such city shall be liable. No judgment against such city shall be enforceable except out of moneys appropriated for that purpose, but the common council and mayor may be compelled by mandamus proceedings to levy, collect and appropriate the necessary sum for the payment of any judgment, in which case such legislative bodies may be sued collectively by their legal name, service of process being had on any member thereof, and all members shall be bound by such judgment. R. S. 1894, § 4114.

Powers and duties of city attorney.—For appointment, removal, etc., under general law of 1867, see *ante*, §§ 59, 59*a*, 96 and notes.

Authority of city attorney.—A city attorney who is charged by statute with the duty to prosecute and defend all suits for and against the city in several controversies involving the same issues may bind the city by an agreement that all the controversies shall abide the result of one test case. Bank of Commerce v. City of Louisville, 88 Fed. Rep. 398.

Department of Public Works.

751. Board of public works—Appointment—Salary—Bonds.—61. The department of public works shall have for its head a board of three members, to be appointed by the mayor, not more than two of whom shall be of the same political party. The mayor shall have the power at any time to remove any member of said board and to fill, by appointment, any vacancy occurring in said office. The person

appointed to fill a vacancy shall hold the office, subject to removal by the mayor, until his successor is appointed by the mayor. Each member of said board shall receive a salary at the rate of one thousand dollars ($1,000) per year, which may be increased by ordinance to a rate not exceeding fifteen hundred dollars ($1,500), and give bonds with sureties in the sum of five thousand dollars ($5,000), to be approved by the comptroller. Said board shall choose a chairman from its own number. No member of said board shall have any authority to act on behalf of the same, except pursuant to an order of the board, regularly made at a meeting of the same, at which meeting a majority of said board shall have been present. All actions of the board shall be recorded by the clerk thereof, together with a record of the vote of each member, where the vote is not unanimous. The board shall make rules governing the time and place for holding regular and called meetings, and for giving notice thereof. R. S. 1894, § 4115.

Rules.—See note, *ante*, § 438.

752. Engineer—Appointment—Salary.—62. The mayor shall also appoint a city civil engineer, who shall be subject to the orders and directions of said board, and receive a salary of fourteen hundred dollars ($1,400) per year, which may be increased by ordinance not to exceed twenty-five hundred dollars per year. R. S. 1894, § 4116.

For powers and duties of city engineer under general law of 1867, see *ante*, § 91 and notes; Hirth v. City of Indianapolis, 18 App. 673.

753. Duties and powers of board.—63. The board of public works shall have the power to condemn, hire or purchase any real estate or personal property needed by such city for any public purpose, except when a different provision for purchase is made by this act. Said board may cause buildings, structures or other things in the way of any street, sewer or other public improvement, to be taken down removed and appropriated upon the payment of damages as herein provided. Said board may enter upon, seize, appropriate and condemn the right of way, yards, depot, grounds or other lands of any railroad company, person or corporation, passing through such city, for street, sewer or alley purposes, whether such lands be occupied or not, upon the payment of damages as herein provided. *Provided*, That when a sum of more than two thousand ($2,000) dollars is required to be paid for the condemnation, hire or purchase of any real estate or personal property, the same shall not take place unless the condemnation, hire or purchase is specifically authorized by ordinance. To have charge of all property, real and personal, belonging to such city, and to care for the same, except where the custody of such property is by this act placed under different control. To design, order, contract for and execute the improvement or repair of any property, real or personal, belonging to or used by such city, and the erection of all buildings for public purposes, together with all fire cisterns, pounds, and other structures of any nature needed for any public purpose. To

approve the platting of all streets and alleys in any addition to such city, or within the corporate limits thereof; to require the same to correspond in width, and be coterminus with the adjoining streets and alleys. No plat shall be entitled to record in the recorder's office in the county in which such city is located without such written approval endorsed thereon. To lay out, open, change, vacate, and to fix or change the grade of any street, alley or public place within such city, and to design, order, contract for and execute the improvement or repair of any street, alley or public place within such city. To repair, clean, light and sprinkle any street, alley or public place within such city which requires the same, in the opinion of such board, said work to be done either by contract or otherwise, and to cause lamp posts or other lighting apparatus to be erected in the streets, alleys or public places of such city. To lay out, design, order, contract for and execute the construction, alteration and maintenance of all public drains or sewers within such city, and all drains or sewers without such city and within four (4) miles thereof, which may be necessary to carry off the drainage of such city. To purchase or erect, by contract or otherwise, and operate water-works, gas-works, electric light works, street car and other lines for the conveyance of passengers and freight, natural gas lines, telegraph and telephone lines, for the purpose of supplying such city, and the suburbs thereof, or to purchase or hold a majority of such stock in corporations organized for either of the above purposes: *Provided*, That none of the powers conferred by this paragraph shall be exercised except pursuant to an ordinance specifically directing the same. To contract for the furnishing of gas, either natural or artificial, water, steam or electricity, light or power to said city or the citizens thereof, by any company or individual, and such contract to fix the prices to be charged for the same in such city, subject to ordinances of such city in relation to consumption by private consumers. *Provided*, That such contracts shall in all cases be submitted by said board to the council of such city, and be approved by them by ordinance before the same shall take effect. To design, order, contract for and execute the erection of any culvert, bridge, way, viaduct, tunnel or aqueduct within such city, or to enter into a contract with any company or individual for the joint erection and maintenance by such company or individual and such city of any such structure. To authorize and empower by contract, telegraph, telephone, electric light, gas, water, steam or street car or railroad companies to use any street, alley or public place in such city, and to erect necessary structures therein, and to prescribe the terms and conditions of such use: To fix by contract the prices to be charged to patrons: *Provided*, That such contract shall in all cases be submitted by said board to the council of such city, and approved by them by ordinance before the same shall take effect: to license the digging of any hole, or the removal of any material from the surface or underneath the surface of any street, alley or public place in such city; to require bonds for damages and for the proper replacement of the street, and to refuse

such licenses when the public interest requires it. To direct the removal of any and all structures in the streets, alleys or public places of such city, and to remove the same at the expense of the person, maintaining the same on their failure to make such removal. To design, order, contract for and execute the erection of any levee within the limits of such city or within four (4) miles thereof. To change any water-course, natural or artificial, within such city or within four (4) miles thereof. To remove all dead animals, garbage, filth, ashes, dirt, rubbish or other offal from such city, either by contract or otherwise. To prepare a general uniform plan for the drainage and sewerage of such city, and extend the same from time to time. To make and keep a map and record of all sewer, gas, water, electric wire conduits in such city, public and private, showing the size, depth, inclination, location and date of construction of the same, and to record therein every change which may be made in the same, together with all new connections and improvements. To discharge all other duties of an executive character not falling within the sphere of some other executive department, or imposed upon this department by ordinance. To fill up or drain any section of ground within such city or within four (4) miles from its corporate limits whenever water has or may become so stagnant or noxious as to be injurious to the public health and comfort at the owner's expense, the same to be a lien and collectible by foreclosure. To construct urinals and fountains in public places. To fix, establish, change and keep a record of the grades of all streets, alleys and sidewalks. [As amended, Acts 1899, p. 138. In force February 27, 1899.]

See note, *ante*, § 440.

Power over streets, alleys and bridges—Duties—Liabilities—Obstructions—Negligence—Actions—Damages.—See *ante*, § 218 and notes.

Plats—Dedication of streets—Prescription, etc.—See *ante*, § 218 and notes.

Opening and vacation of streets—Eminent domain, etc.—See *ante*, § 218 and notes.

Improvement of streets—Fixing and changing grade. See *ante*, §§ 91, 218, 219, and *post*, §§ 1107–1135 and notes.

Sewers, drains, etc.—See *ante*, § 124, clauses 26 and 43 and notes, and §§ 127 and 183 and notes; also *post*, § 1090, *et seq.*, and notes.

Corporations occupying streets under municipal franchises—Duties and liabilities, etc.—See *ante*, § 218 and notes.

Water-works—Contracts, ordinances, etc.—See *ante*, § 124, clause 26 and note, and clause 43 and notes, and § 138, *et seq.*; *post*, §§ 1061–1089, and § 1372, *et seq.*

Public lights—Gas and electricity.—See *ante*, § 124, clause 28 and notes, and *post*, § 1136, *et seq.*, and notes; also *post*, § 1371, *et seq.*

Railroads—Occupation of streets, etc.—See *ante*, § 218 and notes, and *post*, § 1316, *et seq.*, and notes.

Street car companies—Occupation of streets, etc.—See *ante*, § 218 and notes, and *post*, § 1332 and notes.

Telegraph and telephone companies.—See *ante*, §§ 1 and 4 and notes, and § 218 and notes, and as to telephone companies, *post*, § 1380 and notes.

Municipal property—Purchase—Sale—Control of, etc.—See *ante*, § 124 and notes.

754. Contracts for work.—64. It shall be the duty of said board of public works, whenever any work "or improvement of any character ordered or undertaken by it, is payable out of the general treasury of such city from funds belonging to such city," or payable in whole or in part by assessments made for that purpose upon the property benefited thereby, to cause said work to be done either by independent contract or by employes of said board as said board may deem best: *Provided*, That in cases where such work is done by independent contract, such contract shall provide and stipulate under proper penalty that such contractor shall give residents of said city and county wherein it is located the preference as employes. [As amended, Acts 1899, p. 138. In force February 27, 1899.]

755. Letting contracts—Notice—Bids—Collusion, etc.—65. Whenever said board shall order any work to be done, which either by order of said board or according to law, it is to be performed by independent contract, said board shall prepare and place on file in the office of said department complete drawings and specifications of said work. Thereupon said board shall cause a notice to be published in one daily or weekly newspaper of general circulation published in such city, once each week for two weeks, informing the public and contractors of the general nature of the work and of the fact that the drawings and specifications are on file in such office, and calling for sealed proposals for such work by a day not earlier than ten (10) days after the first of said publications. Said board shall require each bidder or firm of bidders to file with said board an affidavit that such bidder or bidders have not directly or indirectly entered into any combination, collusion, undertaking or agreement with any other bidder or bidders to maintain the price of any work or contract or to prevent any other bidder or bidders from bidding or to induce any bidder or bidders to refrain from bidding on any contract or work, and that such bid is made without regard or reference to any other bid or bids, and without any agreement, understanding, or combination, either directly or indirectly, with any other person or persons with reference to such bidding in any way or manner whatever. And if after any contract has been let by said board it shall be made to appear to said board that the successful bidder has been guilty of any collusion, combination, understanding or agreement, as defined in said affidavit, such bidder shall forfeit said contract and such work shall be relet by said board. The board may in its discretion fix a later day for receiving such sealed proposals, provided, such date shall be mentioned in each of such notices. Said board shall, if a satisfactory bid be received, let such contract to the lowest and best bidder. Such board may by order impose further conditions upon bidders with regard to bond and surety guaranteeing the good faith and responsibility of such bidders or insuring the faithful completion of such work, according to contract, or for keeping the same in repair for any length of time, or for any other purpose. [As amended, Acts 1899, p. 138. In force February 27, 1899.]

756. Expenses of board—Payment.—66. All the expenses incurred or authorized by such board of public works shall be payable out of the general funds of such city appropriated to the use of such board and available for the particular purpose, except where this act specifically directs that the same is to be paid for by assessments against property holders. R. S. 1894, § 4120.

CONDEMNATION.

757. Appropriation of property.—67. Whenever the board of public works shall desire to appropriate or condemn, for the use of such city, and [any] property, real or personal, or to open, change, lay out or vacate any street, alley or public place within such city, including proposed street or alley crossings of railways in cases where the proposed street or alley is to cross a railway, it shall adopt a resolution to that effect, describing the property which may be injuriously or beneficially affected, and shall cause notice of such resolution to be published in some daily newspaper of general circulation in such city once each week for two weeks. Such notice shall name a date, after the last day of publication, at which said board will receive or hear remonstrances from persons interested in or affected thereby. Said board shall consider such remonstrances, if any, and thereupon take final action, confirming, modifying or rescinding their original resolution. Such action shall be final and conclusive upon all persons, except upon the dismissal and abandonment of the proceedings as hereinafter provided. R. S. 1894, § 4121.

For decisions on eminent domain, opening and vacation of streets, etc., under the general law of 1867, see *ante*, § 218, *et seq.*, and § 224, *et seq.*, and notes.

See, also, constitutional law, *ante*, §§ 4 and 11 and notes.

758. Roll of owners of property.—68. Upon the final order being made, as provided in the preceding section, said board shall cause to be prepared a list or roll of all the owners or holders of property and of valuable interests therein, sought to be taken or to be injuriously affected, and in the case of opening, laying out, change or vacation of any street, alley or public place in such city, or within four miles thereof, a list of the owners or holders of property, or of valuable interests therein to be beneficially affected by such work. Such list shall not be confined to the owner of property along the line of proposed work, but shall extend to and include all property taken, benefited or injuriously affected. In addition to such list of names, the name [same] shall show, with reasonable certainty, a description of such property to be taken or affected, either beneficially or injuriously, belonging to such persons. No greater certainty in names or descriptions shall be necessary to the validity of any assessment than is required in the assessment of taxes. R. S. 1894, § 4122.

759. Award of damages—Notice.—69. Upon the completion of such list, said board shall proceed to award the damages sustained, and

to assess the benefits accruing to each piece of property of said list. When such assessments or awards are completed, said board shall cause a written notice to be served upon the owner of each piece of property, showing the amount of such assessment or award, by leaving a copy of the same at his last usual place of residence, in such city, or by delivering a copy to such owner personally. If such person be a non-resident, or his residence shall be unknown, then he shall be notified by publication in some daily newspaper of general circulation in such city once each week for three successive weeks. Such notices shall also name a day, not earlier than ten (10) days after service of notice or after the last publication, as the case may be, on which said board shall receive or hear remonstrances from persons with regard to the amount of their respective awards or assessments. Persons not included in such list of assessments or awards, and claiming to be entitled to the same, shall be deemed to have been notified of the pendency of the proceedings by the original notice of the resolution of the board. R. S. 1894, § 4123.

See note, *ante*, § 446.

760. Insane persons and infants.—70. In case any person having an interest in land affected by such proceedings shall be of unsound mind or an infant, said board of public works shall certify the same to the city attorney, and said city attorney shall forthwith apply to the proper court and secure the appointment of a guardian for such infant or person of unsound mind; and thereupon said board shall give notice to such guardian, who shall thereupon appear and protect the interest of his ward: *Provided*, That if such infant or person of unsound mind already have a guardian, such notice may be served on such guardian. The requisites of notice to such guardian shall be the same as in the case of other notices. If there be a defect in the proceedings with respect to one or more interested persons, the same shall not affect such proceedings except so far as it may touch the interest or property of such person or persons, and shall not avail any other person concerned therein. In case of such defect, supplementary proceedings of the same general character as those heretofore prescribed may be had in order to supply the same. R. S. 1894, § 4124.

761. Remonstrance—Appeal.—71. Any person notified, or deemed to be notified, under the preceding sections, may appear before such board on the day fixed for hearing such remonstrances with regard to awards and assessments, and to remonstrate against the same. After such remonstrances shall have been received, said board shall thereupon either sustain or modify the awards or assessments in the cases of such remonstrances, but in no other case. Any person thus remonstrating who is aggrieved by the decision of the board, may, within twenty (20) days thereafter, take an appeal to the circuit or superior court in the county in which said city is located. Such appeal shall only affect the assessment or award of the person appealing. R. S. 1894, § 4125.

762. Appeal—How taken—Judgment.—72. Such appeal may be taken by filing an original complaint in such court against such city within the time named, setting forth the action of the said board of public works in respect to such assessment, and stating the facts relied upon and showing an error on the part of such board. Such court shall rehear the matter of such assessment *de novo*, and confirm, lower or increase the same as may seem just. In case such court shall reduce the amount of benefits assessed against the land of such property holders, or increased the amount of damages awarded in his favor, to the extent of ten per centum of such benefits and [or] damages, the plaintiff in such suit shall recover costs, otherwise not. The judgment of such court shall be final, and no appeal shall lie therefrom. *Provided*, If upon such appeal the report of the board of public works as to benefits or damages be greatly diminished or increased, the city may, upon the payment of costs, discontinue such proceedings. R. S. 1894, § 4126.

763. Assessment of benefits—Lien.—73. On the completion of such assessment roll by said board of public works, the same shall be forthwith delivered to the department of finance, and from that time the respective amounts of benefits therein assessed shall severally be liens, superior to all other liens except taxes, against the respective lots or parcels of land upon which they are assessed. Said department of finance shall at once prepare a duplicate of said assessment roll of benefits, the same to be known as the local assessment duplicate, and deliver the same to the treasurer. The duties of the treasurer and of the department of finance in respect thereto shall be the same as hereinafter more specifically prescribed with regard to assessments for street improvements. R. S. 1894, § 4127.

764. Benefits—When due—Collection.—74. Said assessments of benefits shall be due and payable to the treasurer from the time of the delivery of said assessment duplicate to said treasurer. If not paid within sixty (60) days thereafter, the said city by its attorney shall proceed to foreclose said liens in a court of competent jurisdiction as mortgages are foreclosed, with similar rights of redemption, and have the same sold to pay such assessments. Such city shall recover costs, with a reasonable attorney's fee, and interest from the expiration of the sixty (60) days hereinbefore allowed for payment, at the rate of six per cent. (6 per cent.) per annum. In all cases where the party against whom the assessment is made is a resident of such city, demand for the payment of the same shall be made by delivering to him personally, or leaving at his last and usual place of residence, a notice of such assessment and demand for payment. R. S. 1894, § 4128.

See note, *ante*, § 451.

765. Payment by city of damages.—75. Said board of public works shall have power to determine what, if any, part of the damages

awarded shall be paid out of funds appropriated for the use of such board by the common council: *Provided,* That not more than $2,000 in damages shall be paid out of the city funds for any improvement or condemnation unless pursuant to an ordinance appropriating for the specific improvement or condemnation. All benefits assessed and collected by the treasurer shall be subject to draft, in the usual manner, upon certificate by the board of public works in favor of persons in whose favor damages have been awarded. Any surplus remaining above actual awards shall belong to such city. Said board may delay proceedings until such benefits have been collected. R. S. 1894, § 4129.

766. Damages—Payment.—76. It shall be the duty of the board of public works, upon the completion of their award of damages, or whenever any time for delay as above mentioned shall have expired, to make out certificates for the proper amounts and in favor of the proper persons, upon the presentation of which to the head of the department of finance such person shall be entitled to a warrant on the city treasurer. Such certificates or vouchers shall, whenever practicable, be tendered actually to the persons entitled thereto, but where this is impracticable the same shall be kept for such person in the office of said board of public works, and the making and fixing of such certificate shall in all cases be deemed to be valid and effectual tender to the person entitled thereto, and the same shall be delivered to him on request. In case of a dispute, or doubt as to which of the various persons said money shall be paid, said board shall make out such certificate in favor of the city attorney for the use of the persons entitled thereto, and said attorney shall thereupon draw the money and pay the same into court in a proper proceeding, requiring the various claimants to interplead and have their respective rights determined. In any case where an injunction is obtained because damages have not been paid or tendered, said board may tender such certificate for the amount thereof with interest from the time of entry upon the property, if any has been made, and all accrued costs, and thereupon the injunction shall be dissolved. The pendency of an appeal shall not affect the validity of a tender made under this section, but such city shall be entitled to proceed with its appropriation of the property in question. R. S. 1894, § 4130.

767. Order for street improvement.—77. Whenever the board of public works shall order the improvement of any street, alley, sidewalk or other public place in said city, in whole or in part, it shall adopt a resolution to that effect, setting forth therein a description of the place to be improved, the general character of the improvement, the plans and specifications of the work in detail and the different materials that the board will consider and may determine to select or adopt upon the receiving of bids for such work, as hereafter provided: *Provided,* That such resolution shall name not less than three kinds of material to be considered in street improvements. Notice of such resolution shall be published, remonstrances heard as to the necessity

of said improvement, said resolution modified, confirmed or rescinded in the same manner as heretofore more specifically provided by this act with regard to the condemnation of property and the opening of streets. If such original resolution be altered, confirmed or modified, it shall be final and conclusive on all persons, unless within ten days thereafter two-thirds of the resident freeholders along and upon such street or alley remonstrate against such improvement. In case of such remonstrance, the improvement shall not take place unless specifically ordered by an ordinance within sixty days thereafter, passed by a two-thirds vote of the council, which ordinance shall be valid without the approval of the mayor. If said board shall finally order such improvements, it shall advertise for bids for all the different materials specified in the original resolution in accordance with the various plans and specifications relating thereto on file in the office of the board of public works; upon the opening of said bids, said board shall adopt the material and plans to be used in such improvement out of the different bids that were received, unless all bids are rejected, and the board's action shall be binding and conclusive upon all persons affected by said improvement without further notice, unless within five days thereafter freeholders owning two-thirds of all the real estate along and upon such street or alley shall by written request to the board ask the adoption of some other material, upon which bids have been received, in which case the board shall adopt such material. [As amended, Acts 1899, p. 342. In force March 3, 1899.]

See note, *ante*, § 454.

For powers over streets, duties and liabilities, improvement of streets, etc., under the general law of 1867, and amendatory and supplemental laws, see *ante*, §§ 218–223 and notes, and *post*, §§ 1107–1135 and notes.

For constitutional provisions and decisions, see *ante*, §§ 4 and 11 and notes.

768. Land or lots assessed—Cost—How estimated—Liability of city.—78. If said street be constructed all land or lots or parcels of land or lots lying between the edge of such street and a line drawn an equal distance from such edge of such street and the edge of the next street running parallel thereto, shall be assessed and made liable to pay the cost of constructing such street so improved, and the amount of the several assessments shall be ascertained and estimated as follows: The total cost of improving such street or alley shall first be ascertained and the amount thereof shall be divided by the number of feet the same is in length, and the cost of each running foot shall be assessed upon the lots or land fronting or abutting thereon, if such land or lots extend to said line as hereinbefore stated in the proportion that the same fronts or abuts upon such street compared with the entire length of such improvement. If the land or lots belong to different persons, then such board shall assess such cost against the various land-owners and upon the various lots or parcels of land herein declared liable to pay for such improvement according to the benefits received from such improvement, because of being upon, near, or

having access to such improvement, and such benefit shall be without regard to the assessment for taxation herein provided. Such city shall be liable to the contractor for the contract price of such improvement to the extent of the moneys actually received by said city from the assessment for such improvement hereinafter provided for, and for its *pro rata* share for street and alley crossings; the city to pay for whatever work is done on such improvement that is not in front of some lot or tract of ground; the computation to be made as hereinbefore provided. Such city shall have separate and several liens on such lots or lands from the time the contract for such improvement is finally let for the respective assessments against each lot or parcel of land. [As amended, Acts 1895, p. 239. In force March 11, 1895.] Burns' Supp. 1897, § 4132.

See notes, *ante*, § 455.

769. Lien—Street and alley crossings—Deductions.—79. The lien herein given upon the several lots and parcels of land or tracts of land shall be deemed to include the assessment, principal and interest, together with costs of foreclosure and a reasonable attorney's fee. The lien of the same shall have precedence over all liens except taxes. Any mistake in the description of property, or the name of the owner shall not vitiate such liens. Such city shall be liable to pay for all that part of the street or alley crossings which shall be occupied by street or alley crossings and not in front of any land or lots as hereinbefore provided, and said board shall order that *pro rata* part paid out of the funds at their disposal for that purpose, to that extent reducing the total amount to be apportioned against property holders. If before ordering such improvements any land or lots have already an[y] improvements in front thereof conforming to the general plan, said board shall make an allowance to said owner thereof, to be deducted from his assessment and from the total amount of the contract price. [As amended, Acts 1895, p. 239. In force March 11, 1895.] Burns' Supp. 1897, § 4133.

See notes, *ante*, § 456.

770. Payment by installments.—80. Whenever said board of public works shall order the improvement of any street or alley, as provided in the preceding sections, the assessment for such improvement may, at the option of each property-holder, be payable in ten (10) annual installments, as follows: Ten (10) per cent. of the principal, together with all accrued interest on the entire assessment on or before the third Monday of April next succeeding the allowance of the final estimate on such work by said board, except where such estimate has been made between March 15 and October 1, of any year, in which case such first installment shall be payable on the first Monday of November next succeeding such estimate. The next payment on said assessment shall be six (6) months' interest on the unpaid principal, payable at the date for the general payment of taxes, either spring or fall,

as the case may be, next after the installment on such assessment falls due. The next payment on said assessment shall be ten (10) per cent. of the original principal and six (6) months' interest on the unpaid principal, payable on or before the date for the general payment of taxes, spring or fall, as the case may be, accruing one year after the first installment was payable, and so on, thereafter ten (10) per cent. of the original principal with six months' interest on the unpaid principal once each year, and six months' interest in alternate turn with each annual payment of principal and interest until the principal and interest have been paid. R. S. 1894, § 4134.

771. Assessment roll.—81. In making assessments against each lot or parcel of land, said board of public works shall, as soon as any contract has been completed for the improvement of any street or alley, make out an assessment roll with names of property holders and descriptions of the property adjoining the place of such proposed improvement. Said roll shall also have set opposite each name and description, the total pro rata assessment against each piece of property. When confirmed, said assessment roll shall be delivered to the head of the department of finance. Before the said board shall approve and accept the work under any contract, and allow a final estimate therefor, the contractors who have performed such work shall file with said board an affidavit of some one or more persons having knowledge of the facts, that all work done under such contract and all materials used are of the character, kind, quantity and quality required by the specifications on which such contract was let and that said work has been done in conformity with said contract and specifications, and according to the directions of said board and the city engineer. [As amended, Acts 1899, p. 138. In force February 27, 1899.]

See note, *ante*, § 458.

772. Final estimate—Notice—Hearing.—82. Whenever the board of public works shall approve and accept the entire work under any contract and allow a final estimate therefor, it shall be the duty of such board to give one week's notice by one insertion in a daily newspaper, if any there be, and if there be no such paper, then by posting notices in at least three public places along the line of such improvement, of the time and place when and where a hearing can be had upon such estimate, before such board. Any person feeling himself aggrieved or injured by the acceptance of such work or by such estimate, shall be accorded a hearing thereon. The board may adjourn such hearing from time to time, and of such adjournment all parties interested shall take notice. After the hearing of such objections, if any, the board may change, modify or confirm such estimate, and it shall thereupon be the duty of the department of finance to forthwith deliver to the treasurer a certified copy of such final assessment roll. The costs of all notices shall be estimated in and as a part of the total cost of any such improvement. Such duplicate assessment roll shall

be known as the local assessment duplicate, and shall be appropriately prepared, showing the amount due on each piece of property, if paid in cash within the time limited, together with necessary columns, in which such assessment shall be extended, showing the amount of each installment, and when payable, whenever the same shall be paid in installments, together with the interest due at each spring and fall payment of taxes, until the same shall be fully paid. Said book shall also have appropriate columns in which payments may be properly credited, and also the place for the satisfaction of the lien by the treasurer. All assessments, whether payable in installments or not, shall be payable to the treasurer, except as otherwise herein provided, whose duty it shall be to receive the same and give proper receipts therefor and enter the proper credit and satisfaction in said book or duplicate assessment roll. R. S. 1894, § 4136.

See notes, *ante*, § 459.

773. Agreement of persons paying by installments.—83. Whoever desires to exercise such privilege of payment by installment shall at any time before the expiration of fifteen (15) days after the allowance of the final estimate aforesaid, enter into an agreement in writing that in consideration of such privilege he will make no objection to any illegality or irregularity with regard to the assessment against his property and will pay the same as required by law with the specified interest. Such agreement shall be filed in the office of the department of finance. In all cases where such agreement has not been signed and filed within the time limited, the entire assessment shall be payable in cash without interest before the expiration of said fifteen (15) days. After said fifteen days, if not paid when due such total assessment shall bear interest at the rate of six per cent. (6 per cent.) from the date of the final estimate. Persons signing and filing the agreement within the time limited, and entitled to pay in installments, may nevertheless at any time after the expiration of the first year, pay up their entire assessment and stop the interest thereon and be relieved of the lien of the same, on condition that they at the same time pay up all accrued interest, and also interest up to the time the next installment of interest is payable: *Provided*, That before such persons shall be entitled to make such prepayments they shall give notice in writing at the treasurer's office of their intention so to do, six months in advance of the time when such payment is made. [As amended, Acts 1899, p. 138. In force February 27, 1899.]

See note, *ante*, § 460.

774. Duty of treasurer—Account of fund.—84. It shall be the duty of the treasurer to receive the same, keep all accounts thereof, and give proper vouchers thereof. The department of finance shall charge the treasurer with the amounts of such assessments and interest as it accrues. The department of finance shall carefully keep a separate account of the fund arising from each particular improvement ordered

by the board of public works pursuant to this act, and no proceeds arising from assessments for the improvement of any particular street or alley shall be diverted to the payment for any other improvement whatever. The proceeds shall in each case constitute a separate special fund for the payment of contractors for the particular work, upon the allowance of estimates by the board of public works, or for the security and payment of street improvement bonds, if any are issued, as hereinafter provided for such street or alley. R. S. 1894, § 4138.

See note, *ante*, § 461.

775. Street improvement bonds.—85. For the purpose of anticipating the collection of such assessments, the department of finance shall issue street or public improvement bonds, payable out of the funds actually paid to and collected by such city on such account, the proceeds of the same [to] be applied exclusively to payment for the improvements on the particular street or alley for the anticipation of the assessment for which the same are issued. Bonds shall be issued for the principal of such assessment or assessments, and appropriate coupons shall be thereto attached, evidencing and representing the semi-annual interest. The bonds shall bear interest at a rate not exceeding five per centum per annum, to be computed from the date of the final estimate, which interest shall be payable semi-annually as herein provided. In cases where the final estimate is allowed at any time during the period intervening between the first day of March and the first day of October in any year, the bonds and coupons shall be dated on the first day of January of the year following, and in cases where the final estimate is allowed at any other period in any other year than that intervening between the first day of March and the first day of October, in any year, the bonds and coupons shall be dated on the first of July, following. The interest shall be computed from the date of the final estimate up to the date of such bonds, and the coupons shall properly evidence and provide for such interest computed as aforesaid from the date of the final estimate. Each bond shall bear the name of the street or alley for which it is issued, in cases where it is issued for street improvement assessments, and in cases where it is issued for sewer or other assessments shall appropriately designate the improvement or work for which it is issued. Assessments in cases where the option to pay in installments is exercised shall be payable as follows: Ten per centum of the principal, together with all accrued interest on the same, on or before the first Monday of May next succeeding the allowance of the final estimate on such work by the board except where such estimate has been made between March first and October first of any year, in which case such first installment shall be payable on the first Monday of November next succeeding such estimate: the next payment shall be six months' interest on the entire unpaid principal payable at the date for the general payment of taxes, either spring

or fall, as the case may be, next after the first installment falls due; the next payment shall be ten per centum of the original principal and six months' interest on the unpaid principal, payable on or before the date for the general payment of taxes, spring or fall, as the case may be, occurring one year after the first installment was payable; and so on, thereafter, ten per centum of the original principal, with six months' interest on the unpaid principal once each year, and six months' interest on the unpaid principal in alternate turn with the annual payment of principal and interest until the entire principal and interest have been paid. It being hereby intended and provided that installments of principal and interest shall be paid in advance of the maturity of the bonds and coupons, in order to enable the treasurer to pay such bonds and coupons as they respectively fall due, for which purpose the said treasurer shall hold the money paid to him. It shall be the duty of the treasurer to promptly and properly apply all money paid in on such installments to the holders of the bonds and coupons, and he shall not use the money received by him in payments of such installments for any other purposes whatever than that of paying the bonds and coupons, and shall promptly ascertain the amount paid in on such installments, and without delay pay the same to the bond and coupon holders entitled thereto. In case any person shall exercise his right of prepayment of his assessment, as by law provided, and shall fully pay such assessment and interest, all interest and liability shall thereupon cease as to the property upon which the assessment so paid is levied. Said prepaid assessments shall constitute a "special fund," to be held in trust by the treasurer in the form hereinafter prescribed, for the owner or owners of the different issue of bonds, upon which such prepayments have been made; it shall be the duty of the city, through its comptroller, to invest such trust funds in bonds similar in kind and character, at par, for the benefit of said city as trustee for the holders of the bonds and interest coupons upon which such prepayments were made, and the city shall become liable to such holders to the amount of the prepayments thereon made, with the interest on the principal thereof. The said bonds in which said trust funds are invested, shall be held and collected by the treasurer as other bonds are collected, and the money applied in payment of the installment of interest and principal of the bonds upon which said prepayments were originally made, or to said city: *Provided*, That it has paid the same. If any property owner owning any part of any bond issued for the purposes in this act provided is in default in the payment of any installment of his interest or principal at the time any installment of principal or interest of said bond becomes due, it shall be the duty of the common council, upon recommendation by the comptroller, to appropriate money out of the general fund, to pay such delinquent's part of said installment of principal or interest of such bond, and out of the collection of such delinquency, with penalties and interest as hereinafter provided, to reimburse such general fund to the amount of such payment. It shall be the duty of the treasurer, in all cases where any property owner is

in default, in the payment of an installment, or any part thereof, chargeable upon or against his property, to assess a penalty of ten per centum upon any installment, or any part thereof, with six per cent. interest, for such delinquency, which said penalty and interest, when collected, shall be and become the property of the city, and the treasurer shall, on the first day of January of each year, certify to the county auditor, a list of such delinquencies or delinquents. And the county auditor, between the first Monday of November and the first day of January, in each year, shall enter on the tax duplicate as delinquent, against the name of each person remaining delinquent, such delinquent special assessments so certified to him by the treasurer, as aforesaid, against the lands and lots described in such certifications of the treasurer, which said assessments shall be carried out with the taxes for state, county, township, road, city, school or other purposes, if any delinquent, into one total. Payment of such special assessment, with interest, penalty and costs, shall be enforced by the sale of the lands and lots liable therefor, or so much thereof as may be necessary, which sale shall be made by the county treasurer in the same manner, and at the same time and place and upon the same notice as is prescribed by law for the sale of lands and lots for the payment of delinquent state, county, township, road, city, school and other taxes, the property to be offered for sale and sold for the payment of all taxes and assessments of every kind, for which the same is liable, with interest, penalty and costs thereon, as one entire sum, and not separately for said special assessments, unless said special assessments are the only taxes or assessments delinquent, in which case such property may be sold to satisfy said special assessment alone. Payment of the bid, upon the sale of any such lands and lots, shall be enforced so far as it relates to such municipal assessments, together with the penalties above provided for, by the same officer, and in the same manner as is provided for by law for the enforcement of the payment of a bid made upon the sale of lands and lots for the state, county, township, road, city, school and other taxes, and the proceeds of sale shall be held by the treasurer and paid to the parties entitled thereto: *Provided, however,* If any lands or lots are sold for the payment of any delinquent special assessment together with other delinquent taxes, or for special assessments alone, said lands and lots shall not be released from the payment of the balance of said assessments or the interest thereon as the same becomes due, and if delinquent to be sold as hereinbefore provided. The guarantee required by law to be endorsed by the county treasurer upon each certificate given by him upon a purchase of lands, and lots for state, county, township, road, city, school and other taxes, shall, in every case where such sale is made for said municipal assessments also apply to and embrace the amount of such municipal assessments for which sale was made; and the holders of such certificate shall have the same remedy upon such guaranty as to municipal assessments embraced therein, that he has as to the state, county, township, road, city,

school and other taxes, to which the same relates. All provisions of law in reference to the certificates to be issued to a purchaser of lands and lots upon sale for state, county, township, road, city, school and other taxes; the making of deeds upon failure of redemption, and as to the force and effect of such deeds; the effect of such sale, and the rights of the purchaser; redemption therefrom; for the quieting of titles acquired thereunder; for transferring to the purchaser the original lien for the taxes and municipal assessments for which the sale was made, and subsequent assessments, and for the enforcement of such lien by judicial proceedings when the purchaser fails to acquire a valid title by virtue of the purchase; and as to the interest and penalties to be collected upon redemption from such sales before deed is made, or upon judicial proceedings to quiet the title or enforce the lien of the purchasers; and all other provisions of law relating to the collecting and accounting for the state, county, township, road, city, school and other taxes, shall, so far as the same are applicable, apply with like force and effect in the case of municipal assessments in cities of the class referred to in this act. Said board may provide in its original resolution of improvement for the issue of such bonds and coupons directly to the contractor, in which case it shall be the duty of the department of finance, upon the allowance of the final estimate made by the board of public works, to issue the same directly to the contractor; otherwise they shall be issued and sold as other city bonds: *Provided, however,* That the city can, at its option, turn over to the contractor, said bonds, at par, in payment of the contract price for which said bonds were issued. After the issue of such bonds, no suit shall lie to enjoin the collection of any assessment, and the validity of the same shall not be questioned, but all property owners shall be conclusively estopped and precluded from in any manner assailing the effectiveness or validity thereof. Such bonds, when issued, shall convey and transfer to the owners thereof all lien, right, title and interest in and to the assessments and liens upon the respective lots and parcels of ground hereinbefore provided for, which liens shall stand as security for such bonds and coupons until they are paid, with full power to enforce the collection thereof, if such bond or coupon be not paid on presentation to the treasurer, by foreclosure in any court of competent jurisdiction, as provided in the preceding section, and sales to satisfy such bonds and coupons shall be made as hereinbefore provided for sales upon judgments for decrees foreclosing liens for assessments levied for street improvements: *Provided,* That the first bondholder who institutes foreclosure suit in any court of competent jurisdiction against such property, or any lot or parcel thereof, shall be entitled to have the proceeds of said suit applied pro rata to the payment of his own bonds and of bonds held by others. The property upon which the assessment is laid shall, in no event, be sold for less than the amount of the assessment, attorney's fees and costs, and the avails of the sale shall be distributed as herein provided. If the

property be sold for more than enough to pay the principal, interest, attorney's fees, costs and expenses, the surplus shall be paid to the property owner or party lawfully and rightfully entitled thereto. No more than one foreclosure suit shall be brought against any one lot or parcel of land, but all lots or parcels of lands, the assessments against which are in default, may be joined in one proceeding. All bonds, as herein provided, shall be negotiable as inland bills of exchange, and be free from all defenses by any property owner or property owners. It shall not be necessary in said bonds to recite the steps taken in ordering such improvement, or directing the assessments, but it shall be sufficient to make a general reference to such assessment, and to the statute. [As amended, Acts 1899, p. 138. In force February 27, 1899.)

776. Failure to pay installments—Effect.—86. Failure to pay any installment of principal or interest when the same is due shall bring all installments of principal yet unpaid forthwith due and payable. If such city shall fail to collect any unpaid assessment or installment thereon when due, no liability shall thereby accrue against such city, but the owner of the bonds hereinbefore provided for, or in case no bonds have been issued, then the person to whom is due and owing the amount of such unpaid assessment for the performance of such work, shall have the right to proceed in any court of competent jurisdiction to foreclose the liens on unpaid assessments, recovering interests, costs and a reasonable attorney's fee, and to have the proceeds of sale applied on his claim. It shall be the duty of the county clerk to certify to the treasurer all satisfactions of assessment liens by such sale, and the treasurer and comptroller shall enter the same of record. R. S. 1894, § 4140.

See notes, *ante*, § 463.

777. Levees, viaducts and tunnels.—87. Whenever the board of public works shall order the erection or change of any levee, or the construction of any viaduct, tunnel or aqueduct, or the change of any water-course, natural or artificial, or the drainage of section of ground, it shall cause the necessary drawings and specifications to be prepared for the work and filed in such office, and shall publish a notice of the resolution ordering the work to be done; shall hear remonstrances, modify, confirm or rescind their original resolutions, prepare a list of property holders beneficially or injuriously affected by such work, advertise for bids for such work, let the same by contract, assess benefits, and award damages, and in these and all other respects proceed in accordance with the provisions of this act relating to the appropriation of property and the laying out of streets. R. S. 1894, § 4141.

778. Assessments—Liens—Collection.—88. The provisions of this act for the liens of assessments, preparation of the duplicate assessment roll by the department of finance, delivery of such roll to the treasurer, the collection of assessments, right of election of property holders to pay the same in installments, the issue of bonds to antici-

pate the same, and all other provisions with regard to street improvement assessments, shall govern in the matter of levee assessments so far as the same are applicable. R. S. 1894, § 4142.

779. Sewers and drains.—89. Whenever the board of public works shall order the construction of any local sewer or drain, it shall cause the necessary drawings and specifications for such work to be prepared and filed in such office: shall cause a notice of the adoption of the resolution ordering the work to be done to be published in some daily newspaper of general circulation in such city once each week for two weeks. Such notice shall name a date after the last day of publication at which such board will receive or hear remonstrances from persons interested in or affected thereby. On the day set said board shall consider such remonstrances, if any, and thereupon take final action, confirming, modifying or rescinding their original resolution. Such action shall be final and conclusive on all persons. If such original resolution be confirmed or modified, said board shall cause a notice to be published in such city once each week for two weeks informing the public and contractors of the general nature of the work and of the fact that the drawings and specifications are on file in the office of the board, and calling for sealed proposals for such work by a day not earlier than ten (10) days after the first of said publications. The board may, in its discretion, fix a later day for receiving such sealed proposals, provided such day shall be mentioned in each of such notices. Whenever such sewer or drain shall, from its size and character, be intended and adapted not only for use by owners of abutting property along the line of such sewer or drain, but is also intended and adapted for receiving sewage from collateral drains already constructed or which may be constructed in the future, then the board of public works shall prepare a map which will give thereon the general course of said proposed sewer and its appurtenances, and which will clearly show, by boundary lines, the total area, or district, to be drained and to be assessed for the construction of said sewer; shall prepare all necessary profiles, drawings and specifications for such work, which map, profiles, drawings and specifications shall be placed on file in the office of said board; shall publish a notice of the adoption of the resolution ordering the work to be done, and shall describe in such resolution and in such advertisement the boundary lines of the district, or area, intended to be drained by such sewer and to be assessed for the cost of the same, and such publication of the adoption of the said resolution shall constitute a legal notice to all owners or holders of property, or persons having valuable interests therein, within the bounds of the district or area; that such property in said district or area described is to be assessed for the construction of said sewer. Said publication shall be made in some daily newspaper of general circulation in such city once each week for two weeks and shall name a date, after the last day of publication, at which said board will receive or hear remonstrances from persons interested in or affected by the construction of said sewer. On the date set, said board shall consider

such remonstrances, if any, and thereupon take final action, confirming, modifying or rescinding their original resolution. Such action shall be final and conclusive upon all owners or holders of property, or persons having valuable interests therein, in the district or area intended to be drained and assessed for the construction of such sewer. Advertisement for bids shall be made in the same manner as for the construction of a local sewer or drain, above provided for. [As amended, Acts 1899, p. 138. In force February 27, 1899.]

See notes, *ante*, § 466.

Sewers, drains, etc., and construction of under the general law. See *ante*, § 124, clauses 26 and 43 and notes, §§ 127 and 183 and notes: *post*, §§ 1090, *et seq.* and notes, and 1107, *et seq.* and notes.

780. Local sewers.—90. Whenever any such sewer shall, from its size and character, be intended and adapted only for local use by property-holders along the line of the street or alley on which it is constructed, and in the opinion of such board is not intended or adapted for receiving sewage from collateral drains, then, and in that case, the whole cost of the improvement shall be paid for by the property-holders abutting on such street or alley in the same manner and to the same extent as street improvements are paid for, except that such city shall not be liable for the portions of such local sewer which cross other streets or alleys, but the total cost shall be apportioned pro rata against the property-holders. R. S. 1894, § 4144.

See notes, *ante*, § 467.

781. Cost—How paid.—91. Whenever, in the opinion of such board, any sewer or drain ordered to be constructed, or any enlargement of one already constructed, shall, from its size and character be intended and adapted not only for use by abutting property holders along the line of such drain or sewer, but is also intended and adapted for receiving sewage from collateral drains already constructed, or which may be constructed in the future, then, and in that case, the cost and expense of such sewer shall be assessed against each piece of property beneficially affected, in proportion to the benefits received, including abutting property holders, as well as the holders not situated on the line of such drain or sewer, but, in the opinion of the board, beneficially affected by the construction of such sewer, either directly or immediately or indirectly, and by way of the advantage which shall be realized in the future when collateral drains may be constructed from such property to such main sewer. R. S. 1894, § 4145.

782. Assessments—Collection.—92. In making assessments against each lot or parcel of land said board of public works shall, as soon as any contract has been let for the construction of any sewer or drain, make out an assessment roll, with names of property holders and descriptions of the property assessed for such proposed sewer or drain. The assessment roll, when completed according to these provisions, shall be delivered to the department of finance in the same manner as

street improvement assessment rolls. The department of finance and the treasurer shall thereupon discharge the same duties in respect thereto as are hereinbefore prescribed in relation to street improvement assessments. The provisions of this act in relation to the payment of street improvement assessment by installments, and the issuance of bonds to anticipate the same, and the collection of such assessments or bonds shall also apply to the payment of assessment for the construction of sewers, drain, levees, or for the change of any water-course, or the drainage of any section of ground. [As amended, Acts 1899, p. 138. In force February 27, 1899.]

SPRINKLING OR SWEEPING.

783. Contracts for sprinkling and sweeping.—93. Whenever such board of public works shall order any street, alley or public place to be sprinkled or swept, it shall cause the necessary specifications for such work to be prepared and filed in such office, shall publish a resolution ordering the work to be done, shall hear remonstrances, modify, confirm or rescind their original resolution, and shall advertise for bids and let the same by contract, as more specifically provided in this act with relation to the appropriation of property and the laying out of streets. R. S. 1894, § 4147.

784. Cost—Assessment.—94. The cost of such sprinkling shall be assessed *pro rata* against the property holders along the line of such street, alley or public place, as the cost of street improvements is assessed, except that such city shall not be liable to pay for the sprinkling of any street or alley crossing, but the total cost of such sprinkling shall be paid for by the abutting property holders. The cost of sweeping shall be paid by the city out of the general fund. Such board may, at its option, embrace in one order or resolution, and also in one contract, any number of streets, alleys, or public places for which the specifications for such sprinkling or sweeping are uniform. Or such board may include in one resolution and contract such streets as to which the specifications for sprinkling and sweeping are not uniform: *Provided*, That such contract and the bids therefor shall separately state the cost of sprinkling and sweeping streets or alleys with regard to the specifications to such sprinkling or sweeping. In such cases, such board may accept part of such bid on one group of streets uniform in their specifications, and reject other parts of such bids on other groups of streets. R. S. 1894, § 4148.

See notes, *ante*, §§ 472, 473.

785. Assessments—When payable.—95. The duties of the department of finance and of the treasurer, the rights of contractors and the liability of such city in relation to such street sprinkling assessments, shall be the same as in the case of street improvement assessments, but such assessments shall be payable on the first Monday in November, for any one year, in the manner that street improvement assess-

ments are payable. The provisions of this act in relation to the payment of street improvement assessments by installments, and the issuing of bonds to anticipate the same, shall have no application to street sprinkling assessments. R. S. 1894, § 4149.

LAMP POSTS.

786. Lamp posts—Contracts for.—96. Whenever such board of public works shall order any street, alley or public place to be supplied with lamp posts by the construction of the same, it may by resolution order the same, without publication or notices or the hearing of remonstrances; contracts for the same may be let, like other contracts, and the cost thereof assessed against the holders of abutting property, as the cost of street sprinkling, and the same shall be collected, and the department of finance and the treasurer shall perform the same duties, and the contractor shall have the same rights, as in the case of street sprinkling assessments. R. S. 1894, § 4150.

Department of Public Safety.

787. Board of public safety—Appointment—Salary.—97. The department of public safety shall be under the charge of a board of three commissioners, to be appointed by the mayor of such city as hereinbefore provided. No more than two of said commissioners shall be of the same political party. Said commissioners shall give bond to such city, to be approved by and filed with the department of finance, for the faithful performance of their duties respectively, as required by ordinance. Said board shall have the care, management and supervision and exclusive control of all matters relating to the fire and police force, fire-alarm, telegraph, erection of fire-escapes, inspection of buildings and boilers, market places, and food sold therein, pounds and prisons. Said board shall have power to purchase all necessary supplies and apparatus, and make all repairs needed in its department, subject to the same provisions as are herein prescribed for the exercise of similar powers by the department of public works. Said commissioners shall receive annual salaries of $400 each. R. S. 1894, § 4151.

Fire department and metropolitan police and fire department under the general laws.—See *ante*, § 256, *et seq.*, and § 296, *et seq.*, and notes.

788. Rules—Quorum—Chairman—Record.—98. Said commissioners shall adopt rules for the appointment of members to said fire and police forces, their regulation and duties, subject however, to the laws of the state and to the ordinances of the common council. Any two of said commissioners shall constitute a quorum. Said commissioners shall adopt rules and regulations with regard to the time of the holding regular and called meetings and of giving notice thereof. They shall elect one of their number as chairman, who shall hold such position as long as may be prescribed by the rules of said board. Said

commissioners shall cause all of their proceedings to be carefully recorded by their secretary. They shall only act as a board, and no member thereof shall have power to bind said board, or such city, except pursuant to resolution of such board, authorizing him to act in that behalf as its authorized agent. Said commissioners shall have the care and charge of all property of every kind pertaining to the fire and police force, and to the market places, pounds and prisons of such city. R. S. 1894, § 4152.

789. Duties of board.—99. Said commissioners shall appoint a superintendent of police, chief of the fire force, and all other officers, members and employes of said fire and police forces, together with a market master and weigh master, and other officials necessary for such department of public safety. The annual pay of such appointees shall be fixed by ordinance of the common council, and it shall be lawful in such ordinance to grade the members of such forces and to regulate their pay, not only by rank, but by their length of service. In default of any ordinance fixing the compensation for any member of such fire or police force, said commissioners shall have power to fix the same subject to change by ordinance by said council. Said commissioners of public safety may also fix the number of members of said fire and police forces, and the number of appointees for other purposes subject to the approval of council. Said commissioners of public safety shall in like manner divide such city into police precincts and fire districts. Said commissioners shall also have power to make and promulgate rules and regulations for the appointment of members to such forces, and for their government. The superintendent and [of] police shall have exclusive direction and control of the police force, and the chief of the fire force shall have exclusive control and charge of such fire force, subject to the rules, regulations and orders of said department of public safety. In times of peril, danger, riot, extensive conflagration, disorder, or the apprehension thereof, said chief of the fire force and the superintendent of the police force shall, for the time being, be subordinate to the mayor and obey his orders and directions, anything to the contrary in this act or in the ordinances of such city, or in the regulations or orders of such commissioners of public safety, to the contrary notwithstanding. R. S. 1894, § 4153.

790. Firemen and police—Terms—Removal.—100. Every member of the fire and police force, and all other appointees of the commissioners of public safety, shall hold office until they are removed by the board. They may be removed for any cause other than politics, and the written reasons for such removal shall be entered upon the records of such board. R. S. 1894, § 4154.

791. Punishment of firemen and policemen.—101. On conviction of a member of the said fire or police force for any criminal offense or neglect of duty, or of violation of rules, or neglect or disobedience of orders, or incapacity, or absence without leave, or conduct injurious to the public peace or welfare, or immoral conduct, or conduct unbe-

coming an officer, or other breach of discipline, said commissioners shall have power to punish the offending party by reprimand, forfeiture, suspension without pay, dismissal, or by reducing him to a lower grade and pay. R. S. 1894, § 4155.

792. Powers of policemen.—102. The officers and members of such police force shall possess all the common law and statutory powers of constables, except in relation to the service of civil process, and any warrant of search or arrest, issued by any judge, magistrate, mayor or justice of the peace of this state, may be executed in any part thereof by any member of said police force, subject to the laws of this state governing arrests and bail. The members of such police force shall have the exclusive power, and it shall be their duty to serve all process within such city issuing from the mayor's court. They shall be conservators of the peace in such city, and shall arrest without process all persons who within view commit any crime or misdemeanor contrary to the statutes of this state, or ordinances of such city, take them before the mayor or judge of such city, or other officers having jurisdiction of the offense with which such person is charged, and retain them in custody until the cause of such arrest has been investigated, suppress all breaches of the peace within their knowledge, and authority is hereby given to them to call to their aid the power of such city; to pursue and commit to jail all felons and persons guilty of misdemeanors or crimes in violation of the statutes of this state or of the ordinances of such city. They shall have the exclusive power, and it shall be their duty to serve all process issued by the common council, or any committee thereof pursuant to this act, or by any of the executive departments of such city. The board of public safety shall detail some one member of said force, or as many as it may deem necessary, to attend the mayor's court and preserve order therein. R. S. 1894, § 4156.

For powers and duties of city marshal, police officers, constables, etc., under the general law of 1867, see *ante*, §§ 94, 95 and notes.

793. Duty as to prisoners.—103. The members of the police force, under the direction of the superintendent thereof, shall convey prisoners to and from the county jail or station-houses of such city for arraignment or trial in the mayor's or any court having jurisdiction, or to the house of correction, work-house, reform school, county jail or other place of punishment or imprisonment, under judgment, sentence, order, or process of such court. R. S. 1894, § 4157.

794. Additional policemen.—104. Said commissioners shall have power, on application of any person or corporation, if deemed expedient, to detail regular patrolmen of the police force or fire force, or appoint and swear any additional number of special policemen or firemen to do special duty at any place within such city, upon such person or corporation paying for the use of such city the same rate per diem of service on such detail or special duty as is paid to the regular members of the force. Such special patrolmen shall be subject to the superintendent

and such special firemen to the chief of the fire force. They shall obey the rules and regulations of their respective departments, conform to its discipline and orders, and wear such dress or badge as the commissioners may direct, and shall, during the term of their appointment, possess all the powers, privileges and duties of regular patrolmen or firemen. Such persons so appointed may be removed at any time by said commissioners without notice and without assigning any cause. Said commissioners may, also, upon emergency or apprehension of riot, tumult, mob or insurrection, pestilence or invasion, appoint as many special patrolmen as may be desirable, to be paid the same rate per day and possess the same powers, privileges and duties as members of the regular force, and be subject to the same ordinances, regulations and orders. Such patrolmen and firemen shall wear badges, furnished by their respective departments. Such commissioners may also detail members from the regular forces for the use of the department of health, or any department of the city government. R. S. 1894, § 4158.

795. Oaths—Who may administer.—105. Said commissioners and superintendents of fire and police are authorized to administer oaths to any person summoned in any proceeding authorized by this act, or to take any depositions under the rules, regulations, or orders of said department of public safety. R. S. 1894, § 4159.

796. Duties of policemen.—106. It is hereby made the duty of said police force, at all times within such city, and the members thereof are specially empowered to preserve peace, prevent crime, detect and arrest offenders, suppress riots, mobs and insurrections, disperse unlawful and dangerous assemblages, and assemblages which obstruct the free passage of public streets, sidewalks, parks and places, protect the right of persons and property, guard the public health, preserve order at elections and public meetings, direct the movement of trains [teams] and vehicles in streets, alleys or public places, remove all nuisances in public streets, parks or highways, arrest all street beggars, provide proper police assistance at fires, assist, advise and protect strangers and travelers in public streets or at railroad stations, carefully observe and inspect all places of business under license, or required to have the same, all houses of ill-fame or prostitution, and houses where common prostitutes resort or reside, all lottery or policy shops, all gambling houses, cock pits, dance houses, resorts, and to suppress and restrain all unlawful or disorderly conduct or practices, enforce and prevent the violations of all ordinances and laws in force in such city. The superintendent of police and each captain in his precinct shall possess the power of supervision and inspection over all pawn-brokers, venders, junk shop keepers, cartmen, expressmen, dealers in second-hand merchandise, intelligence offices and auctions, and any member of such force may be authorized by the superintendent to exercise the same powers, by authority in writing. Said superintendent or any captain may, by written authority, empower any member

of such police force, when in search of stolen property, of evidence, or of suspected offenders, to examine the books, business, or premises of any of the persons named in this section, and to examine property in whosesoever possession the same shall be. R. S. 1894, § 4160.

797. Gaming houses.—107. If any member of such force, or if any two or more householders in such city, shall report in writing, under his or their signature, to the superintendent of police, that there are good grounds (and stating the same) for believing that any house, room or premises within such city is kept or used as a common gaming-house, room or premises for therein playing for wagers of money at any game of chance, or to be kept for lewd or obscene purposes of amusements, or for the deposit or sale of lottery tickets or policies, it shall be lawful for said superintendent to authorize any member or members of said police force, in writing, to enter the same, who shall forthwith arrest all persons there found offending against law, and seize all instruments of gaming, or lottery tickets, and deliver the same to the superintendent, who shall destroy them. R. S. 1894, § 4161.

798. Arrest—Duty on making.—108. Whenever arrest has been made by any member of such police force, it shall be the duty of the officer in making the arrest to forthwith bring the person arrested before the mayor, or court having jurisdiction thereof, to be dealt with according to law; if the arrest is made during the hours when such court is not in session, such offender shall be detained in the city prison until there shall be an opportunity for such hearing at the earliest practicable time, or until he shall have given bond for his appearance, and no person shall be detained longer than twenty-four hours without such examination, except where Sunday intervenes, in which case no person shall be detained longer than forty-eight hours; any person or corporation who shall interfere with said commissioners of public safety, or their appointees in the legal discharge of their duties, shall, upon conviction, be fined not more than one thousand dollars ($1,000), to which may be added imprisonment for not more than ninety (90) days. R. S. 1894, § 4162.

799. Bonds of appointees.—109. Said commissioners shall have power, subject, however, to city ordinances, to adopt rules regulating the giving of bond by any appointee or class of appointees in such department for faithful performance of official duty. R. S. 1894, § 4163.

800. Insurance fund.—110. Said commissioners may at any time draft an ordinance and submit the same to the common council, who shall have power to enact the same like other ordinances, for the creation, management and distribution of a police insurance fund, or of a firemen's insurance fund, together with a provision for retaining a per cent. of each appointee's salary, for the creation of such fund, and prescribing the conditions of its investment and who shall be entitled to the benefit thereof. R. S. 1894, § 4164.

See *post*, §§ 1476, *et seq.* and 1493, *et seq.*

Department of Assessment and Collection.

801. City treasurer—Office abolished.—111. That on and after the taking effect of this act the office of city treasurer in all such cities shall be abolished, and the records, books and papers thereof, except as otherwise herein provided, shall be turned over to and preserved by such other officers of said city as the common council of such city may designate. R. S. 1894, § 4165.

802. Treasurer of county to be city treasurer.—112. The treasurer of the county in which any such city is situated shall thereafter perform all the duties which by law or the ordinances of such city were required to be performed by the treasurer thereof, except as herein otherwise provided, in the same manner and with like effects as such duties were required to be performed by such city treasurer; he shall, immediately upon succeeding to the discharge of such duties, and before entering upon the same, take an oath to honestly discharge such duties, and execute a bond, payable to the state of Indiana, with at least four freehold sureties, to the approval of the common council of such city, in a penalty to be prescribed by them, not less than the estimated amount of all taxes, including delinquent, to be levied and collected for municipal and school purposes in such city for the current year, conditioned that he will honestly and faithfully discharge the duties of his office so far as they relate to or affect such city, and safely keep and properly account for and pay over to the proper person or authority all moneys and property of such city which may come into his hands, which bond shall be filed with and preserved by the department of finance. R. S. 1894, § 4166.

See *ante*, § 490, and *post*, § 1412 and notes.

For treasurer's duties under the general law of 1867, see *ante*, §§ 97, 103, and *post*, § 1060 and notes.

803. Duties of treasurer.—113. The city treasurer of any such city at the taking effect of this act shall make settlement with the city clerk for all moneys collected and disbursed by him, and thereupon a statement shall be prepared, which shall be signed by him and attested by such clerk, in which shall be shown the amount of moneys in his hands belonging to the general fund and each other fund of which separate accounts is required to be kept by law or the ordinances of such city, and the total amount of all such funds. A particular description shall also be given of all bonds and other securities and property in the hands of said treasurer belonging to said city. Said treasurer shall present such statements to the county treasurer, and forthwith pay over to him all the funds of such city in his hands as shown therein, and also deliver to him all the bonds, securities and other property described in such statement; and said county treasurer shall give a receipt therefor, showing the amount of money received on account of each fund, and the total amount received, describing the bonds, securities and other property received, which receipt said city

treasurer shall deliver to the city clerk, who shall issue a quietus therefor. R. S. 1894, § 4167.

804. Settlements by treasurer—Collection of taxes.—114. Said city treasurer shall also, at the taking effect of this act, make a settlement with the city clerk on account of the tax duplicate and delinquent list which may then be in his hands for collection. He shall enter upon said duplicate and list, opposite the name of each person from whom he has collected any taxes, a statement of the fact showing the amount collected, and at the end of such duplicate and list the aggregate amount of all taxes of each kind collected by him shall be deducted from the aggregate amount of each kind of tax shown in said duplicate and said list, and the remainder of each kind of tax uncollected shall be stated, and the same shall be signed by said treasurer and attested by the clerk. Said tax duplicate and delinquent list shall then be delivered by said treasurer to the county treasurer, who shall give him a receipt therefor, stating therein the amount of each kind of tax therein remaining uncollected and the aggregate of all such taxes, which receipt shall be filed with the city clerk. Said county treasurer shall thereupon proceed to collect the taxes contained in said duplicate and list in the same manner as he is required by law to collect taxes for state, county, township, road and other purposes upon the county tax duplicate and delinquent list, and shall make settlement on account thereof with the county auditor at the same time and in the same manner as he is required by law to make his settlements on account of the county tax duplicate. R. S. 1894, § 4168.

805. Payment of money into treasury.—115. Whenever by law, or the ordinance of any such city, a license or special tax, or sum of money other than taxes contained upon the tax duplicate, shall be required to be paid by any person into the treasury of such city, such person shall obtain from the department of finance a statement showing the amount to be paid, and on what account, and present the same to the county treasurer, whose duty it shall be to receive and collect said amount, and give to the person paying the same a receipt showing the amount paid and on what account, which receipt such person shall deliver to the department of finance, who shall thereupon issue to such person a license or quietus as may be proper. R. S. 1894, § 4169.

806. City treasurer to deliver precepts.—116. The city treasurer of any such city, on the taking effect of this act, as herein provided, shall deliver to the sheriff of the county, all precepts for the collection of street, sewer, drain and other assessments of like character which may be in his hands unexecuted; and thereafter all such precepts shall be directed and issue to such sheriff, who shall execute the same and make conveyances in execution of sales made by the city treasurer, the same in all respects as such precepts are required to be executed and conveyances made by such city treasurer, for which services such sheriff shall receive the same fees as are allowed by law to the city treasurer, to be paid in the same manner. R. S. 1894, § 4170.

807. Assessments for taxation.—117. Beginning with the year 1894, and thereafter, the assessment and appraisement for taxation for state and county purposes of all real and personal property and polls, subject to taxation within any such city shall be made pursuant to the provisions of the act of the general assembly of the state of Indiana, entitled "An act concerning taxation," approved March 6, 1891, and all acts amendatory thereof and supplemental thereto, as the same shall have been equalized by the county board of review and the state board of tax commissioners, including all additions made thereto by said boards or either of them, and all assessments and appraisements made by the auditor of the county in which such city is situated shall be the basis on which the common council of any such city shall levy and assess the taxes for city purposes, which they shall deem it necessary to levy, within the limitation hereinafter prescribed and the taxes so levied shall become and continue liens upon the property upon which they are levied at the time, and in the manner and to the extent that taxes levied for state, county and other purposes, become and continue liens upon such property by virtue of the provisions of the acts herein referred to. [As amended, Acts 1897, p. 211. In force March 8, 1897.] Burns' Supp. 1897, § 4171.

See Taxation, R. S. 1894, chap. 108 (§§ 8408-8677); Burns' Supp. 1897, chap. 108 (§ 8411, *et seq.*); Acts 1899, pp. 422, 430, 497, 516.

See *ante*, § 212, *et seq.*

808. Duty of county auditor.—118. It shall be the duty of the auditor of the county in which any such city is situated to make out and deliver to the department of finance of said city in each year, beginning with the year 1894, a certificate, under the seal of the board of commissioners of such county, showing the aggregate assessment and valuation for taxation for state and county purposes, for the year in which such certificate is made, of all taxables, real and personal, and railroad property, in such city, and the number of taxable polls therein, as the same shall have been returned by the assessor of the township in which such city, or any part, is situated, and as equalized by the county board of review and state board of tax commissioners, which certificate shall be so made and delivered by said auditor immediately after the assessment and valuation of such property and polls has been completed and returned to his office. R. S. 1894, § 4172.

809. Levy of taxes—Limit.—119. Such department of finance shall lay such certificate before the common council of such city at its regular sitting next held after such certificates are received, and thereupon such common council shall proceed in the manner now prescribed by law, to levy such tax on the amount of property and polls shown in such certificate as may be deemed necessary by them to supply the needs of such city during the ensuing year for city and other purposes for which taxes may be properly levied: *Provided, however*, That it shall be unlawful for the common council to levy a tax or

taxes for any one year exceeding in the aggregate one dollar and twenty-five cents ($1.25) upon the hundred dollars of assessed and appraised value of the property subject to taxation in such city for the year in which the levy is made, as shown by the assessment returned to and on file in the office of the county auditor and by his certificate herein mentioned. [As amended, Acts 1897, p. 211. In force March 8, 1897.] Burns' Supp. 1897, § 4173.

810. Auditor to put taxes on duplicate.—120. The levies of taxes made as provided in the last section shall be certified by the department of finance under its seal, without delay, to the county auditor, and such auditor shall thereupon proceed to estimate, as he is now required to do in reference to state, county, township, road and other taxes, the amount of tax chargeable according to the rate prescribed by such levies, to each person who is listed for any taxable property or poll in such city upon the assessment and appraisement of property and polls therein made for the year, in which such tax is levied, and returned by the assessor of the township in which such city is situated, and equalized by the county board of review and state board of tax commissioners, he shall enter the amount of the tax, including delinquent tax chargeable to each person against the name of such person, as it appears upon the tax duplicate of the county for such city for the current year, in the column in which are entered the current and delinquent state, county, township, road and other taxes with which such person is charged. The aggregate of all taxes with which such person is chargeable, including state, county, township, road and other taxes, shall be carried out and set down opposite the name of such person in a column of totals, and in the recapitulation of the duplicate now required by law to be made by him, he shall set down the aggregate of all taxes contained in the duplicate for such city, said duplicate shall thereupon be delivered to the treasurer of the county, as now provided by law. R. S. 1894, § 4174.

811. Notice by county treasurer.—121. The county treasurer shall include in the notice now required by law to be given by him of the receipt of the tax duplicate for collection a statement of the amount of tax charged in such city, for city purposes, upon each one hundred dollars' valuation of the taxable property, and also for such purposes upon each taxable poll, and such notice shall be the only notice required to be given of the fact of such taxes being in his hands for collection. [As amended, Acts 1897, p. 211. In force March 8, 1897.] Burns' Supp. 1897, § 4175.

812. Collection of taxes—Delinquency.—122. It shall be the duty of the county treasurer to receive and collect all taxes shown upon the duplicate of such city, for city purposes, the same as he is required by law to receive and collect the taxes shown thereon for state, county, township, road and other purposes, if one-half of the amount of such city taxes for the current year charged to any person, and the entire amount of delinquent city taxes, penalty, interest and costs charged to such person and unpaid, be paid on or before the third Monday of

April, the payment of the other half of such taxes for the current year may be postponed to the first Monday of November following, but if on or before the third Monday of April, payment be not made of that portion of the above specified amount, the entire amount of unpaid city taxes charged upon the duplicate to such person shall become due and be returned delinquent and collected as such, with like penalty, interest and costs as is provided where the first installment of state, county, township and road taxes are not paid by the time prescribed. If such taxes remain delinquent after the first Monday of November following, there shall be an additional penalty of six per centum added to all such taxes that become delinquent at the preceding April and November settlements, but a penalty of ten per centum only shall be added to the current delinquency occurring on the first Monday of November. After payment by any person of taxes charged to him, the treasurer shall give to such person a receipt in the form prescribed by law, which shall include all taxes paid by him, the city as well as other taxes. Any partial payment of either current or delinquent taxes shall be prorated among the different taxes charged to the person paying in proportion to the amount of such taxes respectively. [As amended, Acts 1897, p. 211. In force March 8, 1897.] Burns' Supp. 1897, § 4176.

813. Delinquent tax, collection.—123. If either installment, or any part thereof, of such taxes for such city purposes remain unpaid after expiration of the time limited for payment thereof, the county treasurer shall have the same power and be under a like duty to collect the entire amount of such taxes remaining unpaid by levy and sale of personal property and by suit as is granted to and imposed upon him for the collection of delinquent state, county, township, road and other taxes. [As amended, Acts 1897, p. 211. In force March 8, 1897.] Burns' Supp. 1897, § 4177.

814. Settlement by county treasurer.—124. The county treasurer shall at the time of making his annual settlement with the county auditor, on the third Monday of April, as now required by law, make settlement with said auditor, for the amount with which said treasurer is to stand charged on account of city taxes, in the manner prescribed for his settlement of state, county, township, road and other taxes, and for all of such city taxes appearing upon the tax duplicate, and not shown upon such settlement to be uncollected, said treasurer shall be held liable as having been collected and received by him. Immediately upon such settlement being made, the auditor shall make out a statement showing the aggregate amount of all current and delinquent taxes for city purposes, including with the delinquent taxes, the penalties and interest thereon, which appear upon the tax duplicate for said city, the amount of such taxes, penalty and interest that remains uncollected at the time of such settlement, and the amount of each class, including penalty and interest, that has been collected by said treasurer and appear upon the duplicate for such city; the amount thereof that has been collected by such treasurer, and the amount

thereof that remains uncollected at the time of settlement. Said statement shall be signed and sworn to by said treasurer, and certified by the county auditor, under the seal of the board of commissioners, to be corrected abstracts of the treasurer's settlement on account of such city taxes. One copy of the first mentioned statement shall be delivered by the county auditor to the department of finance of such city, who shall thereupon charge the amount shown thereby to have been collected to such county treasurer as cash in his hands. [As amended, Acts 1897, p. 211. In force March 8, 1897.] Burns' Supp. 1897, § 4178.

815. Payment of school taxes.—125. The county treasurer, immediately upon such settlement being made, shall pay over to the treasurer of the board of school trustees of such city, the full amount for which he is liable as shown by such settlement on account of school taxes, interest and penalty collected by him, for which he shall take a receipt from such treasurer, which receipt he shall deliver to the secretary of said board of school trustees, who shall give him a quietus therefor and credit him with the amount thereof, and charge such amount to the treasurer of the board. R. S. 1894, § 4179.

816. Delinquent list, collection.—126. The county auditor shall include in the delinquent list required by law to be made by him after the annual settlement with the treasurer on the third Monday of April the amount of all city taxes shown by such settlement to be uncollected, and carry the same out and include it in the total of all taxes due from the person liable therefor as shown in said list, and such list when delivered to the county treasurer, shall empower him and it shall be his duty to collect all delinquent city taxes embraced therein, in the same manner and with the same penalty and interest, as the state, county, township, road and other taxes contained therein. [As amended, Acts 1897, p. 211. In force March 8, 1897.] Burns' Supp. 1897, § 4180.

817. Settlement for delinquent taxes.—127. On the first Monday of each year the county treasurer shall make settlement with the county auditor for the amount of delinquent city taxes, penalty and interest shown upon said delinquent list in the same manner as he is now required by law to make in such settlement for delinquent state, county, township, road and other taxes collected by him, and upon such settlement, statements signed, sworn and certified to by said treasurer and auditor. In the same manner prescribed in section 124 of this act shall be prepared a statement showing the aggregate amount of city delinquent taxes, penalty and interest which had been contained in such delinquent list, the amount thereof collected and the amount still remaining uncollected; a copy of which statement shall be transmitted to the department of finance as required with reference to the statements mentioned in section 124. [As amended, Acts 1897, p. 211. In force March 8, 1897.] Burns' Supp. 1897, § 4181.

818. Payment of school delinquency.—128. The county treasurer shall immediately thereafter pay to the treasurer of the board of school

trustees of such city the full amount of delinquent school taxes, interest and penalty, shown by such statement to have been collected, and shall take a receipt therefor, which he shall deliver to the secretary of the board of school trustees, who shall give him a quietus therefor, and thereupon charge the treasurer of the board with the amount shown by such receipt to have been received by him. R. S. 1894, § 4182.

819. Delinquent list of lands—Taxes charged.—129. The county auditor in making out the list of lands and lots in such city returned and remaining delinquent for state, county, township, road and other taxes which he is required by law to make between the first Monday of November and first day of January in each year shall enter therein against the name of each person remaining delinquent on account of state, county, township, road and other taxes the amount of all delinquent taxes for city purposes for which said lands and lots are liable, including taxes on poll and personality [personalty], and adding interest and a penalty of ten per centum thereon, and also the amount of all taxes for city purposes assessed for the current year, for which said lands and lots are liable, including taxes on poll and personalty, which said taxes shall be carried out with the taxes for state, county, township, road and other purposes, into one total. [As amended, Acts 1897, p. 211. In force March 8, 1897.] Burns' Supp. 1897, § 4183.

820. Sale of delinquent lots.—130. Payment of such delinquent and current city taxes, with interest, penalty and costs, shall be enforced by sale of the lands and lots liable therefor, or so much thereof as may be necessary, which sale shall be made by the county treasurer in the same manner, at the same time and place, and upon the same notice as is prescribed by law for the sale of lands and lots for the payment of delinquent state, county, township, road and other taxes, the property to be offered for sale and sold for the payment of all taxes of every kind for which the same is liable, with interest, penalty and costs thereon, as one entire sum, and not separately, for said city taxes. Nor shall notice of the sale be given separately for the city taxes, but it shall be stated in the notice required to be given of the sale of the lands and lots for state, county, township, road and other taxes that the sale thereof will also be for the payment of the city taxes, which shall be the only notice required to be given. [As amended, Acts 1897, p. 211. In force March 8, 1897.] Burns' Supp. 1897, § 4184.

821. Payment of bids—Guaranty.—131. Payment of the bid, upon the sale of any such lands and lots, shall be enforced, so far as it relates to city taxes, by the same officer, and in the same manner, and with the same penalty and costs, as is provided by law for the enforcement of the payment of a bid made upon the sale of lands and lots for state, county, township, road, and other taxes alone. The guaranty required by law to be indorsed by the county treasurer upon each certificate given by him for the purchase of lands and lots for state,

county, township, road and other taxes, shall in every case where such sale is made for city taxes, also apply to and embrace the amount of city taxes for which sale was made; and the holder of such certificate shall have the same remedy upon such guaranty as to the city taxes embraced therein that he has as to state, county, township, road and other taxes to which the same relates. [As amended, Acts 1897, p. 211. In force March 8, 1897.] Burns' Supp. 1897, § 4185.

822. Laws applicable to sales.—132. All provisions of law in reference to the certificate to be issued to a purchaser of lands and lots upon sale for state, county, township, road and other taxes; the effect of such sale and the rights of the purchaser; redemption therefrom; the making of deeds on failure of redemption, and as to the force and effect of such deeds, for the quieting of titles acquired thereunder; for transferring to the purchaser the original lien for the taxes for which the sale was made, and subsequent taxes paid, and for the enforcement of such lien by judicial proceedings, when the purchaser fails to acquire a valid title by virtue of the purchase; and as to the interest and penalties to be collected upon redemption from such sales before deed is made, or upon judicial proceedings to quiet the title or enforce the lien of the purchaser; and all other provisions of law relating to levying, assessing, collecting and accounting for state, county, township, road and other taxes, shall, so far as the same are applicable, apply with like force and effect in case of city taxes in cities of the class referred to in this act. [As amended, Acts 1897, p. 211. In force March 8, 1897.] Burns' Supp. 1897, § 4186.

823. School and library tax laws revived.—12. All laws or parts of laws relating to the levying and collecting of school and library tax repealed by §§ 117, 119, 121, 122, 124, 126, 127, 129, 130, 131 and 132 of the original act and herein amended are hereby revived upon and after the passage of this act. Burns' Supp. 1897, § 4186*a*.

824. Salary of county auditor.—133. The county auditor, for all services required to be performed by him under this act, shall receive an annual salary of three hundred dollars (300) to be paid quarterly out of the funds of the city, upon allowance by the common council thereof. The county treasurer, for all services required to be performed by him under this act, shall receive an annual salary of one thousand dollars ($1,000), to be paid quarterly out of the funds of the city upon allowance by the common council thereof. He shall receive no percentage for receiving, collecting or disbursing any of the funds of such city, whether derived from taxes, current or delinquent, or from special assessments, taxes, licenses or other sources. R. S. 1894, § 4187.

Department of Public Health and Charities.

825. Board of health and charities—Appointment—Salaries—Duties.—134. The department of health and charities shall be under

the control of three commissioners, who shall be practicing physicians, to be appointed by the mayor as hereinbefore provided. Said commissioners shall each receive a salary of one hundred dollars ($100) per year. Said commissioners shall have charge of all matters relating to public health and the enforcement of laws in relation thereto. Said commissioners shall elect one of their number registrar of vital statistics, who shall be secretary and executive officer of their board, and shall attend to the proper registration of births, marriages and deaths, and such other statistical information as the department may require. Said registrar of vital statistics shall receive for his services the sum of one hundred dollars ($100) in addition to his salary as health commissioner. Said health commissioners shall nominate for appointment by the department of public safety, as special sanitary officers, if in their judgment they deem it necessary, skilled and competent persons for live stock and meat inspectors and food inspectors, whose duty it shall be to inspect all live stock, meat and food offered for sale for human food in such city, and to attend the public markets and carefully watch over the same and prevent the selling, or offering to sell, for human food, any and all articles unfit for use, and said commissioners are hereby authorized to require from the department of public safety special detail of policemen or firemen to execute orders of such department of public health whenever needed. Said department of public safety shall detail policemen who shall be constantly subject to the orders of such department of health. In case of disagreement as to the number of sanitary officers required, between said two departments, or as to the number or duration of service of such details of firemen and policemen, the mayor shall decide the question. R. S. 1894, § 4188.

826. Preparation of ordinances.—135. Said health commissioners are hereby authorized and directed to prepare ordinances for the protection of public health, for securing the proper registration of births, marriages and deaths, and such other statistical information as the department may require, with penalties for their violation; for the removal and burial of the dead, and the destruction or the fumigation of infected property or premises, for the registration of plumbers and the inspection of plumbing and house drainage in all buildings, both public and private, erected after the passage of this act, and in all buildings, both public and private, erected prior thereto wherein changes in or additions to the plumbing or drainage are to be made; for the appointment of an inspector of plumbing and house drainage, who shall be a practical plumber, who shall be required to pass an examination as to his qualifications by a board of three practical plumbers doing business and residing in such city, said board to be selected by the health commissioners of such city. Such ordinances shall be submitted to the council for passage as other ordinances. R. S. 1894, § 4189.

ARTICLE 4.—WATER-WORKS TRUSTEES.

SEC.

827. Water-works trustees—Election—Duties and powers.

827. Water-works trustees—Election—Duties and powers.—136. In any such city in which water works have been constructed, or are now in process of construction or extension, or where water works shall hereafter be ordered, there shall be a board of three trustees to be known as the trustees of the water works, who shall have and possess all the power and be under all the obligations and do and perform all the duties now conferred upon trustees of the water works under and by virtue of an act of the general assembly of this state, entitled "an act to authorize cities and incorporated towns to construct, maintain and operate water works, issue and sell bonds to pay for such construction, repealing all laws in conflict with this act, and declaring an emergency," approved March 25, 1879, and all laws amendatory thereof and supplementary thereto. Such trustees shall be elected by the qualified voters of such city at the said city election to be held on the first Tuesday of May, 1901, and every two (2) years thereafter, and shall hold their office for a term of two years. Whenever in such cities there is at present a board of water works trustees, elected by the people, they shall hold their office until noon of the first Tuesday after said election on the first Tuesday in May, 1901. For the purpose of paying the expenses of managing and operating the water works in such city, and for making extensions and improvements, and paying the interest on any water works debt, thereon incurred in the building thereof. The board of trustees of the water works in such cities shall have power to assess and collect from time to time, a water rent or charge of sufficient amount in such manner as they deem most equitable, upon all tenants and premises supplied with water, and for the supply of boilers, locomotive engines, and all other purposes for which water may be supplied. Should there be any surplus after the payment of the costs of operation and maintenance, and the necessary extensions and improvements, and the interest on water works debt, if any, such surplus shall be set aside as a sinking fund for the ultimate payment of such debt. [As amended, Acts 1899, p. 138. In force February 27, 1899.]

CHAPTER 5.

CITIES OF MORE THAN TWENTY-THREE THOUSAND.

ART.
1. Incorporation and officers.
2. Legislative—Common council.
3. Executive and judicial officers and departments.

ARTICLE 1.—INCORPORATION AND OFFICERS.

SEC.
828. Cities governed by this act.
829. Elective officers—Election.
830. Old officers, powers continued.
831. Vacancies.
832. Notice to officers elected.
833. Oaths of officers—Bonds.
834. Officers not interested—Contracts.
835. Purchase of claims by officers.

[Acts 1899, p. 270. In force March 3, 1899.]

828. Cities governed by this act.—1. That all cities of this state which had a population of more than twenty-three thousand and less than thirty-five thousand inhabitants as shown by the last preceding United States census, shall on and after the first day of July, 1899, be governed by the provisions of this act. Any city falling within the scope of this act shall be, and continue to be the same legal corporation as heretofore, subject to the same liabilities heretofore incurred, and possessing the same rights which have heretofore accrued. All by-laws, ordinances and regulations not inconsistent with this act shall remain and continue in force until altered or repealed by the common council in conformity with the provisions of this act, but all by-laws, ordinances and regulations inconsistent with this act are hereby abolished on and after the taking effect of this act.

See note, *ante*, § 382.

Charter—Rules of construction.—The charter or statute by which a municipal corporation is created or governed is its organic law, and the rules applicable to the interpretation of constitutions may be used in the construction thereof. Newcomb v. City of Indianapolis, 141 Ind. 451.

For rules of construction, see *ante*, § 45, general notes.

Incorporation and organization.—For decisions relating to incorporation and organization under the general law of 1867, see *ante*, § 46 and notes.

Organization of municipal corporation—Validity of tested by quo warranto.—See *ante*, § 46 and notes.

Incorporation—Presumption as to—Prescription—Judicial notice of.—See *ante*, § 46 and notes.

Amendments—Repeal, etc.—The charter of a municipal corporation may be amended or repealed at the pleasure of the legislature. Special charters may be amended by either general or special act. See *ante*, § 46, notes and cases.

Municipal powers—Sovereign—Legislative—Judicial—Not liable for exercise or non-exercise of.—See *ante*, § 46 and notes.
Municipal corporation defined.—See *ante*, § 46 and notes.

829. Elective officers—Election.—2. The elective officers of such city shall be a mayor, city clerk, and councilmen as hereinafter provided. An election in such cities shall be held on the first Tuesday in the month of May, 1902, and biennially thereafter for the election of mayor, clerk and councilmen: *Provided*, That on the first Tuesday in May, 1900, at an election which shall be then held for such purpose there shall be elected, three (3) councilmen at large by the voters of any such city, whose qualifications shall be as hereinafter prescribed and whose term of office shall expire at twelve o'clock noon on the second Tuesday in May, 1902: *And provided further*, That any vacancy in the office of councilman from any ward, or at large, existing before the time of the May election, 1902, shall be filled by appointment of the mayor; said councilman to be of same political faith as his predecessor and to serve until the second Tuesday in May, 1902, and until his successor shall be elected and qualified. Such elections shall be held in conformity to and in accordance with the general election laws of this state, and with the laws for the making out of certificates and memoranda of the result, the delivery of the list of voters and the tally papers, the assemblage of inspectors or judges of elections as a board of canvassers and the duties of such board in reference to state elections: *Provided*, That such board in city elections shall assemble in the room of the council [of such city on the day following] such election at ten o'clock A. M. The duties of the county clerk in reference to such state elections shall be performed by the clerk of such city. All special elections in such city shall be governed by the same provisions. The laws of this state in reference to contests after state elections and all other matters shall be applicable to such city elections as far as they are adapted to the same.

City officers—Legislature can not appoint.—See *ante*, § 59 and note.
Nature of office—Salaries—Allowances, etc.—See *ante*, § 59 and note.
Officers—Duties—Liabilities.—See *ante*, § 59 and note.
Election of officers—Validity of—Quo warranto.—See *ante*, § 59 and note.
Officers—Jurisdiction of—Injunction—Mandamus.—See *ante*, § 59 and note.
Removal of officers.—See *ante*, § 59 and note.
Mayor—Under general law.—See *ante*, § 80 and note.
For councilmen and other officers, under general law, see *ante* §§ 59–68 and notes.
Municipal elections.—See *ante*, § 61, *et seq.*, and notes.

830. Old officers—Powers continued.—3. On and after the first day of July, 1899, the common council, mayor, city clerk and all other city officers and employes shall possess the powers conferred by this act, and no others. Until then they shall have the power now and heretofore conferred by law. All officers created by the statutes of this state or ordinances of the city heretofore in force in conflict with this act are hereby abolished on and after said first day of July, 1899,

except as herein otherwise provided, but until that time the officers filling the same shall continue in office, and have and possess the powers and perform the duties now and hereafter conferred by law, and the members of the common council of such city heretofore elected shall hold their offices until their respective terms of office would have expired under the laws heretofore in force: *Provided, however,* They shall not be removed from office except by impeachment as provided herein. In case such city, prior to the taking effect of this act, shall have commenced, by its proper officers, any proceedings or undertakings of a public nature, which was lawfully commenced or undertaken, the same shall not be interrupted by the passage of this act, but it shall be taken up and carried forward by the proper officer or department as prescribed by this act, except that in case of public improvements of any sort, whether of sewers, streets, alleys, levees, public buildings, or any other matter of an executive nature, in which a contract has not at the time of the passage of this act been actually let and entered into, the executive department having charge of such matter shall not be bound, unless it so elects, by the previous proceedings, but may review the whole subject and modify, change or rescind all orders previously made in that behalf. The present officers of such city shall surrender the custody of all property, records and documents of every nature whatsoever, to the appropriate officer or department entitled to the possession of the same under this act.

See note, *ante*, § 59 *et seq.*

831. Vacancies.—4. In the event of a vacancy occurring in any elective office of said city from death, resignation or other cause, except mayor, it shall be the duty of the acting mayor within ten (10) days of such time to fill such vacancy by appointment for the unexpired term, said appointee to be of the same political faith as his predecessor, subject to the approval of the council.

832. Notice to officers elected.—5. The city clerk shall forthwith, after the execution of the certificate of election by the board of inspectors of elections of said office, as hereinbefore provided, notify every person so elected of the time when he must qualify, either by personal service or leaving copy at his usual place of residence, and shall make return of such service, and file the same in his office.

833. Oaths of officers—Bonds.—6. Every elective officer of such city shall before entering upon the duties of his office, take and subscribe an oath to be indorsed on the back of his certificate of election, and every appointive officer shall likewise take such oath, to be indorsed on the back of his certificate of appointment, before some officer authorized to administer the same, to support the constitution of the United States and the constitution of the state of Indiana, and to faithfully and honestly discharge all his official duties, such oath to be filed with the city clerk. Each of said officers, except the mayor and members of the common council, shall likewise execute a bond with surety, to be approved by the mayor, payable to such city in

such penal sum as said council may enact by ordinance covering such cases, conditioned for the faithful performance of the duties of his office, and the payment of all moneys received by him as such officer to the proper person, such bond to be filed with the head of the department of finance. Any person who shall not file his oath, or oath and bond, as the case may be, with the proper officer, within ten days after the beginning of the term for which he is elected, or appointed, shall be deemed to have refused to serve.

See note, *ante*, § 113.

834. Officers not interested—Contracts.—7. No member of the council, nor any officer, clerk or deputy, or employe of such city shall, either directly or indirectly, be a party to, or in any manner interested in any contract or agreement, either with such city, for any matter, cause or thing, or by which any liability or indebtedness is in any way or manner created or passed upon, authorized or approved by said council, or either of them by any officer, board, clerk, deputy or employe of such city. No officer, employe, agent or servant of any corporation, holding or operating under, a franchise granted by such city, or having any contract with such city, shall be eligible to hold any office in such city under this act. And any officer of such city accepting any office in or employment by any such corporation, shall thereby vacate such city office. Any contract in contravention of the foregoing provisions shall be absolutely void. Whoever shall knowingly violate the provisions of this section shall be fined not more than one thousand dollars ($1,000.00), to which may be added imprisonment for any period not exceeding one (1) year.

See *ante*, § 122, and *post*, § 1420 and notes.

835. Purchase of claims by officers.—8. No councilman, or other officer, clerk, deputy or employe of such city shall purchase, either directly or indirectly, any bond, order, claim or demand whatsoever against such city, during his continuance in office or employment for any less sum than the amount specified therein, and any bond, order, claim or demand so purchased by any such person, in contravention of the foregoing provision, shall be forfeited to such city, and no action shall ever be maintained thereon. Gifts and the acquirements of equitable interests shall be deemed to be within the meaning and scope of the provisions of this section.

ARTICLE 2.—LEGISLATIVE—COMMON COUNCIL.

SEC.
836. Legislative authority.
837. Wards—Change of boundaries.
838. Councilmen—Terms.
839. Qualifications of councilmen.
840. Expulsion of councilmen.
841. Meetings of council—Quorum.
842. Mayor to preside.
SEC.
843. Meetings public.
844. City clerk—Duty.
845. Ordinances—Signing—Appropriations.
846. Passage of ordinances.
847. Publication of ordinances.
848. Approval of ordinances—Veto.

SEC.
849. Recording of ordinances.
850. Powers of council generally.
851. Penalties imposed.
852. Imprisonment.
853. Executive and administrative duties.
854. Investigating departments.
855. Impeachment—Removal.
856. Taxation.
857. Loans—Limit.
358. Bonds—Issue and sale.
859. Temporary loans.
SEC.
860. Refunding bonds.
861. Warrants—When not issued.
862. Interest.
863. Continuation of appropriations and tax levy.
864. Boundaries and annexation.
865. Remonstrance—Appeal—Proceedings.
866. Parts of cities and towns not to be annexed.
867. Disannexation of territory.

836. Legislative authority.—9. The legislative authority of the city shall be vested in a common council.

For decisions and interpretation of statutes relating to the powers of the common council under the general law of 1867, see notes to *ante*, §§ 114–211.

837. Wards—Change of boundaries.—10. Such city shall be divided by the common council, by ordinance, into six (6) wards: *Provided*, That whenever such city has a main business street dividing the city into nearly equal parts, three (3) of such wards shall be located on either side of said main business street, the lines dividing such wards to extend at right angles from said main street to the limits of said city, the three (3) wards to be of as compact and contiguous territory and as nearly equal population as practicable. It is made the duty of the common council of such city, prior to the city election in 1902, to readjust the ward or common council boundaries in such city in accordance with the provisions of this act, and every sixth year thereafter a new readjustment may be made, but no oftener, unless the same is made necessary by the annexation of new territory, in which case the same may be done at any time by an ordinance passed by a two-thirds vote of the council. But such new territory may be added to any existing ward or wards by ordinance of the council.

Creation of wards—Judicial notice of existing wards.—See *ante*, § 53.

838. Councilmen—Terms.—11. Each ward shall elect one (1) councilman at the city election to be held the first Tuesday in May, 1902, as hereinbefore provided for, and the whole city shall elect three councilmen at large, whose terms of office shall commence at twelve o'clock noon on the second Tuesday of May, 1902, and shall continue until the same hour of the same day, week and month of the second year thereafter. And biennially thereafter an election shall be held in said city for the election of a councilman for each ward in any such city, and three (3) councilmen at large for the whole city whose terms of office shall commence at twelve o'clock noon on the second Tuesday of May following such election, and shall continue until the same hour of the same day, week and month of the second year thereafter.

Provided, That all officers chosen at the first general election after the taking effect of this act shall commence their official terms at the expiration of the terms of their respective predecessors as hereinbefore provided.

839. Qualifications of councilmen.—12. No person shall hold the office of councilman from any ward unless he is at the time of his election a resident and voter thereof; a removal of residence from such ward shall vacate his office. No person shall hold the office of councilman at large unless he is a resident and voter of such city.

840. Expulsion of councilmen.—13. The common council shall have the power to expel any of its own members for violation of official duty, and to declare the seat of any member vacant by reason of his disability to perform the duties of his office. The council may adopt its own rules to govern such cases, but a two-thirds vote shall be required to expel a member or vacate his seat under this section.

See note, *ante*, § 119.

841. Meetings of council—Quorum.—14. The members of the common council shall hold their first regular meeting on the first Monday of July, 1899, at 7:30 o'clock P. M., in the council chamber. The council shall thereafter meet not less than once a month, and as much oftener as their rules may require. Special meetings may be held on the call of the mayor, or on such other calls as may be provided for by rules. A majority of all the members elect shall constitute a quorum. It shall require a majority vote of all members elect to pass an ordinance. Wherever it is provided in this act that an ordinance shall be passed by a two-thirds vote the same shall be construed to mean two-thirds of all the members elect.

See notes, *ante*, § 114.

842. Mayor to preside.—15. It shall be the duty of the mayor to preside at all meetings of the common council, and in his absence for any cause, the council shall choose a presiding officer *pro tem.* from their members.

843. Meetings public.—16. All meetings of the common council shall be public.

844. City clerk—Duty.—17. The city clerk shall be the clerk of the common council. It shall be his duty to keep the files and papers thereof, to make and keep an accurate minute and journal of the proceedings, to enter the ayes and noes of the passage of every ordinance and resolution in full, and on all other votes whenever requested to do so by two members.

For duties of city clerk under the general law of 1867, see *ante*, §§ 86, 87 and notes.

845. Ordinances—Signing—Appropriations.—18. All ordinances, orders, resolutions and motions for the government or regulation of such city, and all ordinances for the appropriation of money shall originate in the common council. No appropriation shall be made

for the payment of money otherwise than by ordinance, specifying by items the amount thereof, and the department for which such appropriation shall be made. The council may prescribe its own rules. No ordinance, order or resolution shall become law, or operative until it has been signed by the presiding officer thereof, and approved in writing by the mayor, or passed over his veto, as provided in this act, and whenever the same may be necessary, promulgated according to law.

846. Passage of ordinances.—19. No ordinance shall be passed on the same day, or the same meeting that it is introduced, except by unanimous consent; and then only in case there are present and voting at least two-thirds of all members of the council-elect.

See notes, *ante*, §§ 117, 117*a*, 118, 124.

847. Publication of ordinances.—20. Every ordinance imposing a penalty or forfeiture for the violation thereof shall, before the same shall take effect, be published once each week for two (2) weeks consecutively in some newspaper printed in the city: *Provided*, That in case of insurrection, riot, pestilence, conflagration or other public necessity requiring immediate operation of such ordinance, it shall take effect as soon as proclamation is made thereof by the mayor, and posted in five (5) public places in each of the wards of such city: *Provided further*, The common council shall have discretionary power to direct the publication of any ordinance in a daily newspaper, and the publication thereof for one day each in any two consecutive weeks in any daily paper shall be deemed sufficient to allow the same to take effect: *Provided further*, That whenever any city shall publish any of its ordinances in book or pamphlet form, such publication shall be of itself sufficient publication, and such ordinance or ordinances shall take effect two weeks from the date of publication appearing upon the said books or pamphlet, and such publication in book or pamphlet form, if the same shall purport to be printed under the authority of the common council of such city shall be presumptive evidence in all courts and places of the ordinances therein contained, and of the date of adoption, and that the same are properly signed, attested and recorded, and approved by mayor.

See notes, *ante*, §§ 82, 87, 117, 118, 124.

848. Approval of ordinances—Veto.—21. Every ordinance, order or resolution of the common council shall, immediately upon its enrollment, attestation and signature by the clerk, be presented by him to the mayor, and a record of the time of such presentment kept by the clerk. If the mayor approves it he shall sign it and it shall become a law. If he does not approve it he shall return it to the clerk with his objections in writing, within ten (10) days after receiving it, and the clerk shall present the same to the common council at its next meeting. It shall be the mayor's official duty to express in writing his approval or disapproval, as hereinbefore provided. If for any

reason the mayor fails to discharge his duty within the time named, by approving or disapproving the same, in writing, the same shall be deemed equivalent to a disapproval, and in all cases of disapproval by the mayor the same shall not become a law unless the body in which the measure originated within thirty (30) days after the time named for the mayor's action, again pass the same by a majority vote of all members of the council-elect.

849. Recording of ordinances.—22. All ordinances shall, within a reasonable time after their approval by the mayor, or their passage over his veto, be recorded in a book for that purpose kept by the city clerk. Such record shall include the signature of the presiding officer, attestation of clerk, and the mayor's written approval or disapproval, and memorandum of its passage over his veto. Such record or certified copy thereof shall be presumptive evidence of the going into effect of such ordinance. On the passage of any ordinance or resolution by the council the yeas and nays shall be taken and entered in full on the journal.

See notes, *ante*, §§ 117, 124.

850. Powers of council generally.—23. The common council shall have power to enact ordinances for the following purposes: To provide a corporate seal, with appropriate device for such city, to be affixed to all instruments or writings needing authentication. To fix the salaries or compensation of the various officers and employes of such city, except where a different provision is made in the act upon this subject: *Provided,* That no member of the common council shall be allowed more than one hundred and fifty dollars ($150.00) for each year of his service as such member, nor shall any salary be changed after the election or appointment of a person to an office until his term expires or his office is vacated. To protect all city property, real and personal. To provide for the punishment of contempt and disorder in the rooms of the council and of the police court. To authorize a census of the city. To receive gifts, donations, bequests and public trusts, and to agree to conditions and terms accompanying the same, and bind the corporation to carry them out.

PUBLIC COMFORT AND HEALTH.

To declare what shall constitute a nuisance, to prevent the same, require its abatement, authorize the removal of the same by the proper officers, and provide for the punishment of the person or persons causing, continuing or suffering the same to exist, and to assess the expenses of its removal against such person or persons, and to provide for collecting such expenses either by placing the same on tax duplicate or by suit. To regulate or prohibit the use of hand organs or instruments of any annoying character or other music of itinerant performers in the streets, alleys or public places of such city. To authorize the cleaning and purification of water and water-courses by the

board of public works; to prevent encroachment or injury to the banks thereof, or the casting into the same of offal, dead animals, logs, rubbish, dirt, or impure liquids of any kind whatever. For the purpose of this paragraph jurisdiction is hereby conferred upon said city for ten miles from the corporate limits thereof. To regulate the location and management of starch factories, glue factories, renderies, tallow candleries, bone factories, soap factories, tanneries, founderies, slaughter houses, breweries, distilleries, livery stables and of all other establishments of which the business or trade may become noxious or injurious to public comfort or health, to prohibit the erection of such buildings or the continuance of such noxious or injurious occupations therein whenever the public comfort or health requires it. For the purpose of this paragraph such city is hereby given jurisdiction for four miles from the corporate limits thereof. To prevent or regulate the use of fire-arms, fire-works, bonfires or other things or practices tending to endanger persons or property. To regulate and prohibit the running at large of cattle, horses, swine, fowls, sheep, goats, dogs or other animals; to authorize the impounding, keeping, sale and redemption of such animals when found in violation of the ordinances in such cases provided. To prevent the deposit of any unwholesome substance either on private or public property, compel its removal to designated points, and to require slops, garbage, ashes and other waste or unwholesome material to be removed to designated points, or to require the occupants of premises to place them conveniently for removal. For the purpose of this paragraph jurisdiction is given such city four miles from the corporate limits. To compel the occupants of any premises, buildings or out-houses situated in said city or within four miles of the corporate limits thereof when the same has become filthy or unwholesome, to abate or cleanse the same, and to authorize the same to be done by the proper public officers, and to assess the expense thereof against such property. To regulate or prevent the storage of gunpowder, tar, pitch, resin, coal oil, benzine, turpentine, hemp, cotton, nitro-glycerine, dynamite, giant powder, petroleum, gasoline or gas, or any product thereof, or any other explosive or combustible material or any material which may seem dangerous. To regulate the location and management of cemeteries or burial places with or without such city, and to protect the same and to provide for the sanctity of the dead. To regulate or prohibit the interment of bodies; to authorize the removal of bodies now or hereafter buried, or of cemeteries to some other proper place. For these purposes such city shall have jurisdiction for four (4) miles from the city limits. To establish quarantine regulations. To authorize the removal or confinement of persons having infectious or pestilential diseases. For the purpose of this paragraph and the preceding paragraph jurisdiction is given such city for four (4) miles from the corporate limits. To regulate or prohibit the ringing of bells, crying of goods or sounding of steam whistles. To direct the location and regulate the management of all public markets and market places,

whether established by the city or by private individuals; to prevent the offenses of regrating and forestalling. To regulate and require reports and records of births and deaths, and to make such requirements as may be deemed necessary to prevent the spread of contagious or infectious diseases. To authorize and require the inspection and condemnation, if unwholesome, and to regulate the sale of meats, poultry, fish, butter, oleomargarine, cheese, lard, vegetables, and all other food or provisions. To regulate the selling, weighing, measuring of hay, wood, coal, coke and all other articles sold by weights and measures, and to require dealers to keep honest weights and measures, and to provide for their inspection and selling. To authorize and require the inspection and licensing of steam boilers and elevators, and to prohibit their use when unsafe or dangerous or without license. To define fire limits in such city, and the character of buildings which are forbidden to be erected within such limits, and to prohibit the erection of buildings in such city without a license first obtained therefor, and to regulate the construction of buildings to prevent the spread of fire. To authorize and require the inspection of buildings and structures erected or to be erected, or in the process of erection. To authorize the license therefor to be revoked, and the condemnation thereof, and of any building already erected, in whole or in part, either by ordinance fixing the method of such condemnation, or by appropriate action in the name of such city, to be brought in any court of competent jurisdiction for such purpose when dangerous or insecure in the opinion of the department of public works, and to authorize the same to be taken down within a specified time by the owner thereof, or in default thereof to authorize the same to be taken down at the owner's expense, or in case of an emergency to authorize the same to be taken down by the department of public works, without delaying for the owner to do so. To compel persons about to undertake dangerous improvements to execute bond of sufficient sureties, conditioned that the owner or contractor will pay all damages which may be sustained by any person or property from such work. To make all regulations which may be deemed expedient for the promotion of health or suppression of disease. To regulate the construction of chimneys, smoke stacks, hearths, ovens; the erection of stoves and stove-pipes, boilers and apparatus used in buildings or other places, and cause the same to be removed or made secure when considered dangerous. To compel owners and occupants of houses and buildings to make scuttles in the roof thereof, with stairs or ladders leading to the same, and to compel the erection of fire escapes. To authorize and require the inspection of gas pipes, water pipes, plumbing, drainage, sewage and electric lines or wires on private property or elsewhere; to compel them to be repaired or made secure by the owner or occupant, and on failure of such owner or occupant to do so to authorize or require the gas or electric current to be shut off from the same until such repairs are made. To regulate and prohibit the keeping of any lumber yard and the placing or piling of any lumber, wood or other combustible

material within the fire limits. Also to require and regulate the use of smoke consumers. To require the owners of real estate to cut and remove weeds and other rank vegetation growing thereon; and in default thereof to cause the same to be done at the expense of such city and make the cost thereof a lien on such real estate and provide for the enforcement of such lien and the collection of the same.

STREETS.

To prevent immoderate or careless driving or riding. To regulate the use of streets and alleys by vehicles, and designate the kind of conveyances and vehicles which may not use designated streets, which have been improved, together with hours for the use of such streets by certain specified classes of vehicles. To prevent the incumbering of streets, alleys, squares, sidewalks and crossings with vehicles, horses, or any substance or material interfering with the free use of the same. To regulate the speed of horses, wheeled vehicles, cars and locomotives. To regulate and protect all bridges, culverts, tunnels, viaducts, aqueducts, sewers, canals and hydrants, wholly or partly in said city, and to prohibit digging in such streets, alleys or public places, or in any way injuring, disturbing or making holes in the surface thereof. To regulate the use of sidewalks and prohibit the use of vehicles thereon, and regulate all structures in, under or over the same, and to require the owner or occupant of premises to keep the sidewalks in front of the same free from snow and other obstructions, and to prescribe hours for cleaning the same. To regulate and prevent the throwing or depositing of sweepings, dust, ashes, offal, dirt, garbage, paper, hand bills, dirty liquids or any other material into any streets, alley or public places. To regulate and prevent the use of streets, sidewalks and public places for signs, sign posts, awnings, awning posts, poles, horse troughs, steps, railings, entrances, racks, posting hand bills and advertisements, and displays of goods, wares and merchandise. To regulate and prohibit the exhibition or carrying of banners, placards, advertisements or hand bills on the streets, alleys or public places. To regulate and prevent the flying of flags, banners or signs across the streets, or from houses. To regulate the numbering of houses and lots, and to compel the owners to renumber the same, or, in default thereof, to authorize and require the same to be done by the department of public works at the owner's expense, such expense to constitute a lien upon the property, and enforceable as may be provided by ordinance. To regulate or change the name of streets and parks. To regulate the making of private connections with sewer, gas and water pipes, and to compel owners of property to bring such connections inside the curb of streets before permanent improvement thereof, and in default of the owners making such connections, to authorize the city to do so at the owner's expense, and to make such expense a lien on the property, and collectible in the same manner that expenses for sprinkling streets are collectible.

OCCUPATIONS.

To regulate, license and tax street cars, telephone and telegraph companies, the use of coaches, hacks, drays and all other vehicles for the transportation of passengers, freight or other articles to or from points within said city for hire or pay. To regulate license, tax, restrain or prohibit theatrical and all other exhibitions, shows or entertainments for which money is demanded or received: *Provided*, That lectures on scientific, historic, benevolent, artistic, religious or literary subjects, and apparatus for the elucidation of the same and specimens of fine art shall not be deemed to be within this provision. To license, tax, regulate or prohibit runners at railroad stations and other places for stages, cars, public houses, for other things or persons. To regulate the sale of all kinds of property at auction in the streets, stores, shops or elsewhere in the city, and to license auctioneers. To license, tax, regulate and prohibit the supply, distribution and consumption of artificial and natural gas, and to fix the prices thereof, and to regulate the laying of mains and pipes and to designate the streets and alleys through which the same shall be laid and maintained, and to compel, by ordinance, the extension of any such mains, pipes and electric lines, and the supply of gas, water and electricity. To license, tax, regulate, suppress and prohibit hawkers and itinerant dealers, peddlers and pawnbrokers, and to revoke such license at pleasure. To license, tax, and regulate public hackmen, draymen, omnibus drivers, carters, cabmen, porters, expressmen, bill posters and all other persons pursuing like occupations, and to prescribe their compensation. To license, tax and regulate or prohibit all inns, taverns, hotels, restaurants or other places used or kept for public entertainments. To license, tax and regulate the selling or giving away of any spirituous, vinous or malt liquor, and to tax, license and regulate places where such liquors or either of them are manufactured or stored, or where such liquors or either of them are to be used on the premises where given away, sold, stored or manufactured; but such license shall not exceed the amount provided by the laws of this state for other cities thereof. To tax, license and regulate distilleries and breweries, and the depots or agencies established in said city of all breweries and distilleries; but such license shall not exceed the amount of one thousand ($1,000) dollars for each distillery, brewery, depot or agency established in said city. For the purpose of this section jurisdiction is given such city for four (4) miles from its corporate limits. To regulate and license lumber yards, livery stables, and public scales. To tax, license and regulate second-hand and junk stores, and to forbid their purchasing or receiving from minors any article whatever without the consent of their parents or guardians. To license, tax, regulate and prohibit the keeping or harboring of dogs. To license, tax, regulate and prohibit dairies and keeping of milch cows. To license, tax and regulate wheeled vehicles: *Provided*, That the funds derived therefrom shall be applied only to the maintenance and repair of streets and alleys. To license,

tax and regulate branch stores or establishments and all other concerns established in said city for temporary business only. To license, tax and regulate stationary engineers.

MORALS.

To preserve peace and good order, prevent vice and immorality, quiet riots and dispel disorderly assemblages. To suppress gaming and gaming houses, and places and houses of ill-fame or assignation, or houses kept for any immoral purposes. To prohibit and destroy any instruments and devices of gaming, and to restrain fraudulent practices. To license, tax, regulate, restrain or prohibit all tables, alleys, machines, devices or places of any kind for sports or games. To regulate the time and place of, restrain or prohibit bathing in the rivers or public waters of such city. To direct the location and management of public bath houses, to license the same or to require the same to be closed, if deemed expedient. To restrain and punish vagrants, mendicants, street beggars, common prostitutes and their associates, thieves and criminals, or persons known or reputed to be such. For the purposes of the last five paragraphs such city is given jurisdiction for four miles from the limits thereof. To probibit cruelty to children or animals.

DRAINAGE.

To keep open rivers, streams or water-ways, prevent the waters thereof from pollution; jurisdiction for these two purposes being given such city for ten miles from its corporate limits. To provide for change in the course of streams, rivers, and water-ways passing through or bordering upon the corporate limits thereof, and to authorize the exercise of the power of eminent domain, either within or without such city, for the purpose of securing a new course for such streams, river or water-way. To provide on what terms real estate in such city may be drained or sewered by means of surface or under drains or sewers over and across other real estate therein, or within four miles thereof, whether within or without the limits of another municipal corporation, and to provide the methods of assessing the property benefited thereby and collecting such assessment to pay for the costs and uses thereof.

RAILROADS.

To secure the safety of citizens and others in the running of trains in or through such city, to require persons or corporations owning or operating railroads, to fence their respective railroads, to construct cattle-guards, street crossings and viaducts and public roads and to keep the same in repair and safe condition for persons on foot, in vehicles, or otherwise; to construct and maintain gates, and to keep

flagmen at railroad crossings, and provide protection against injury to persons or property from the operation of said railroads; to authorize and require railroad companies to change the location, grade and crossings of their respective railroads; to compel them to raise or lower their railroad tracks to conform to any grade which may be established by such ordinance, to compel persons or companies owning or operating railroads to construct bridges, viaducts or tunnels, and approaches thereto, across their respective railroads or rights of way at street or alley crossings; to compel railroad companies to make and keep open and in repair ditches, drains, sewers, culverts along and under their respective tracks; to require railroad corporations or persons owning or operating railroads to keep gutters and street crossings clean along their right of way; to prohibit the laying of any railroad track across any street or alley or public place without permission first obtained therefor from the common council, and to provide for the taking up and removing any track so laid without notice, and charge the expense thereof against the offending person or corporation; to require any person or company owning or operating any railroad to take up and change the location of any railroad track or switch heretofore or hereafter laid within the limits of said city.

PUBLIC PROPERTY.

To regulate and protect, except as otherwise herein provided, fire engines, hose, hook and ladders and all other property or apparatus belonging to or used by the police or fire department, and to prevent interference with the members of the police and fire departments while on duty. To authorize the closing of any street, alley or public place, or part thereof, whenever the public safety may require. To authorize the alienation and conveyance of any property, real or personal, belonging to such city: *Provided*, That no such property shall be sold until the same has been appraised by three disinterested freeholders of such city, appointed by the judge of the circuit court in the county where such city is located, neither of said appraisers to be officers or employes of such city, and their sworn valuation, in writing, returned to the mayor; no sale or conveyance shall be made for a less sum than such appraisement, and in the case of real estate only by a two-thirds vote of the common council. To regulate pounds, market houses, market places, houses of refuge, pest houses, hospitals, dispensaries, engine houses and all other public city institutions.

MISCELLANEOUS.

To regulate the building of party walls and partition fences, prescribe in what proportion adjoining owners shall bear the expense of the same, in what manner such expense shall be levied and collected, and to define the terms upon which partition walls already established

may be used by adjoining owners. To carry out the objects of the corporation not hereinbefore particularly specified: *Provided*, That such ordinances are not inconsistent with the laws of the state. The common council shall have power to make other by-laws and ordinances not inconsistent with the laws of this state, and necessary to carry out the objects of the corporation, and to enforce the observance of all by-laws and ordinances, by enacting penalties for their violation not exceeding one hundred dollars ($100.00) for any offense; which may be recovered in an action at law, with costs, as they may deem right and proper.

Powers of common council.—See *ante*, §§ 124, 404 and notes.

Municipal powers—Mode of exercise—Municipal contracts—Municipal property, etc.—See *ante*, § 124 and notes.

Legislative and ministerial powers—Police power.—See *ante*, § 124 and note.

Actions—Statute of limitations, etc.—See *ante*, § 124 and note.

Ordinances—Enactment, amendment, repeal, validity, invalidity and construction of, etc.—See *ante*, §§ 117, 124 and notes.

Resolution and rules of council.—See *ante*, §§ 116, 124 and notes.

Special subjects—Powers of council to legislate concerning.—For special subjects under the general law over which council has power to legislate, and the decisions of the courts relating thereto, see *ante*, § 124 and notes.

851. Penalties imposed.—24. In every ordinance which the common council shall pass there may be imposed a penalty for the violation or non-performance thereof. This penalty may be either a forfeiture of money or a fine or imprisonment or both of the last two: *Provided*, That no penalty or fine shall exceed five hundred dollars ($500.00) and no imprisonment shall exceed six (6) months for one offense.

852. Imprisonment.—25. The city council shall have power to provide by ordinance for imprisonment for any person against whom a penalty, fine or cost for violation of any penal ordinance shall have been adjudged until such fine, penalty and costs are fully paid or replevied; also to compel the enforcement of manual labor by such defendant and by persons sentenced to imprisonment, by the use of sufficient force and means.

See notes, *ante*, §§ 118, 211, and *post*, §§ 1237, 1383.

A penalty is not a debt in the sense of the constitution. See *ante*, § 12 and note.

853. Executive and administrative duties.—26. Whenever any executive or administrative function shall be required to be performed by any ordinance or resolution of such common council, the same shall be performed by the proper executive department and not by said council. No new department shall be created; said ordinance shall designate the department which is to perform the duties thereunder, but if designation is not made, either by statute or ordinance or resolution, the mayor shall assign such duties to the proper department.

See note, *ante*, § 407.

INVESTIGATION AND IMPEACHMENT.

854. Investigating departments.—27. The common council shall have power to supervise and investigate all departments, officers and employes of the government of such city, and to examine into any charge preferred against the same and into the affairs of any corporation, department or board in which the city may be interested, or with which it may have entered into a contract or may be about so to do. It shall have power of access to all records thereto pertaining, and power to compel the attendance of witnesses and the production of books, papers and other evidence at any meeting of the body, or any committee thereof, and for that purpose may issue subpenas and attachments in any case of inquiry, investigation or impeachment, and cause the same to be served and executed in any part of the county where such city is located. If any witness shall refuse to testify as to any fact within his knowledge or to produce any books or papers within his possession or under his control, required to be used as evidence in any case, the clerk of the body by whose authority such witness was subpenaed, if so directed by the body, or committee holding the investigation, shall forthwith report the facts relating to such refusal to the circuit or superior court in such county or judge thereof; and all questions arising upon such refusal, and also upon any new evidence not included in such first report, which new evidence may be offered either in behalf or against such witness, shall be heard by such court or judge. If the court or judge determine that the testimony or evidence required by such witness is competent and relevant, and material, and ought to be given or produced by the witness, the court or judge shall make an order requiring the witness to testify or to produce books and papers or both. In case of refusal to comply with such order, the court or judge shall have power to commit the witness or otherwise punish him for contempt, as provided for in the law governing contempt of court in this state. No witness shall be excused from testifying in any criminal proceeding or in any investigation or inquiry before the council or any committee thereof, or any officer of the city having the right to conduct the investigation touching his knowledge of any offense committed against the provisions of this act, or of any ordinance passed in pursuance thereof, or continued in force by this act. But such testimony shall not be used against him in any criminal prosecution whatever.

855. Impeachment—Removal.—28. Whenever any written charges shall have been adopted by the council, or any committee thereof, against any officer, employe or department of the corporation, except members of the council, the same shall be heard by the council, under such regulation as may be prescribed by ordinance. It shall require a two-thirds vote to impeach or remove an officer or employe.

See note, *ante*, § 119.

FINANCIAL.

856. Taxation.—29. The common council shall have power to order and direct the levy of an annual tax, not exceeding the rate of one dollar and twenty-five [cents] ($1.25) upon every one hundred dollars ($100.00) of valuation for any one year, as shown by the tax duplicate for the current year, and to manage the finances of the city, subject, however, to the powers and duties herein prescribed in respect to the several executive departments created by this act. The assessment [of property and collection] of taxes shall be made as now provided by law: *Provided*, That all real estate within the limits of such city, not exempt from taxation by the laws of this state, shall be assessed at its fair cash value, without discrimination in the valuation of lands used for agricultural purposes within the limits of such city.

See *post*, § 955.

See Taxation, R. S. 1894, ch. 108 (§§ 8408–8677); Burns' Supp. 1897, ch. 108 (§ 8411, *et seq.*); and Acts 1899, pp. 422, 430, 497, 516.

See *ante*, § 212, *et seq.*, and notes.

857. Loans—Limit.—30. The common council shall have power to borrow money to an amount not exceeding two per cent. (2 per cent.) of the taxable property of such city, as the same may appear on the tax duplicate of such city, for the year in which such loan shall be effected: *Provided*, That the entire money borrowed shall not at any time exceed two per cent. (2 per cent.) of the taxable property of such city, except for the issue and sale of refunding bonds as hereinbefore provided. Such loans may be made only for the purpose of procuring money to be used in the legitimate exercises of the corporate powers of such city, and for the payment of legitimate corporate debts.

See constitutional limitation, *ante*, § 39 and notes, and §§ 143, 411 and notes.

858. Bonds—Issue and sale.—31. Such ordinance for loans may authorize the issue of bonds or other city obligation, negotiable or not, bearing interest at a rate not exceeding six (6) per cent., and running not to exceed thirty years. Such ordinance shall provide for the time and manner of advertising the sale of such bonds or other securities, and of the receipt of bids for the same, together with the mode and terms of sale. All duties with regard to the preparation, advertisement, negotiation and sale of such bonds or other securities shall be performed by the head of the department of finance; said officer, after causing such bonds to be properly executed, shall deliver the same to the city treasurer, taking his receipt therefor, and upon the conclusion of the contract for the sale of such bonds or other securities shall certify to the treasurer the amount which the purchaser is to pay for the same, together with the name of the purchaser, and thereupon it shall be the duty of the treasurer to receive from the purchaser the amount

so certified by the head of the department of finance, and to deliver the bonds or other securities to the purchaser, taking his receipt therefor. The treasurer and the head of the department of finance shall thereupon each make a report of his proceedings to the mayor.

859. Temporary loans.—32. Temporary loans may be authorized by ordinance of the common council in anticipation of the revenue of the city for the current and following year, and payable within that period, but the aggregate amount of such temporary loan in any fiscal year shall not exceed the amount of the city tax levy for the same year. No temporary or other loan upon the revenue of any current or succeeding year shall be made until all temporary loans upon the revenue of any preceding year shall have been fully paid.

860. Refunding bonds.—33. The common council shall have power to authorize the issue and sale of refunding bonds in order to raise money to take up any outstanding bonds of such city, or to exchange with the holders of such outstanding bonds. The same shall be governed by the provisions of the second preceding section, so far as the same are applicable.

See *ante*, §§ 39, 143, 144, 157, 414 and notes.

861. Warrants—When not issued.—34. No order or warrant shall be drawn against the funds of such city in the hands of the treasurer or other officer, unless an appropriation has been made by ordinance of money for such purpose which is not exhausted, or unless the same shall be for a salary fixed by statute or ordinance, or for the payment of some judgment which such city is compelled to pay.

862. Interest.—35. All bonds or other city securities offered for sale, pursuant to the provisions of this act, may bear annual interest not exceeding six per cent. (6 per cent.), may run not longer than thirty years, and may contain an option allowing such city to redeem the same at earlier specified dates, in whole or in part, if so directed in the ordinance authorizing such issue.

863. Continuation of appropriations and tax levy.—36. If the common council for any year shall fail to pass ordinances fixing the annual tax levy and appropriating money for the various executive departments by or before the first day of November in any year, then in that case the appropriations made for such department or departments for the preceding year, shall be deemed to be continued and renewed for the current year, and the tax levy of the preceding year continued.

ANNEXATION.

864. Boundaries and annexation.—37. The common council shall have power by ordinance to declare and define the entire corporate boundaries of such city, and such ordinance, properly certified, shall be conclusive evidence in any court or proceeding of the boundaries of such city, except as provided in the next section. Such ordinance de-

fining the entire city boundary may include contiguous territory, whether platted or not, not previously annexed, and such annexation shall be binding, unless such newly annexed territory shall be within the limits of another town or city, in which case there may be an appeal, as hereinafter provided. Said common council may also, by separate ordinance, not purporting to define the entire boundaries of such city, annex contiguous territory, whether platted or not, and whether in the limits of an incorporated town or not, to such city; and a certified copy of such ordinance shall be conclusive evidence in any proceeding that the territory therein described was properly annexed, and constitutes a part of such city, except as provided in the next section. Immediately after the passage of every such ordinance as provided for in this section, the same shall be published for at least two (2) consecutive weeks in a daily newspaper of general circulation published in such city.

See *ante*, §§ 253–255 and notes, 418 and notes, and *post*, §§ 1017–1048 and notes.

865. Remonstrance—Appeal—Proceedings.—38. Whenever such territory is annexed to such city, as provided in the foregoing section, whether by general ordinance defining the city boundaries, or by special ordinance for the purpose of annexing territory, and such territory so sought to be annexed is unplatted ground or lies within the corporate limits of any other town or city, an appeal may be taken from such annexation by one or more resident freeholders in the territory sought to be annexed, filing their remonstrance in writing against such annexation, together with a copy of such ordinance in the circuit or superior courts of the county where such territory is situated, within ten (10) days after the last publication provided for in the preceding section, such written remonstrance or complaint shall state the reason why such annexation ought not in justice to take place. Notice of such proceedings by way of summons shall be served upon the proper officer of the city seeking to make annexation, and such city shall become defendant in such cause, and shall be required to appear and answer as in other cases. The court shall thereupon proceed to hear and determine such appeal without the intervention of a jury, and shall give judgment upon the question of such annexation according to the evidence which either party may introduce relevant to the issue. If the court should be satisfied upon hearing that less than seventy-five (75) per cent. of the resident freeholders of the territory sought to be annexed have remonstrated and that the adding of such territory to the city will be for its interest and will cause no manifest injury to the persons owning real estate in the territory sought to be annexed, he shall so find, and said annexation shall take place. If the court shall be satisfied that seventy-five (75) per cent. or more of the resident freeholders in the territory sought to be annexed have remonstrated, then such annexation shall not take place, unless the court shall find from the evidence that the prosperity of such city and territory will be materially retarded, and the safety of

the inhabitants and property thereof endangered without such annexation. In case the court shall so find the annexation shall take place. Notwithstanding the remonstrances such decision shall be final, and no appeal shall lie therefrom; nor shall the laws touching change of venue from the county apply, but changes of venue from the judge may be had as in other cases. Costs shall follow judgment. Pending such appeal, and during the time within which such appeal may be taken, such territory sought to be annexed shall not be deemed a part of the annexing city. Upon the determination of such appeal the judgment shall particularly describe the ordinance upon which the appeal is based, and it shall be the duty of the county clerk to forthwith deliver a certified copy of such judgment to the clerk of such city, who shall record the same in the ordinance record and make a cross reference to the page thereof upon the margin where such original ordinance was recorded. In case the decision is adverse to such annexation no further annexation proceedings for such territory shall be lawful for two (2) years after the rendition of such judgment.

See note, *ante*, § 419.

866. Parts of cities and towns not to be annexed.—39. No such annexation shall be made, under the foregoing sections, of any part of the territory of any other incorporated town or city, but only of the whole corporate territory thereof. In case of such annexation the two corporations shall be deemed to be consolidated, and the consolidated corporation shall be bound for all the debts and liabilities, and shall be the owner of all corporate property, franchises and rights of every nature, including all taxes of both of such municipal corporations.

867. Disannexation of territory.—40. The common council shall have power by ordinance to disannex and throw out any territory forming a part of the corporate limits of such city, upon a petition of a majority of the freeholders resident therein; but such disannexation shall not relieve such territory from being taxed for the purpose of paying any city indebtedness existing before such disannexation, nor the interest thereon, nor any new securities issued to refund such indebtedness, nor the interest thereon.

ARTICLE 3.—EXECUTIVE AND JUDICIAL OFFICERS AND DEPARTMENTS.

SEC.
868. Executive and administrative authority.
869. Mayor—Election—Qualifications—Term—City clerk.
870. Vacancy in office of mayor.
871. Acting mayor.
872. Duties and powers of mayor.
873. City court—Officers thereof—Effect of judgments—Proceedings.
874. Court seal—Change of venue.
875. Appointment of judge—Removal—Term—Bond—Sessions—Jurisdiction.
876. Original and concurrent jurisdiction—Punishment—Limit.
877. Rules—Oaths—Appeals.
878. Judge *pro tem.*—Docket fee.
879. Failure to pay fine—Imprisonment.
880. Vacancy in office of police judge.
881. Officers not to receive fees.

SEC.
882. Salary of judge.
883. Clerk of court—Duties.
884. Bailiff of court—Bond—Duties.
885. Suits—Averments as to incorporation and publication of ordinances not required.
886. Railroad and other corporations—Summons—Service—Judgment—Arrest.
887. Actions—Process—Arrest—Complaint—Proceedings.
888. Commitment for failure to pay judgment—Limit—Manual labor.
889. Salary of mayor.
890. City clerk—Duties—Deputy—Salaries.
891. Departments established.
892. Qualifications of heads of departments—Reports of moneys received.
893. Estimates of heads of departments—Tax levy—Appropriations.
894. Contracts—When bind city.
895. Issuing illegal warrants—Unauthorized contracts—Penalty.
896. Comptroller—Appointment—Salary—Deputy.
897. Duties of comptroller.
898. City attorney—Appointment—Bond—Salary—Duties.
899. Board of public works—Appointment—Salary—Bonds—Record of proceedings.
900. Engineer—Appointment—Salary.
901. Duties and powers of board.
902. Contracts for work.
903. Letting contracts—Drawings and specifications—Notice—Bids, etc.
904. Expenses of board—Payment.
905. Appropriation of property.
906. Roll of owners of property.
907. Awards and assessments—Damages—Benefits—Notice.
908. Insane persons and infants.
909. Remonstrance—Appeal.
910. Appeal—How taken—Judgment.
911. Assessment of benefits—Lien.
912. Benefits—When due—Collection.
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EXECUTIVE.

868. Executive and administrative authority.—41. The executive and administrative authority of such city shall be vested in a mayor, city clerk, the departments hereinafter created or referred to, and such other officers as may hereinafter be appointed by virtue of this act.

For powers and duties of executive and administrative officers under the general law of 1867, see *ante*, § 59, *et seq.*, and notes.

869. Mayor—Election—Qualifications—Term—City clerk.—42. There shall be chosen at each general election, hereinbefore provided for, by the voters of said city, a mayor, a city clerk, each of whose terms of office shall commence at twelve o'clock noon on the first Monday in September, 1902, and shall continue two (2) years, or until his respective successor is elected and qualified, except as herein otherwise provided: *Provided*, That the mayor and city clerk now in office shall hold their respective offices until twelve o'clock noon on the first Monday in September, 1902. No person shall be qualified for the office of mayor who has not been a citizen and resident of such city for three years previous to his election, and who is not at least twenty-five (25) years of age.

870. Vacancy in office of mayor.—43. In case of a vacancy occurring in the office of mayor, from death, resignation or otherwise, more than six (6) months before a general election shall occur, it shall be the duty of the acting mayor to take official notice thereof, and within ten (10) days thereafter issue his proclamation calling for a special election by the voters of such city at a date therein named, not later than forty (40) days, nor earlier than twenty-five (25) days after the issuance of such proclamation to fill such vacancy or vacancies. Such special election shall be governed by the laws and regulations governing general elections.

871. Acting mayor.—44. In case of vacancy in the office of mayor, from death, resignation or otherwise, or in case of disability on the part of the mayor to perform the duties of his office, the city comp-

troller shall perform the duties of acting mayor, and be entitled to his salary for the time being: *Provided*, That during the time of performing such duties of acting mayor he shall not perform any duties as comptroller.

872. Duties and powers of mayor.—45. It shall be the duty of the mayor to cause the ordinances of the city and the laws of the state to be executed and enforced; to communicate to the council at least once a year a statement of the finances and general condition of city affairs, and also such information in relation to the same as he may be called upon to furnish from time to time; to make such recommendations in writing, by message to the council, as he may deem expedient; to call special meetings of the council, when he shall deem the same expedient; to perform such duties of an executive or administrative character as may be prescribed by law, and he shall be responsible for the good order and efficient government of the city; to fill, by appointment, vacancies for unexpired terms in all elective offices, except that of mayor; to appoint the heads of departments, as hereinafter created, who shall hold office until their successors are appointed and qualified: *Provided*, That the mayor may at any time suspend or remove from office any or all of such persons, whether appointed by him or his predecessors, by notifying them to that effect and sending a message to the council stating in writing his reasons for such removal; to sign all bonds, deeds and written contracts of the corporation, and all licenses issued pursuant to law, by any department, and to revoke or suspend any such license; to approve or disapprove in writing, within ten (10) days after receiving the same, every ordinance or resolution of the council, and he shall transmit to the body in which the same originated within such time a message announcing such approval or veto; in case of a veto he shall state in writing his reasons therefor; and such resolution or ordinance shall not become operative unless the same is passed over such veto, by a majority vote of all the members of the common council elect: *Provided*, That in ordinances appropriating money or levying a tax or taxes, the mayor may approve or disapprove of the separate items of such appropriation or levy. In case of disapproval of any item or items and approval of the remainder of the ordinance, so much of the same as is approved shall be law and operative and those items which are disapproved shall not become law and operative, unless passed over his veto by a majority vote as above provided. To call together the heads of departments, except of assessment and collection, for consultation and advice upon the affairs of the city at least once a month, and to call on the heads of all departments for reports from the same, which it shall be their duty to prepare and submit in writing. Records shall be kept of such meetings as above provided for, and rules and regulations shall be adopted thereat, for the administration of the affairs of the city departments not inconsistent with any law or ordinance, which regulations shall prescribe a common and systematic method of ascertaining the comparative fitness of applicants for office, position and

promotion, and of selecting, appointing and promoting those found to be best fitted. To appoint, as often as he thinks proper, three competent persons to examine without notice the accounts of any department, officer or employe, and the money, securities and property of the city in their possession or charge, and report the result of such investigation.

See note, *ante*, § 426.

For powers and duties of mayor under the general law of 1867, see *ante*, § 80 and notes.

For city court under said general law, see *ante*, § 262, *et seq.*, and notes.

JUDICIAL.

873. City court—Officers thereof—Effect of judgments—Proceedings.—46. The judicial power of such city shall be vested in a city court. The officers thereof shall be one (1) judge, a clerk and a bailiff. The style of such court shall be: "The city court of ———, Indiana," according to the name of such city. Said court shall be a court of record, and all its judgments, decrees, orders and proceedings, shall have the same force and effect as those of the criminal or circuit courts, except that no judgment shall be a lien on the real estate otherwise than is provided by taking transcript, and the same shall be enforced in the same manner as liens by transcripts from justices of the peace in similar cases.

874. Court seal—Change of venue.—47. The city judge shall provide, at the expense of the city, a seal for such court, which shall contain on the face the words: "The city court of ———, Indiana," the blank to be filled with the name of the city. A description of such seals, together with the impress thereof, shall be spread on the records of such court. No change of venue shall be taken from such court, but any defendant may take a change of venue from the judge thereof, as is now provided by law relating to criminal and circuit courts.

875. Appointment of judge—Removal—Term—Bond—Sessions—Jurisdiction.—48. The police judge shall be appointed by the mayor of such city. He shall be an attorney at law of good standing and reputation. He may be removed by the mayor, and his removal shall take effect upon the appointment and qualification of his successor. Before entering upon the discharge of his duties, he shall execute a bond, payable to such city, in the penal sum of five thousand dollars ($5,000.00), with good and sufficient freehold security, to be approved by the mayor and filed in the office of the city comptroller, conditioned for the faithful and honest discharge of the duties of his office. He shall hold daily sessions of the police court, Sundays excepted, at a place within such city, provided and designated by the common council. He shall have and exercise within such county in which such city is located, the powers and jurisdiction now or hereafter conferred upon justices of the peace in all felonies, crimes and misdemeanors, except as otherwise herein provided. He shall have and exercise

within such city the powers and jurisdiction now conferred on mayors, except as otherwise herein provided. He shall have exclusive jurisdiction of all violations of the ordinances of such city. He shall also have such further and additional jurisdiction as in the next section provided.

For city court under general law of 1867, see *ante*, § 262, *et seq.*, and notes.

876. Original and concurrent jurisdiction—Punishment—Limit.—49. The police court of said city shall have original concurring jurisdiction with the circuit courts of the state and in all cases of petit larceny and in all other cases of felonies and misdemeanors where the punishment fixed by law can not exceed a fine of one thousand dollars ($1,000) and imprisonment in the state prison not more than three (3) years. On the trial of any person in said court for the violation of any law of this state, the judge or jury trying the case shall, upon conviction, have the power to assess a fine not exceeding one thousand dollars ($1,000), with imprisonment in the state prison not exceeding three (3) years, and disfranchisement for any determinate period. Or to assess a fine not exceeding one thousand dollars ($1,000), to which may be added imprisonment in the county jail, work-house, or other lawfully designated place of confinement, for a term not exceeding one (1) year, with disfranchisement as above provided. Appeals may be taken from the judgment of this court to the circuit court of the county within ten (10) days from the rendition thereof, upon filing a bond as required by law.

877. Rules—Oaths—Appeals.—50. Such judge shall have full power and authority to make and adopt rules and regulations for conducting the business of said court, not repugnant to the laws of this state, and shall have all power incident to the court of record in relation to the attendance of witnesses, the punishment of contempts, and enforcements of its orders, and to issue commissions for taking depositions in cases pending in said court. He shall have full authority to administer oaths and to give all necessary certificates for the authentication of the records and proceedings of said court in the matter of changes of venue, and in the trial of any person charged with the violation of any law of this state. Such court shall be governed, as far as may be, by the laws, rules, practices and pleadings relating to criminal courts, except where herein otherwise provided, and in the trial of any person charged with the violation of any ordinance of such city, such court shall be governed, as far as may be, by the laws, rules, practice and pleadings now in force relating to mayors' courts, except where herein otherwise provided. Appeals shall be from the judgment of said court in criminal cases to the criminal circuit court and in civil cases to the superior or circuit courts in the same manner that is now provided for the appeals from the mayor's court.

878. Judge pro tem.—Docket fee.—51 In case of the temporary absence or inability of the police judge to act, he shall appoint any

reputable practicing attorney to preside in his absence, and such judge *pro tem.* shall have and possess all the powers and rights, and perform and exercise all of the duties of judge of such court as fully and completely as the police judge appointing him. It shall be the duty of the regular judge of such court and such special judge to tax for the use and benefit of such city, a docket fee of five dollars ($5.00) in each case where a defendant is adjudged guilty of a violation of any law of this state or ordinance of such city, which docket fee shall be collectible in the same manner as other costs are collected; and no other fees whatever shall be taxed against a defendant except as herein provided for: *Provided, however,* That nothing herein shall prevent the taxing and collection of the penalties and fees now provided by law in case of the collection of judgments on execution, levy and sale of personal property, but such penalties and fees when collected shall be for the use and benefit of such city.

879. Failure to pay fine—Imprisonment.—52. Any person having been adjudged guilty of a violation of an ordinance of said city and committed therefor may be discharged by such court or judge after said defendant has been imprisoned, in addition to the term of imprisonment, if any, adjudged against him as a part of the sentence, and one (1) day for every dollar of such fine and cost, if it appear to such court or judge that such defendant is unable to pay or replevy such fine and costs, but an execution may issue against the property of the defendant, as in the case of other judgments. In no such case, however, shall the city be liable to any person for costs or fees.

880. Vacancy in office of police judge.—53. In the case of vacancy in the office of police judge, the mayor shall appoint a successor, who shall hold such office during the unexpired term of his predecessor.

881. Officers not to receive fees.—54. The police judge, clerk of the police court, or the bailiff thereof, shall not receive any fee, or other compensation whatever than their respective salaries.

882. Salary of judge.—55. The salary of the police judge shall be at the rate of one thousand dollars ($1,000) per annum, payable quarterly, as the salaries of other city officers are paid.

883. Clerk of court—Duties.—56. The police judge shall discharge the duties of clerk of the police court. He shall issue all process of said court, affix the seal of the court thereto, and attest the same. He shall keep a true, correct and complete record and docket of all cases and persons arrested and brought before the said court, how tried and disposed of, and of the fees, fines, penalties, forfeitures, judgments, executions, decrees and orders had therein, in the same manner, as nearly as may be, as such records are kept by the clerks of the criminal courts. He shall collect, prosecute and receive payment of all such fees, fines, penalties and forfeitures, and all judgments and executions, and all moneys whatever accruing or to be paid in for the use of said city from the enforcement of any of the laws thereof.

884. Bailiff of court—Bond—Duties.—57. The bailiff of such police court shall have the powers of a constable, and shall be a police

officer of such city, designated and assigned to such court by the superintendent of police of such city. He shall give bond payable to such city, in the penal sum of one thousand dollars ($1,000), with sufficient freehold surety, to be approved by the mayor, conditioned upon the faithful and honest discharge of his duties, which bond shall be filed in the office of the comptroller. It shall be his duty to be present at the sessions of such court, maintain order therein, and perform all other ordinary court duties, subject to the order of the court. He shall have and exercise the powers and duties of a constable, as now prescribed by law, except as herein otherwise provided. He shall take charge of all executions issued by the police court, and shall see to the collection of the same. He shall keep, in books to be furnished him by the comptroller, a full and accurate account and docket of all executions which may come to his hands, showing the names of the defendants, date and number of the execution, amount of fines, fees or penalties imposed, and the disposition of such execution. He shall make out and deliver a written report to the clerk of the police court, every Tuesday of each week, of all moneys collected by him during the week, giving the names of the defendants, number of executions, amount of fines, fees or penalties collected, and forthwith pay such moneys to said clerk, taking his receipt therefor.

885. Suits—Averments as to incorporation and publication of ordinances not required.—58. Whenever any suit shall be instituted by such city it shall not be necessary to aver its corporate organization, or the publication of its by-laws or ordinances, unless the same is contradicted by affidavit.

See notes, *ante*, § 82–84.

886. Railroad and other corporations—Summons—Service—Judgment—Arrest.—59. In all prosecutions against any railroad or other incorporated company for the violation of any ordinance of the common council of any city, a summons may issue against the company and may be served on the president, superintendent, secretary, treasurer, station agent or general agent, and upon the trial of the cause, judgment may be rendered against the railroad company for such penalty as may be adjudged, or the conductors or other agents of the company guilty of the violation, may be arrested by warrant, and may be proceeded against personally as in other cases.

887. Actions—Process—Arrest—Complaint—Proceedings.—60. All actions brought to recover any penalty or forfeiture incurred under this act or ordinance made in pursuance thereof, shall be brought in the corporate name of such city, the process in every such action shall be a warrant and the person named in such warrant shall be arrested and retained in custody or under reasonable recognizance until the next sitting of the city court, and it shall not be necessary to file with the affidavit or complaint a copy of the ordinance, or section thereof charged to have been violated, but it shall be sufficient to recite in the affidavit or complaint the number of the section charged to have been

violated with the date of its adoption; nor shall it be necessary to copy any part of the affidavit or complaint or other pleadings in the record of the cause: *Provided*, That the city judge shall note upon his docket the parties to the action, the title to the cause, the filing of the complaint or affidavit, the issuing and return of process and the judgment and proceedings had in the cause, and the satisfaction of judgment when paid.

See *ante*, §§ 82–84 and notes.

888. Commitment for failure to pay judgment—Limit—Manual labor.—61. If the penalty or forfeiture in which judgment is obtained is not paid or replevied, the defendant may be committed for any period not exceeding thirty (30) days, to the work-house of such city, or if such city has no work-house, then to the county prison of the county in which such city is situated, and in the latter case it shall be the duty of the person having charge of such prison to receive such defendant, and obey the judgment of the city court in reference to him or her, and in default of payment or replevy of such judgment and costs, the defendant, unless a female, may be adjudged and required to pay the same by manual labor in said work-house or county prison, or on the street or other public works of such city, under the control of the department of public works of such city, for which labor such defendant shall be allowed on such judgment and costs seventy-five cents ($0.75) per day. It shall be the duty of said department of public works, or such officer as the department of public works may direct, to work such defendant not less than six (6) nor more than ten (10) hours per day, according to the season, and each evening return him to the custody of the keeper of such prison or work-house. Upon the full payment, as aforesaid, of the judgment and costs, such defendant shall be fully discharged. And such department of public works is hereby authorized and required to perform all the duties herein prescribed and to use all proper means thereto; and the common council is hereby vested with full authority to pass by-laws and ordinances for the purpose of compelling the enforcement of such manual labor by such defendant, by the use of sufficient force and means as they may deem right and proper. If any prisoner is required to work upon the streets or other public works of the city as a part of his punishment, then such city shall pay to the county the fees now allowed to the sheriff for boarding prisoners while such prisoner is confined in the county prison or jail, and such defendant may, at any time replevy and pay such judgment and costs; and in case he has performed labor under such judgment, he shall be entitled to a credit for the same amount of labor performed, and the balance may be paid or replevied as aforesaid.

889. Salary of mayor.—62. The mayor of such city shall be paid an annual salary of two thousand dollars ($2,000), which may be increased by ordinance to any amount not exceeding twenty-five hun-

dred dollars ($2,500), and he shall receive no other compensation whatever.

890. City clerk—Duties—Deputy—Salaries.—63. The clerk of such city shall be the clerk of the common council, and may appoint one (1) or more deputies at his own expense to assist him; he shall keep the records of the proceedings of said body, said city clerk shall have charge of all the papers relating to the business of said common council, shall prepare and keep an ordinance book, as elsewhere provided in this act, shall have charge of all documents and books, the keeping of which may be entrusted to him by statute or ordinance, shall keep the city seal, and shall perform all other duties prescribed by law, or incident to his office. He shall receive a salary at the rate of eighteen hundred dollars ($1,800) per year, which may be increased by ordinance to a rate not exceeding two thousand dollars ($2,000) for all such services, and shall not receive any other compensation, fee or perquisite, except for furnishing certified copies of the records in his possession, which shall be received as evidence in any proceeding, and for which the said clerk shall receive like fees as paid to the county clerks for similar services; said clerk shall deliver over to his successor, as soon as the same shall have qualified for office, all documents, books and belongings of his office. The city clerk may be authorized by the common council to employ a deputy at a salary, to be paid by the city, not to exceed eight hundred dollars ($800) per year: *Provided*, That it is shown to the satisfaction of the council that such deputy is necessary. The city clerk of such city shall be *ex-officio* city comptroller, and possess all the powers and perform all the duties pertaining to such office, unless and until the common council shall, by ordinance passed by three-fourths of all the members of the council elect, provide for the selection of some other person as city comptroller, as herein provided. And so long as the city clerk shall perform the duties of comptroller, he shall receive a salary in full for all services performed by him as such clerk and comptroller, of twenty-three hundred dollars ($2,300) per year, which may be increased by the common council, by ordinance, to twenty-five hundred dollars ($2,500) per year.

For duties of city clerk under the general law of 1867, see *ante*, § 86 and notes.

DEPARTMENTS.

891. Departments established.—64. The following executive departments are hereby established in such city:

a. Department of finance.
b. Department of law.
c. Department of public works.
d. Department of public safety.
e. Department of assessment and collection.
f. Department of public health and charities.

No other executive or administrative departments shall be established in such city. Subordinate officers and employes not herein provided for shall be appointed by the heads of their respective departments; each department shall have power to prescribe rules and regulations not inconsistent with any statute or ordinance, or regulation established pursuant to this act for its own government, regulating the conduct of its officers, clerks and employes, the distribution and performance of its business, preservation of books, records, papers and property under its control. Each department shall promptly furnish to the mayor or common council any information which may be called for in relation to its affairs. The heads of said departments, except the department of assessment and collection, shall be appointed by the mayor. The departments of public works, public safety and public health and charities shall [keep] a continuous record or minute of all official business in said several departments. All officers shall give bond as required by ordinance except when otherwise provided herein.

See note, *ante*, § 429.

892. Qualifications of heads of departments—Reports of moneys received.—65. No person shall be appointed as the head of any department or as a member of any board herein provided for, unless he shall have been a resident and elector of such city for three years immediately prior thereto. No person who is paid a salary for his services from the city treasury shall receive to or for his own use, directly or indirectly, any fees, perquisites of office, commissions, percentages, or money paid to him in his official capacity, unless specially authorized in this act, but all fees, perquisites, commissions, percentages and moneys so paid and received by or for any such officer or person shall be the property of the city, and shall be paid by him into the city treasury; and all moneys received for licenses or permits shall be paid into the treasury weekly without deduction by the officer or department receiving them, and every such officer or person who shall receive any fees, perquisites, percentages, or other moneys which belong to the city, and should be so paid into the treasury, shall, before he shall be entitled to receive or be paid his salary, make, under oath, a detailed statement and return to the head of the department of finance in such form as he may prescribe, showing the aggregate amount of all moneys received by him since the last preceding statement and return, and shall produce a receipt showing the payment of such sum to the treasurer. The comptroller may require any such officer or person to make such statement and return to him, if it be not made as herein provided, and examine such officer or person under oath touching the matter herein provided for.

893. Estimates of heads of departments—Tax levy—Appropriations.—66. It shall be the duty of each executive department, before the commencement of each fiscal year, to submit to the joint meeting of the heads of departments and of the various boards in this act pro-

vided for, an estimate of the amount of money required for their respective departments for the ensuing fiscal year, stating with as great particularity as possible each item thereof. The comptroller shall at the same time submit a statement or estimate of city expenditures for other purposes for the ensuing year, over and above the moneys proposed to be used by the various executive departments, giving with as great particularity as possible each item thereof. After such meeting and reports and consultation, the city comptroller shall thereupon proceed to revise such estimates for the ensuing year, and the comptroller shall then prepare a report to the mayor of the various estimated amounts required in said comptroller's opinion for each executive department, and for other city expense, together with an estimate of the necessary per cent. of taxes to be levied. The mayor shall at the next meeting of the common council present such report with such recommendations as he may see fit. It shall be the duty of the committee of finance of said common council thereupon to prepare an ordinance fixing the rate of taxation for the ensuing year, and also an ordinance making appropriations by items for the use of the various executive departments and other city purposes for the ensuing year. Said ordinance may reduce any estimated item for any executive department, from the figures submitted in the report of the city comptroller, but shall not increase the same unless recommended by the mayor. Such appropriation ordinance shall thereafter be promptly acted upon by the common council. If at any time after the passage of such ordinance an emergency shall arise for further appropriations for the use of any department as certified by such department as hereinbefore provided, or other purposes during the year, such additional appropriation may be made on the recommendation of the comptroller by a two-thirds vote of the council.

894. Contracts—When bind city.—67. No executive department officer, or employe thereof, shall have power to bind such city by any contract, agreement, or in any other way, to any extent beyond the amount of money at the time already appropriated by ordinance for the purpose of such department, and all contracts and agreements, express or implied, and all obligations of any and every sort, beyond such existing appropriations, are declared to be absolutely void.

See note, *ante*, § 432.

895. Issuing illegal warrants—Unauthorized contracts—Penalty.—68. Any city official who shall issue any bond, certificate or warrant for the payment of money which shall purport to be an obligation of such city, and be beyond the unexpended balance of any appropriation made for such purpose, or who shall attempt to bind such city by any contract, agreement, or in any other way, to any extent beyond the amount of money at the time already appropriated by ordinance for such purpose, and remaining at the time unexpended, shall be liable on his official bond to any person injured thereby, and shall be fined in any sum not more than one thousand dollars ($1,000) and

imprisoned in the county jail not more than six (6) months, either or both.

DEPARTMENT OF FINANCE.

896. Comptroller—Appointment—Salary—Deputy.—69. The city comptroller shall be at the head of the department of finance, and shall have an appropriate seal; he shall be appointed by the mayor; his salary shall be twelve hundred dollars ($1,200), which may be increased by ordinance to a sum not exceeding eighteen hundred dollars ($1,800) per year. The common council may provide by ordinance for the appointment by the comptroller of a deputy for whose acts he shall be responsible, having an annual salary of eight hundred dollars ($800), which may be increased by ordinance to a sum not exceeding one thousand dollars ($1,000). The comptroller and his deputy are hereby authorized and empowered to administer oaths in all matters relating to his office.

897. Duties of comptroller.—70. It shall be the duty of the comptroller: To prescribe the form of reports and accounts to be rendered to his department and to have the inspection and revision of the accounts of all other departments and trusts. To audit the accounts of the several departments and trusts, and all other accounts in which the city is concerned, and submit annually to the council at the end of each fiscal year a report of the accounts of the city, under his oath, exhibiting the revenues, receipts and expenditures, the sources from which the revenues and funds are derived, which report shall be published in pamphlet form. To keep separate accounts for each specific item or appropriation made by the council to each department, and require all warrants to state specifically against which of said items the warrant is drawn. Each account shall be accompanied by a statement in detail in separate columns of the several appropriations, the amount drawn on each appropriation, the unpaid contracts charged against it, and the balance standing to the credit of the same. He shall not suffer any appropriation to be overdrawn or the appropriation for one item of expense to be drawn upon for any other purpose, or by any department other than that for which the appropriation was specifically made, except on transfers authorized by ordinances. He shall sign and issue all orders for money on the city treasury, and no moneys shall be paid out by the treasurer except upon such order, and after the same is countersigned by the mayor. In case of stated salaries fixed by law or ordinance, said comptroller shall issue orders therefor, but in all cases he shall require a warrant to be presented to him from the head of the department under whose supervision the obligation has been incurred, or if not so incurred, then such warrant shall be drawn by the mayor. In no case shall the comptroller draw an order on the treasury unless there be at the time money in the treasury properly applicable to the payment thereof. The expenditures of the comptroller must be approved in writing by the mayor before any or-

der is drawn therefor. To have charge of all books or papers pertaining to his department or entrusted to the same, and to turn the same over to his successor. If any warrant presented to the comptroller contain an item for which no appropriation has been made, or there shall not be a sufficient balance of the proper fund for the payment thereof, or which for any cause should not be approved, he shall not approve the same, and shall notify the proper department of the facts. And if the comptroller shall approve any warrant contrary to the provisions hereof, he shall be individually liable for the amount of the same to the holder thereof, and to the extent of his bond; his sureties shall also be liable. Whenever a warrant shall be presented to him, he shall have power to require evidence that the amount claimed is justly due, and for that purpose may summon before him any officer, agent or employe of any department of the city, or any other person, and examine him upon oath relative to such warrant or claim. Such persons so summoned shall be subject to the provisions of this act touching the examination of persons by the council, said comptroller having the same power as such body. To perform the duties elsewhere defined by this act in regard to the negotiation and sale of city securities, and to keep a register of all bonds of the city and of the transfer thereof, and an account of all outstanding securities. To manage and direct the finances and accounts of the city and make investments of city funds, subject to the ordinances of the common council. To issue all city licenses of every nature whatever upon the presentation and surrender of the receipts of the treasurer showing the payment of the license fee, and to collect comptroller's fees as fixed by ordinance. Said comptroller shall once each week pay to the treasurer the amounts collected by his department for the preceding week, specifying the source from which they have been derived, and the comptroller shall relinquish in writing to such city all fees which have been or may be collected. To prescribe the forms and methods of keeping, and rendering all city accounts and pay-rolls to be used in the several departments and offices, the manner in which all salaries shall be drawn and the mode by which all creditors, officers and employes shall be paid. All salaries shall be payable once in three (3) months. To furnish the treasurer statements of all appropriations made by the council before any warrants shall be drawn on account of the same, and to notify the mayor in case of any neglect or failure on the part of an officer or officers authorized to collect moneys for or on account of the city, in the performance of such duty or in depositing their collections in the treasury, and thereupon the mayor shall suspend such officer or officers, and proceed against them by an action upon their official bond or otherwise, as he may deem best. To carefully examine the tax duplicates in the hands of the county auditor and county treasurer and see that they are properly made out so far as the same relate to the city taxes, and to see that the assessment of property is properly made out by the assessor so far as the same relates to city taxes, and to notify the county auditor of any omitted property that may come

to his knowledge. To examine the accounts of the treasurer and make an annual settlement with him, charging to such treasurer the amount of all taxes and other assessments entered upon said duplicate in favor of such city, together with all penalties, interest and other sums in addition to the amount of such tax, which it may be the duty, according to law, of such treasurer to collect in behalf [of] the city, and to credit him with all disbursements made on account of lawful orders drawn on him by such comptroller. To draw orders on the treasury for miscellaneous city expenditures not made under the direction of any executive department, nor specifically fixed by law as in the case of salaries: *Provided,* That no such order shall be drawn by such comptroller unless the money properly applicable thereto has been appropriated by ordinance and remains unexpended, and no liability shall accrue against such city, nor can any officer, agent or employe of such city bind the same directly or indirectly for any such miscellaneous expense without the written approval of the comptroller previously obtained and filed in the comptroller's office, nor in any case beyond the appropriation already made and remaining unexpended available for such purposes. All obligations in contravention of the preceding provisions are declared to be void for all purposes.

DEPARTMENT OF LAW.

898. City attorney—Appointment—Bond—Salary—Duties.—71. The head of the department of law shall be the attorney and counsel of such city. He shall be appointed by the mayor. He is to give a bond in the sum of five thousand dollars ($5,000) to be approved by the comptroller. He shall receive an annual salary of not less than fifteen hundred dollars ($1,500), which may be increased by ordinance to any amount not exceeding two thousand dollars ($2,000), in full for all services, except as herein otherwise especially provided, said salary to be fixed by the common council. He shall have the management, charge, and control of the law business of such city and for each branch of its government, and prosecute all violators of city ordinances; shall draw up ordinances, leases, deeds, contracts or other legal papers for such city and its various departments when requested to do so by the proper officers; shall be the custodian of the papers properly appertaining to his office, and shall turn the same over to his successor in office. He shall conduct all legal proceedings authorized by this act, and all appeals of every nature whatsoever in which such city or the public shall have an interest; shall make all searches and abstracts of title required in opening, widening or changing any street, alley or public place. All fees, perquisites or other emoluments received by him, or payable to him, excepting fees for the prosecution of violations of city ordinances, shall be collected by him for and in behalf of such city, careful account kept thereof, and the same paid into the city treasury, once a week, said payment to be made under oath as to the amount received. Such attorney shall use

all diligence to collect costs due such city, and all other fees or recoveries falling within the purview of his official duties. He may employ a deputy and also such other assistants as he may be authorized to do by ordinance and not other, and shall promptly commence all proceedings necessary or advisable for the prosecution or enforcement of the rights of such city or the public. He shall report to the mayor in writing all such matters as he may deem important, and to the department of finance all judgments for which such city shall be liable. No judgment against such city shall be enforceable except out of moneys appropriated for that purpose, but the common council and mayor may be compelled by mandamus proceedings to levy, collect and appropriate the necessary sum for the payment of any judgment, in which case such legislative bodies may be sued collectively by their legal name, service of process being had on any member thereof, and all members shall be bound by such judgment.

For powers and duties of city attorney, appointment, removal, etc., under the general law of 1867, see *ante*, §§ 59, 59*a*, 96 and notes.

Authority of city attorney.—A city attorney who is charged by statute with the duty to prosecute and defend all suits for and against the city, in several controversies involving the same issues, may bind the city by an agreement that all the controversies shall abide the result of one test case. Bank of Commerce v. City of Louisville, 88 Fed. Rep. 398.

DEPARTMENT OF PUBLIC WORKS.

899. Board of public works—Appointment—Salary—Bonds—Record of proceedings.—72. The department of public works shall have for its head a board of three (3) members, to be appointed by the mayor, not more than two (2) of whom shall be of the same political party. The mayor shall have the power at any time to remove any member of said board and to fill, by appointment, any vacancy occurring in said office. The person appointed to fill a vacancy shall hold the office, subject to removal by the mayor, until his successor is appointed by the mayor. Each member of said board shall receive a salary at the rate of twelve hundred dollars ($1,200) per year, which may be increased by ordinance to a rate not exceeding fifteen hundred dollars ($1,500) and give bonds with sureties in the sum of five thousand dollars ($5,000), to be approved by the comptroller. Said board shall choose a president and clerk from its own number. The president shall perform the duties usually pertaining to such office; and the clerk shall keep the records of the proceedings of such board as prescribed by this act. No member of said board shall have any authority to act on behalf of the same except pursuant to an order of the board, regularly made at a meeting of the same, at which meeting a majority of said board shall have been present. All actions of the board shall be recorded by the clerk thereof, together with a record of the vote of each member, where the vote is not unanimous. The board shall make rules governing the time and place for holding regular and called meetings, and for giving notice thereof.

Rules.—See note, *ante*, § 438.

900. Engineer—Appointment—Salary.—73. The mayor shall also appoint a city civil engineer, who shall be subject to the orders and directions of said board, and receive a salary of fifteen hundred dollars ($1,500) per year, which may be increased by ordinance not to exceed twenty hundred dollars ($2,000) per year.

For powers and duties of city engineer under the general law of 1867, see *ante*, § 91 and notes; Hirth v. City of Indianapolis, 18 App. 673.

901. Duties and powers of board.—74. The board of public works shall have the power to condemn, hire or purchase any real estate or personal property needed by such city for any public purpose, except when a different provision for purchase is made by this act; said board may cause buildings, structures or other things in the way of any street, sewer or other public improvement to be taken down, removed and appropriated upon the payment of damages as herein provided; said board may enter upon, seize, appropriate and condemn the right of way, yards, depot, grounds or other lands of any railroad company, person or corporation, passing through such city, for street, sewer or alley purposes, whether such lands be occupied or not, upon the payment of damages as herein provided: *Provided,* That when a sum of more than five hundred dollars ($500) is required to be paid for the condemnation, hire or purchase of any real estate or personal property, the same shall not take place unless the condemnation, hire or purchase is specially authorized by ordinance. To have charge of all property, real and personal, belonging to such city, and to care for the same, except where the custody of such property is by this act placed under different control. To design, order, contract for and execute the improvement or repair of any property, real or personal, belonging to or used by such city, and the erection of all buildings for public purposes, together with all fire cisterns, pounds and other structures of any nature needed for any public purpose. To approve the platting of all streets and alleys in any addition to such city, or within the corporate limits thereof; to require the same to correspond in width, and to be coterminus with the adjoining streets and alleys. No plat shall be entitled to record in the recorder's office in the county in which such city is located, without such written approval endorsed thereon. To lay out, open, change, vacate, and to fix or change the grade of any street, alley or public place within such city, and to design, order, contract for and execute the improvement or repair of any street, alley or public place within such city. To repair, clean, light and sprinkle any street, alley or public place within such city which requires the same, in the opinion of such board, said work to be done either by contract or otherwise, and to cause lamp posts or other lighting apparatus to be erected in the streets, alleys or public places of such city. To lay out, design, order, contract for and execute the construction, alteration and maintenance of all public drains or sewers within such city, and all drains or sewers without such city and within four (4) miles thereof which may be necessary to carry off the drainage of such city.

To purchase or erect, by contract or otherwise, and operate water works, gas-works, electric light works, street car and other lines for the conveyance of passengers and freight, natural gas lines, telegraph and telephone lines, for the purpose of supplying such city, and the suburbs thereof, or to purchase or hold a majority of such stock in corporations organized for either of the above purposes: *Provided*, That none of the powers conferred by this paragraph shall be exercised except pursuant to an ordinance specifically directing the same. To contract for the furnishing of gas, either natural or artificial, water, steam or electricity, light or power, to said city or the citizens thereof, by any company or individual, and such contract to fix the prices to be charged for the same in such city, subject to ordinances of such city in relation to consumption by private consumers: *Provided*, That such contracts shall in all cases be submitted by said board to the council of such city, and be approved by them by ordinance before the same shall take effect. To design, order, contract for and execute the erection of any culvert, bridge, way, viaduct, tunnel or aqueduct within such city, or to enter into a contract with any company or individual for the joint erection and maintenance by such company or individual and such city of any such structure. To authorize and empower by contract, telegraph, telephone, electric light, gas, water, steam or street car or railroad companies to use any street, alley or public place in such city, and to erect necessary structures therein, and to prescribe the terms and conditions of such use; to fix by contract the prices to be charged to patrons: *Provided*, That such contract shall in all cases be submitted by said board to the council of such city, and approved by them by ordinance before the same shall take effect; to license the digging of any hole, or the removal of any material from the surface or underneath the surface of any street, alley or public place in such city; to require bonds for damages and for the proper replacement of the street, and to refuse such licenses when the public interest requires it; to direct the removal of any and all structures in the streets, alleys, or public places of such city, and to remove the same at the expense of the person maintaining the same, on their failure to make such removal; to design, order, contract for and execute the erection of any levee within the limits of such city or within four (4) miles thereof. To change any watercourse, natural or artificial, within such city or within four (4) miles thereof. To remove all dead animals, garbage, filth, ashes, dirt, rubbish or other offal from such city, either by contract or otherwise. To prepare a general, uniform plan for the drainage and sewerage of such city, and extend the same from time to time. To make and keep a map and record of all sewer, gas, water, electric wire conduits in such city, public and private, showing the size, depth, inclination, location and date of construction of the same, and to record therein every change which may be made in the same, together with all new connections and improvements. To discharge all other duties of an executive character not falling within the sphere of some other execu-

tive department, or imposed upon this department by ordinance. To fill up or drain any section of ground within such city or within four (4) miles from its corporate limits whenever water has or may become so stagnant or noxious as to be injurious to the public health and comfort at the owner's expense, the same to be a lien and collectible by foreclosure. To construct urinals and fountains in public places. To fix, establish, change and keep a record of the grades of all streets, alleys and sidewalks.

See *post*, § 947.

See note, *ante*, § 440.

Power over streets, alleys and bridges—Duties—Liabilities—Obstructions—Negligence—Actions—Damages.—See *ante*, § 218 and notes.

Plats—Dedication of streets—Prescription, etc.—See *ante*, § 218 and notes.

Opening and vacation of streets—Eminent domain, etc.—See *ante*, § 218 and notes.

Improvement of streets—Fixing and changing grade.—See *ante*, §§ 91, 218, 219, and *post*, §§ 1107–1135 and notes.

Sewers, drains, etc.—See *ante*, § 124, clauses 26 and 43 and notes, §§ 127 and 183 and notes, and *post*, § 1090, *et seq.*, and notes.

Corporations occupying streets under municipal franchises—Duties and liabilities, etc.—See *ante*, § 218 and notes.

Water-works—Contracts, ordinances, etc.—See *ante*, § 124, clauses 26 and 43 and notes, and § 138, *et seq.*; *post*, §§ 1061–1089.

Public lights—Gas and electricity.—See *ante*, § 124, clause 28 and notes, and *post*, § 1136, *et seq.*, and notes; also *post*, §§ 1360–1371, *et seq.*

Railroads—Occupation of streets, etc.—See *ante*, § 218 and notes, and *post*, § 1316, *et seq.*, and notes.

Street car companies—Occupation of streets, etc.—See *ante*, § 218 and notes, and *post*, § 1332 and notes.

Telegraph and telephone companies.—See *ante*, §§ 1 and 4 and notes, § 218 and notes, and as to telephone companies, *post*, § 1380, *et seq.* and notes.

Municipal property—Purchase—Sale—Control of, etc.—See *ante*, § 124 and notes.

902. Contracts for work.—75. It shall be the duty of said board of public works whenever any work ordered or undertaken by it is payable out of the general treasury of such city, from funds belonging to such city, to cause said work to be done either by independent contract or by employes of said board, as said board may deem best. But whenever any work ordered or undertaken by said board is to be paid for, in whole or in part, by assessments made for that purpose upon the property benefited thereby, said board shall cause said work to be done by independent contract.

903. Letting contracts—Drawings and specifications—Notice—Bids, etc.—76. Whenever said board shall order any work to be done, which either by order of said board or according to law, is to be performed by independent contract, said board shall prepare and place on file in the office of said department complete drawings and specifications of said work. Thereupon said board shall cause a notice to be published in one (1) daily or weekly newspaper of general circulation published in such city, once each week for two (2) weeks, informing the public and contractors of the general nature of the work and of the fact that the drawings and specifications are on file in such office, and calling

for sealed proposals for such work by a day not earlier than ten (10) days after the first of said publication. Said board shall require each bidder or firm of bidders to file with said board an affidavit that such bidder or bidders have not directly or indirectly entered into any combination, collusion, undertaking or agreement with any other bidder or bidders to maintain the price of any work or contract, or to prevent any other bidder or bidders from bidding, or to induce any bidder or bidders to refrain from bidding on any contract or work, and that such bid is made without regard or reference to any other bid or bids and with[out] any agreement, understanding or combination, either directly or indirectly, with any other person or persons with reference to such bidding in any way or manner whatever. And if after any contract has been let by said board it shall be made to appear to said board that the successful bidder has been guilty of any collusion, combination, understanding or agreement, as defined in said affidavit, such bidder shall forfeit said contract and such work shall be relet by said board; the board may in its discretion fix a later day for receiving such sealed proposals, provided such date shall be mentioned in each of such notices. Said board shall, if a satisfactory bid be received, let such contract to the lowest and best bidder. Such board may by order impose further conditions upon bidders with regard to bond and surety guaranteeing the good faith and responsibility of such bidders or insuring the faithful completion of such work, according to contract, or for keeping the same in repair for any length of time, or for any other purpose.

904. Expenses of board—Payment.—77. All the expenses incurred or authorized by such board of public works shall be payable out of the general funds of such city appropriated to the use of such board and available for the particular purpose, except where this act specifically directs that the same is to be paid for by assessments against property holders.

CONDEMNATION.

905. Appropriation of property.—78. Whenever the board of public works shall desire to appropriate or condemn, for the use of such city, any property, real or personal, or to open, change, lay out or vacate any street, alley or public place within such city, including proposed street or alley crossings of railways in cases where the proposed street or alley is to cross a railway, they may enter upon, seize, appropriate and condemn, the right-of way, lands or other property, either real or personal, of any railroad company, person or corporation, passing through such city for the above named purposes, whether such land be occupied and used or not, it shall adopt a resolution to that effect, describing the property which may be injuriously or beneficially affected, and shall cause notice of such resolution to be published in some daily newspaper of general circulation in such city once each week for two (2) weeks. Such notice shall name a date,

after the last day of publication, at which said board will receive or hear remonstrances from persons interested in or affected thereby. Said board shall consider such remonstrances, if any, and thereupon take final action, confirming, modifying or rescinding their original resolution. Such action shall be final and conclusive upon all persons except upon the dismissal and abandonment of the proceedings as hereinafter provided.

For decisions on eminent domain, opening and vacation of streets, etc., under the general law of 1867, see *ante*, §§ 218, *et seq.*, 224, *et seq.*, and notes.

For constitutional limitations, see *ante*, §§ 4 and 11 and notes.

906. Roll of owners of property.—79. Upon the final order being made, as provided in the preceding section, said board shall cause to be prepared a list or roll of all the owners or holders of property and of valuable interests therein, sought to be taken or to be injuriously affected, and in the case of opening, laying out, change or vacation of any street, alley or public place in such city, or within four (4) miles thereof, a list of the owners or holders of property or of valuable interests therein to be beneficially affected by such work. Such list shall not be confined to the owner of property along the line of proposed work, but shall extend to and include all property taken, benefited or injuriously affected. In addition to such list of names, the same shall show with reasonable certainty, a description of such property to be taken or affected, either beneficially or injuriously, belonging to such persons. No greater certainty in names or descriptions shall be necessary to the validity of any assessment than is required in the assessment of taxes.

907. Awards and assessments—Damages—Benefits—Notice.—80. Upon the completion of such list, said board shall proceed to award the damages sustained, and to assess the benefits accruing to each piece of property of said list. When such assessments or awards are completed, said board shall cause a written notice to be served upon the owners of each piece of property, showing the amount of such assessment or award, by leaving a copy of the same at his last usual place of residence in such city, or by delivering a copy to such owner personally. If such person be a non-resident, or his residence shall be unknown, then he shall be notified by publication in some daily newspaper of general circulation in such city once each week for three successive weeks. Such notices shall also name a day, not earlier than ten (10) days after service of notice or after the last publication, as the case may be, on which said board shall receive or hear remonstrances from persons with regard to the amount of their respective awards or assessments. Persons not included in such list of assessments or awards, and claiming to be entitled to the same, shall be deemed to have been notified of the pendency of the proceedings by the original notice of the resolution of the board.

See note, *ante*, § 446.

908. Insane persons and infants.—81. In case any person having any interest in land affected by such proceedings shall be of unsound mind or an infant, said board of public works shall certify the same to the city attorney, and said city attorney shall forthwith apply to the proper court and secure the appointment of a guardian for such infant or person of unsound mind; and thereupon said board shall give notice to such guardian, who shall thereupon appear and protect the interest of his ward: *Provided*, That if such infant or person of unsound mind already have a guardian, such notice may be served on such guardian. The requisites of notice to such guardian shall be the same as in the case of other notices. If there be a defect in the proceedings with respect to one or more interested persons, the same shall not affect such proceedings except so far as it may touch the interests or property of such person or persons, and shall not avail any other person concerned therein. In case of such defect, supplementary proceedings of the same general character as those heretofore prescribed may be had in order to supply the same.

909. Remonstrance—Appeal.—82. Any person notified or deemed to be notified, under the preceding sections, may appear before such board on the day fixed for hearing such remonstrances with regard to awards and assessments, and remonstrate against the same. After such remonstrances shall have been received, said board shall thereupon either sustain or modify the awards or assessments in the cases of such remonstrances, but in no other case. Any person thus remonstrating who is aggrieved by the decision of the board may, within twenty (20) days thereafter, take an appeal to the circuit or superior court in the county in which said city is located. Such appeal shall only affect the assessment or award of the person appealing.

910. Appeal—How taken—Judgment.—83. Such appeal may be taken by filing an original complaint in such court against such city within the time named, setting forth the action of the said board of public works in respect to such assessment, and stating the facts relied upon as showing an error on the part of such board. Such court shall rehear the matter of such assessment *de novo*, and confirm, lower or increase the same as may seem just. In case such court shall reduce the amount of benefits assessed against the land of such property holders, or increase the amount of damages awarded in his favor to the extent of ten (10) per centum of such benefits or damages, the plaintiff in such suit shall recover costs, otherwise not. The judgment of such court shall be final, and no appeal shall lie therefrom: *Provided*, If upon such appeal the report of the board of public works as to benefits or damages be greatly diminished or increased, the city may, upon the payment of costs, discontinue such proceedings.

911. Assessment of benefits—Lien.—84. On the completion of such assessment roll by said board of public works, the same shall be forthwith delivered to the department of finance, and from that time the respective amounts of benefits therein assessed shall severally be liens, superior to all other liens, except taxes, against the respective

lots or parcels of land upon which they are assessed. Said department of finance shall at once prepare a duplicate of said assessment roll of benefits, the same to be known as the local assessment duplicate and deliver the same to the treasurer. The duties of the treasurer and of the department of finance in respect thereto shall be the same as hereinafter more specifically prescribed with regard to assessments for street improvements.

912. Benefits—When due—Collection.—85. Said assessments of benefits shall be due and payable to the treasurer from the time of the delivery of said assessment duplicate to said treasurer. If not paid within sixty (60) days thereafter, the said city by its attorney shall proceed to foreclose said liens in a court of competent jurisdiction as mortgages are foreclosed with similar rights of redemption, and have the same sold to pay such assessments. Such city shall recover costs, with a reasonable attorney's fee, and interest from the expiration of the sixty (60) days hereinbefore allowed for payment, at the rate of six (6) per cent. per annum. In all cases where the party against whom the assessment is made is a resident of such city, demand for the payment of the same shall be made by delivering to him personally, or leaving at his last and usual place of residence, a notice of such assessment and demand for payment.

See note, *ante*, § 451.

913. Damages—Payment by city.—86. Said board of public works shall have power to determine what, if any, part of the damage awarded shall be paid out of the funds appropriated for the use of such board by the common council: *Provided,* That not more [than] two thousand dollars ($2,000) in damages shall be paid out of the city funds for any improvement or condemnation unless pursuant to an ordinance appropriating for the specific improvement or condemnation. All benefits assessed and collected by the treasurer shall be subject to draft, in the usual manner, upon certificates by the board of public works in favor of persons in whose favor damages have been awarded. Any surplus remaining above actual rewards shall belong to such city. Said board may delay proceedings until such benefits have been collected.

914. Damages—Payment.—87. It shall be the duty of the board of public works upon the completion of their award of damages, or whenever any time for delay as above mentioned shall have expired, to make out certificates for the proper amounts and in favor of the proper persons, upon the presentation of which to the head of the department of finance such person shall be entitled to a warrant on the city treasury. Such certificates or vouchers shall, whenever practicable, be tendered actually to the person entitled thereto, but where this is impracticable the same shall be kept for such person in the office of said board of public works and the making and fixing of such certificate shall in all cases be deemed to be valid and effectual tender to the person entitled

thereto, and the same shall be delivered to him on request. In case of a dispute or doubt as to which of the various persons said money shall be paid, said board shall make out such certificate in favor of the city attorney for the use of the persons entitled thereto, and said attorney shall thereupon draw the money and pay the same into court in a proper proceeding, requiring the various claimants to interplead and have their respective rights determined. In any case where an injunction is obtained because damages have not been paid or tendered, said board may tender such certificate for the amount thereof, with interest from the time of entry upon the property, if any has been made, and all accrued costs, and thereupon the injunction shall be dissolved. The pendency of an appeal shall not affect the validity of a tender made under this section, but such city shall be entitled to proceed with its appropriation of the property in question.

915. Street—Alley—Highway—Water-course—Change of.—88. Whenever a street, alley, highway or water-course shall have been opened or laid out, the abutters thereon may, by mutual agreement, change the same so as to give it a proper location, width or direction: *Provided*, They shall first obtain the consent of the common council. Before any such change shall be made, the persons interested therein shall file with the city clerk a written agreement, and shall petition the common council to change or alter such street, and shall state in their petition the reason for such change, and shall accompany the petition with a map or plat of the highway and the surrounding locality.

916. Powers of common council—Opening of streets, alleys, etc.—Removal of obstructions.—89. The common council shall have power to pass all ordinances necessary to more effectually carry into execution the powers herein granted, and which are not inconsistent with the laws of the state; and they may also cause to be opened streets, alleys, or highways which have been laid out or opened, but which have not been vacated; and they shall have power to cause all obstructions to be removed from highways, streets, alleys, or water-courses, when necessary for the general welfare. The superintendent of police of said city shall have full power to open any street, alley, or highway, when directed by the common council, and may remove any and all obstructions therein. When any person shall, after five (5) days' notice, fail, neglect, or refuse to remove obstructions, the superintendent of police shall cause the same to be done at the expense of such persons, and shall cause the city attorney to enter an action therefor; and in such action, judgment shall be rendered against such person for the reasonable expense and cost of such removal.

STREET IMPROVEMENTS.

917. Order for street improvement.—90. Whenever the board of public works shall order the improvement of any street, alley, sidewalk, or other public place in such city, in whole or in part, it shall

adopt a resolution to that effect, setting forth a description of the place to be improved and full details, drawings and specifications for such work. Notice of such resolution shall be published, remonstrances heard, said original resolution altered or modified, confirmed or rescinded, in the same manner as heretofore more specifically provided by this act with regard to the condemnation of property and the opening of streets. If such original resolution be altered, confirmed or modified, it shall be final and conclusive on all persons, unless within ten (10) days thereafter, two-thirds of all the resident freeholders along and upon such street or alley remonstrate against such improvement. In case of such remonstrance, the improvement shall not take place unless specifically ordered by an ordinance within sixty (60) days thereafter passed by a two-thirds vote of the council, and approved by the mayor.

See note, *ante*, § 454.

For powers over streets, duties and liabilities, improvement of streets, etc., under the general law of 1867, and amendatory and supplemental laws, see *ante*, §§ 218, 223 and notes, and *post*, §§ 1107–1135 and notes.

For constitutional provisions and decisions, see *ante*, §§ 4 and 11 and notes.

918. Payment by installments.—91. Whenever said board of public works shall order the improvement of any street or alley, as provided in the preceding sections, the assessment for such improvement may, at the option of each property holder, be payable in ten (10) annual installments, as follows: Ten (10) per cent. of the principal, together with all accrued interest on the entire assessment, on or before the third Monday of April next succeeding the allowance of the final estimates on such work by said board, except where such estimate has been made between March 15 and October 1, of any year, in which case such first installment, shall be payable on the first Monday of November next succeeding such estimate. The next payment on said assessment shall be six (6) months' interest on the unpaid principal, payable at the date for the general payment of taxes, either spring or fall, as the case may be, next after the installment on such assessment falls due. The next payment on said assessment shall be ten (10) per cent. of the original principal and six (6) months' interest, on the unpaid principal, payable on or before the date for the general payment of taxes, spring or fall, as the case may be, accruing one year after the first installment was payable, and so on; thereafter ten (10) per cent. of the original principal, with six (6) months' interest on the unpaid principal once each year and six (6) months' interest in alternate turn with each annual payment of principal and interest until the principal and interest have been paid.

919. Assessment roll.—92. In making assessments against each lot or parcel of land, said board of public works shall, as soon as any contract has been completed for the improvement of any street or alley, make out an assessment roll with names of property holders and descriptions of the property adjoining the place of such proposed im-

provement. Said roll shall also have set opposite each name and description, the total pro rata assessment against each piece of property. When confirmed, said assessment roll shall be delivered to the head of the department of finance. Before the said board shall approve and accept the work under any contract, and allow a final estimate therefor, the contractors who have performed such work shall file with said board an affidavit of some one or more persons having knowledge of the facts, that all work done under such contract, and all material used are of the character, kind, quantity and quality required by the specifications on which such contract was let, and that said work has been done in conformity with said contract and specifications and according to the directions of said board and the city engineer.

See note, *ante*, § 458.

920. Final estimate—Notice—Hearing.—93. Whenever the board of public works shall approve and accept the entire work under any contract and allow a final estimate therefor, it shall be the duty of such board to give one (1) week's notice by one (1) insertion in a daily newspaper, if any there be, and if there be no such paper, then by posting notices in at least three (3) public places along the line of such improvement, of the time and place when and where a hearing can be had upon such estimate, before such board. Any person feeling himself aggrieved or injured by the acceptance of such work or by such estimate, shall be accorded a hearing thereon. The board may adjourn such hearing from time to time, and of such adjournment all parties interested shall take notice. After the hearing of such objections, if any, the board may change, modify or confirm such estimate, which shall be final, and it shall thereupon be the duty of the department of finance to forthwith deliver to the treasurer a certified copy of such final assessment roll. The costs of all notices shall be estimated in and as a part of the total cost of any such improvement. Such duplicate assessment roll shall be known as the local assessment duplicate, and shall be appropriately prepared, showing the amount due on each piece of property, if paid in cash within the time limited, together with necessary columns, in which such assessment shall be extended, showing the amount of each installment, and when payable, whenever the same shall be paid in installments, together with the interest due at each spring and fall payment of taxes, until the same shall be fully paid. Said book shall also have appropriate columns in which payments may be properly credited, and also the place for the satisfaction of the lien by the treasurer. All assessments, whether payable in installments or not, shall be payable to the treasurer, except as otherwise herein provided, whose duty it shall be to receive the same and give proper receipts therefor, and enter the proper credit and satisfaction in said book or duplicate assessment roll.

See notes, *ante*, § 459.

921. Agreement of persons paying by installments.—94. Whoever desires to exercise such privilege of payment by installment shall at any time before the expiration of fifteen (15) days after the allowance of the final estimate aforesaid, enter into an agreement in writing, that in consideration of such privilege he will make no objection to any illegality or irregularity with regard to the assessment against his property and will pay the same as required by law with the specified interest. Such agreement shall be filed in the office of the city comptroller. In all cases where such agreement has not been signed and filed within the time limited, the entire assessment shall be payable in cash without interest before the expiration of said fifteen (15) days. After said fifteen (15) days if not paid when due, such total assessment shall bear interest at the rate of six (6) per cent. from the date of the final estimate.

See note, *ante*, § 460.

922. Duty of treasurer—Account of fund.—95. It shall be the duty of the treasurer to receive the same, keep all accounts thereof and give proper vouchers thereof. The department of finance shall charge the treasurer with the amounts of such assessments and interest as it accrues. The department of finance shall carefully keep a separate account of the fund arising from each particular improvement ordered by the board of public works pursuant to this act, and no proceeds arising from assessments for the improvement of any particular street or alley shall be diverted to the payment for any other improvement whatever. The proceeds shall in each case constitute a separate special fund for the payment of contractors for the particular work, upon the allowance of estimates by the board of public works, or for the security and payment of street improvement bonds, if any are issued, as hereinafter provided for such street or alley.

See note, *ante*, § 461.

923. Street improvement bonds.—96. For the purpose of anticipating the collection of such assessments, the department of finance shall issue street or public improvement bonds, payable out of the funds actually paid to and collected by such city on such account, the proceeds of the same to be applied exclusively to payment for the improvement on the particular street or alley for the anticipation of the assessment for which the same are issued. Bonds shall be issued for the principal of such assessment or assessments, and appropriate coupons shall be thereto attached, evidencing and representing the semi-annual interest. The bonds shall bear interest at a rate not exceeding six (6) per centum per annum, to be computed from the date of the final estimate, which interest shall be payable semi-annually as herein provided. In cases where the final estimate is allowed at any time during the period intervening between the first day of May and the first day of November in any year, the bonds and coupons shall be

dated on the first day of January of the year following, and in cases where the final estimate is allowed at any other period in any other year than that intervening between the first day of May and the first of November in any year, the bonds and coupons shall be dated on the first of July following. The interest shall be computed from the date of the final estimate up to the date of such bonds, and the coupons shall properly evidence and provide for such interest computed aforesaid from the date of the final estimate. Each bond shall bear the name of the street or alley for which it is issued, in cases where it is issued for street improvement assessments, and in cases where it is issued for sewer or other assessments shall appropriately designate the improvement or work for which it is issued. Assessments in cases where the option to pay in installments is exercised shall be payable as follows: Ten (10) per centum of the principal, together with all accrued interest on the same, on or before the first Monday of May next succeeding the allowance of the final estimate on such work by the board, except where such estimate has been made between March first and October first of any year, in which case such first installment shall be payable on the first Monday of November next succeeding such estimate; the next payment shall be six (6) months' interest on the entire unpaid principal payable at the date for the general payment of taxes, either spring or fall, as the case may be, next after the first installment falls due; the next payment shall be ten (10) per centum of the original principal and six (6) months' interest on the unpaid principal, payable on or before the date for the general payment of taxes, spring or fall, as the case may be, occurring one (1) year after the first installment was payable; and so on thereafter, ten (10) per centum of the original principal, with six (6) months' interest on the unpaid principal once each year, and six (6) months' interest on the unpaid principal in alternate turn with the annual payment of principal and interest, until the entire principal and interest have been paid. It being hereby intended and provided that installments of principal and interest shall be paid in advance of the maturity of the bonds and coupons, in order to enable the treasurer to pay such bonds and coupons as they respectively fall due, for which purpose the said treasurer shall hold the money paid to him. It shall be the duty of the treasurer to promptly and properly apply all money paid in on such installments to the holder of the bonds and coupons, and he shall not use the money received by him in payment of such installments for any other purpose whatever than that of paying the bonds and coupons, and shall promptly ascertain the amount paid in on such installments, and without delay pay the same to the bond and coupon holders entitled thereto. It shall be the duty of the treasurer, in all cases where any property owner is in default in the payment of any installment, or any part thereof, chargeable upon or against his property, to assess a penalty of ten (10) per centum upon any installment, or any part thereof, with six (6) per cent interest, for such delinquency, which said penalty and interest, when collected,

shall be and become the property of the city. And the treasurer shall, on the first day of January, of each year, certify to the county auditor, a list of such delinquency or delinquents. And the county auditor, between the first Monday of November and the first day of January, in each year, shall enter on the tax duplicate as delinquent, against the name of each person remaining delinquent, such delinquent special assessments so certified to him by the treasurer, as aforesaid, against the lands and lots described in such certification of the treasurer, which said assessments shall be carried out with the taxes for state, county, township, road, city, school or other purposes, if any delinquent, into one total. Payment of such special assessment, with interest, penalty and costs, shall be enforced by the sale of the lands and lots liable therefor, or so much thereof as may be necessary, which sale shall be made by the county treasurer in the same manner, and at the same time and place, and upon the same notice as is prescribed by law for the sale of lands and lots for the payment of delinquent state, county, township, road, city, school and other taxes, the property to be offered for sale and sold for the payment of all taxes and assessments of every kind, for which the same is liable, with interest, penalty and costs thereon, as one entire sum, and not separately for said special assessments, unless said special assessments are the only taxes or assessments delinquent, in which case such property may be sold to satisfy said special assessment alone. Payment of the bid, upon the sale of any such lands and lots, shall be enforced so far as it relates to such municipal assessments, together with the penalties above provided for, by the same officer, and in the same manner as is provided for by law for the enforcement of the payment of a bid made upon the sale of lands and lots for the state, county, township, road, city, school and other taxes, and the proceeds of sale shall be held by the treasurer and paid to the parties entitled thereto: *Provided, however*, If any lands or lots are sold for the payment of any delinquent special assessment together with other delinquent taxes, or for special assessments alone, said lands and lots shall not be released from the payment of the balance of said assessments or the interest thereon as the same becomes due, and if delinquent, to be sold as hereinbefore provided. The guarantee required by law to be endorsed by the county treasurer upon each certificate given by him upon a purchase of lands and lots for state, county, township, road, city, school and other taxes shall in every case where such sale is made for said municipal assessments also apply to and embrace the amount of such municipal assessments for which sale was made, and the holder of such certificate shall have the same remedy upon such guaranty as to municipal assessments embraced therein that he has as to the state, county, township, road, city, school and other taxes, to which the same relates. All provisions of law in reference to the certificates to be issued to a purchaser of lands and lots upon sale for state, county, township, road, city, school and other taxes, the making of deeds upon failure of redemption and as to the force and effect of such deeds, the

effect of such sale and the rights of the purchaser, redemption therefrom, for the quieting of title acquired thereunder, for transferring to the purchaser the original lien for the taxes and municipal assessments for which the sale was made and subsequent assessments paid, and for the enforcement of such lien by judicial proceedings when the purchaser fails to acquire a valid title by virtue of the purchase, and as to the interest and penalties to be collected upon redemption from such sales before deed is made, or upon judicial proceedings to quiet the title or enforce the lien of the purchasers; and all other provisions of law relating to the collecting and accounting for the state, county, township, road, city, school and other taxes, shall, so far as the same are applicable, apply with like force and effect in the case of municipal assessments in cities of the class referred to in this act. Said board may provide in its original resolution of improvement for the issue of such bonds and coupons directly to the contractor, in which case it shall be the duty of the department of finance, upon the allowance of the final estimate made by the board of public works, to issue the same directly to the contractor; otherwise they shall be issued and sold as other city improvement bonds: *Provided, however*, That the city can, at its option, turn over to the contractor said bonds, at par, in payment of the contract price for which said bonds were issued. After the issue of such bonds no suit shall lie to enjoin the collection of any assessment, and the validity of the same shall not be questioned, but all property owners shall be conclusively estopped and precluded from in any manner assailing the effectiveness or validity thereof. Such bonds, when issued, shall convey and transfer to the owners thereof all lien, right, title and interest in and to the assessments and liens upon the respective lots and parcels of ground hereinbefore provided for, which liens shall stand as security for such bonds and coupons until they are paid, with full power to enforce the collection thereof, if such bond or coupon be not paid on presentation to the treasurer, by foreclosure in any court of competent jurisdiction, as provided in the preceding section, and sales to satisfy such bonds and coupons shall be made as hereinbefore provided for sales upon judgments for decrees foreclosing liens for assessments levied for street improvements: *Provided*, That the first bondholder who institutes foreclosure suit in any court of competent jurisdiction against such property, or any lot or parcel thereof, shall be entitled to have the proceeds of said suit applied pro rata to the payment of his own bonds and of bonds held by others. The property upon which the assessment is laid shall, in no event, be sold for less than the amount of the assessment, attorneys' fees and costs, and the avails of the sale shall be distributed as herein provided. If the property be sold for more than enough to pay the principal, interest, attorneys' fees, costs and expenses, the surplus shall be paid to the property owner or party lawfully and rightfully entitled thereto. No more than one foreclosure suit shall be brought against any one lot or parcel of land, but all lots or parcels of lands, the assessments against

which are in default, may be joined in one proceeding. All bonds, as herein provided, shall be negotiable as inland bills of exchange and be free from all defenses by any property owner or property owners. It shall not be necessary in said bonds to recite the steps taken in ordering such improvement or directing the assessments, but it shall be sufficient to make a general reference to such assessment and to the statute.

924. Failure to pay installments—Effect.—97. Failure to pay any installment of principal or interest when the same is due shall bring all installments of principal yet unpaid forthwith due and payable. If such city shall fail to collect any unpaid assessment, or installment thereon when due, no liability shall thereby accrue against such city, but the owner of the bonds hereinbefore provided for, or in case no bonds have been issued, then the person to whom is due and owing the amount of such unpaid assessment for the peformance of such work, shall have the right to proceed in any court of competent jurisdiction to foreclose the liens on unpaid assessments, recovering interest, cost and a reasonable attorney's fee, and to have the proceeds of sale applied on his claim. It shall be the duty of the county clerk to certify to the treasurer all satisfactions of assessment liens by such sale, and the treasurer and comptroller shall enter the same of record.

See note, *ante*, § 463.

925. Levees, viaducts, tunnel or aqueduct, water-course, drainage.—98. Whenever the board of public works shall order the erection or change of [any] levee or the construction of any viaduct, tunnel or aqueduct, or the change of any water-course, natural or artificial, or the drainage of section of ground, it shall cause the necessary drawings and specifications to be prepared for the work and filed in such office, and shall publish a notice of the resolution ordering the work to be done; shall hear remonstrances, modify, confirm or rescind their original resolution, prepare a list of property holders beneficially or injuriously affected by such work, advertise for bids for such work, let the same by contract, assess benefits and award damages, and in these and all other respects proceed in accordance with the provisions of this act relating to the appropriation of property and the laying out of streets

926. Assessments—Liens—Collection.—99. The provisions of this act for the liens of assessments, preparation of the duplicate assessment roll by the department of finance, delivery of such roll to the treasurer, the collection of assessments, right of election of property holders to pay the same in installments, the issue of bonds to anticipate the same, and all other provisions with regard to street improvement assessments, shall govern in the manner of levee assessments so far as the same are applicable.

927. Sewers and drains.—100. Whenever the board of public works shall order the construction of any sewer or public drain, it shall cause the necessary drawings and specifications for such work to

be prepared and filed in such office, shall publish a notice of the resolution ordering the work to be done, shall hear remonstrances, modify, confirm or rescind their original resolution, and shall advertise for bids and let the same by contract as more specifically provided in this act with relation to the appropriation of property and laying out of streets.

See notes, *ante*, § 466.

For sewers, drains, etc., and construction of, under the general law, see *ante*, § 124, clauses 26 and 43 and notes, §§ 127 and 183 and notes, and *post*, § 1090, *et seq.*, and notes.

928. Local sewers.—101. Whenever any such sewer shall from its size and character be intended and adapted only for local use by property-holders along the line of the street or alley on which it is constructed, and in the opinion of such board is not intended or adapted for receiving sewage from collateral drains, then, and in that case, the whole cost of such improvement shall be paid for by the property holders abutting on such street or alley in the same manner and to the same extent as street improvements are paid for, except that such city shall not be liable for the portions of such local sewer which cross other streets or alleys, but the total costs shall be apportioned pro rata against the property holders.

See notes, *ante*, § 467.

929. General sewers—Cost—How paid.—102. Whenever, in the opinion of such board, any sewer or drain ordered to be constructed, or any enlargement of one already constructed shall, from its size and character be intended and adapted not only for use by abutting property holders along the line of such drain or sewer, but it is also intended and adapted for receiving sewage from collateral drains already constructed, or which may be constructed in the future, then, and in that case, the cost and expense of such sewer shall be assessed against each piece of property beneficially affected, in proportion to the benefits received, including abutting property holders, as well as the holders not situated on the line of such drain or sewer, but, in the opinion of the board, beneficially affected by the construction of such sewer, either directly or immediately or indirectly, and by way of the advantage which shall be realized in the future when collateral drains may be constructed from such property to such main sewer: *Provided*, That whenever in the opinion of the board of public works the whole or any part of the cost of any sewer or public drain mentioned in the preceding section should be paid out of the public treasury, such board may so order and provide.

930. Assessments—Collection.—103. The provisions of this act relating to the assessment for street improvement shall govern such board in making its assessments for the cost of any local sewer or drain, or the equivalent thereof. In construction or enlargement of any sewer or drain adapted for more than local use, the provisions of this act relating to the assessment of benefits in the laying out of

streets, shall govern such board in assessing benefits. The assessment roll, when completed according to these provisions, shall be delivered to the department of finance in the same manner as street improvement assessment rolls. The department of finance and the treasurer shall thereupon discharge the same duties in respect thereto as are hereinbefore prescribed in relation to street improvement assessments by installments, and the issuance of bonds to anticipate the same, shall also apply to the payment of assessment for the construction of sewers, drains, levees, or for the change of any water-course, or the drainage of any section of ground.

SPRINKLING OR SWEEPING.

931. Contracts for sprinkling and sweeping.—104. Whenever such board of public works shall order any street, alley or public place to be sprinkled or swept, it shall cause the necessary specifications for such work to be prepared and filed in such office, shall publish a resolution ordering the work to be done, shall hear remonstrances, modify, confirm or rescind their original resolution, and shall advertise for bids, and let the same by contract, as more specifically provided in this act with relation to the appropriation of property and the laying out of streets.

932. Cost—Assessment.—105. The cost of such sprinkling shall be assessed pro rata against the property holders along the line of such street, alley or public place, as the cost of street improvements is assessed, except that such city shall not be liable to pay for the sprinkling of any street or alley crossing, but the total cost of such sprinkling shall be paid for by the abutting property holders. The cost of sweeping shall be paid by the city out of the general fund. Such board may, at its option, embrace in one order or resolution, and also in one contract, any number of streets, alleys or public places for which the specifications for such sprinkling or sweeping are uniform. Or such board may include in one resolution and contract such streets as to which the specifications for sprinkling and sweeping are not uniform: *Provided*, That such contract and the bids therefor shall separately state the cost of sprinkling and sweeping streets or alleys with regard to the specifications to such sprinkling or sweeping. In such cases such board may accept part of such bid on one group of streets uniform in their specifications, and reject other parts of such bids on other groups of streets.

See notes, *ante*, §§ 472, 473.

933. Assessments—When payable.—106. The duties of the department of finance and of the treasurer, the rights of contractors and the liability of such city in relation to such street sprinkling assessments, shall be the same as in the case of street improvement assessments, but such assessments shall be payable on the first Monday in November, for any one year, in the manner that street improvement

assessments are payable. The provisions of this act in relation to the payment of street improvement assessments by installments, and the issuing of bonds to anticipate the same shall have no application to street sprinkling assessments.

DEPARTMENT OF PUBLIC SAFETY.

934. Board of public safety—Appointment—Bond—Salary.—107. The department of public safety shall be under the charge of a board of three (3) commissioners to be appointed by the mayor of such city as hereinbefore provided. No more than two (2) of said commissioners shall be of the same political party. Said commissioners shall give bond to such city, to be approved by and filed with the department of finance for the faithful performance of their duties, respectively, as required by ordinance. Said board shall have the care, management and supervision and exclusive control of all matters relating to the fire and police force, fire alarm, telegraph, erection of fire escapes, inspection of buildings and boilers, market places, and food sold therein, pounds and prisons. Said board shall have power to purchase all necessary supplies and apparatus and make all repairs needed in its department, subject to the same provisions as are herein prescribed for the exercise of similar powers by the department of public works. Said commissioners shall receive annual salaries of four hundred dollars ($400) each.

Fire department and metropolitan police and fire department under the general law, see *ante*, §§ 256, *et seq.*, and 296, *et seq.*, and notes.

935. Rules—Quorum—Chairman—Record.—108. Said commissioners shall adopt rules for appointment of members to said fire and police forces, their regulation and duties, subject, however, to the laws of the state and to the ordinances of the common council. Any two (2) of said commissioners shall constitute a quorum. Said commissioners shall adopt rules and regulations with regard to the time of the holding regular and called meetings and of giving notice thereof. They shall elect one (1) of their number as chairman, who shall hold such position as long as may be prescribed by the rules of said board. Said commissioners shall cause all of their proceedings to be carefully recorded by their secretary. They shall only act as a board, and no member thereof shall have power to bind said board, or such city, except pursuant to resolution of such board, authorizing him to act in that behalf as its authorized agent. Said commissioners shall have the care and charge of all property of every kind pertaining to the fire and police force and to the market places, pounds and prisons of such city.

936. Powers and duties of board.—109. Said commissioners shall appoint a superintendent of police, chief of the fire force and all other officers, members and employes of said fire and police forces, together with a market-master and weighmaster and other officials necessary

for such department of public safety. The annual pay of such appointees shall be fixed by ordinance of the common council, and it shall be lawful in such ordinance to grade the members of such forces and to regulate their pay, not only by rank, but by their length of service. In default of any ordinance fixing the compensation for any member of such fire or police force, said commissioners shall have power to fix the same, subject to change by ordinance by said council. Said commissioners of public safety may also fix the number of members of said fire and police forces and the number of appointees for other purposes, subject to the approval of the council: *Provided*, That such commissioners shall not have the power to appoint more than one patrolman for each ten hundred inhabitants in such city. Said commissioners of public safety shall in like manner divide such city into police precincts and fire districts. Said commissioners shall also have power to make and promulgate rules and regulations for the appointment of members to such forces, and for their government. The superintendent of police shall have exclusive direction and control of the police force, and the chief of the fire force shall have exclusive control and charge of such fire force, subject to the rules, regulations and orders of said department of public safety. In times of peril, danger, riot, extensive conflagration, disorder or the apprehension thereof, said chief of the fire force and the superintendent of the police force shall, for the time being, be subordinate to the mayor, and obey his orders and directions, anything to the contrary in this act or in the ordinances of such city or in the regulations or orders of such commissioners of public safety to the contrary notwithstanding.

937. Firemen and police—Terms—Removal.—110. Every member of the fire and police force, and all other appointees of the commissioners of public safety, shall hold office until they are removed by the board. They may be removed for any cause other than politics, and the written reasons for such removal shall be entered upon the records of such board: *Provided*, That the membership of the fire and police force shall be and remain (as nearly as possible) equally divided between the two political parties casting the largest number of votes at the last preceding city election.

938. Punishment of firemen and policemen.—111. On conviction of a member of the said fire or police force for any criminal offense or neglect of duty, or of violation of rules or neglect or disobedience of orders, or incapacity, or absence without leave, or conduct injurious to the public peace or welfare, or immoral conduct, or conduct unbecoming an officer, or other breach of discipline, said commissioners shall have power to punish the offending party by reprimand, forfeiture, suspension without pay, dismissal or by reducing him to a lower grade and pay.

939. Powers of policemen.—112. The officers and members of such police force shall possess all the common law and statutory powers of constables, except in relation to the service of civil process, and any warrant of search or arrest issued by any judge, magistrate, mayor, or

justice of the peace of this state, may be executed in any part thereof by any member of said police force, subject to the laws of this state governing arrests and bail. The members of such police force shall have the exclusive power, and it shall be their duty to serve all process within such city, issuing from the city court. They shall be conservators of the peace in such city, and shall arrest without process all persons who within view commit any crime or misdemeanor contrary to the statutes of this state, or ordinances of such city, take them before the judge of such city, or other officers having jurisdiction of the offense with which such person is charged, and retain them in custody until the cause of such arrest has been investigated, suppress all breaches of the peace within their knowledge, and authority is hereby given to them to call to their aid the power of such city; to pursue and commit to jail all felons and persons guilty of misdemeanors or crimes in violation of the statutes of this state or of the ordinances of such city. They shall have the exclusive power, and it shall be their duty to serve all process issued by the common council, or any committee thereof, pursuant to this act, or by any of the executive departments of such city. The board of public safety shall detail some one member of said force, or as many as it may deem necessary, to attend the city court and preserve order therein.

For powers and duties of city marshal, police officers, constables, etc., under the general law of 1867, see *ante*, §§ 94, 95 and notes.

940. Duty as to prisoners.—113. The members of the police force, under the direction of the superintendent thereof, shall convey prisoners to and from the county jail or station houses of such city for arraignment or trial in the city or any court having jurisdiction, or to the house of correction, work-house, reform school, county jail or other place of punishment or imprisonment, under judgment, sentence, order, or process of such court.

941. Detail of policemen—Additional policemen.—114. Said commissioners shall have power, on application of any person or corporation, if deemed expedient, to detail regular patrolmen of the police force or fire force, or appoint and swear any additional number of special policemen or firemen to do special duty at any place within such city, upon such person or corporation paying for the use of such city the same rate per diem of service on such detail of special duty as is paid to the regular members of the force. Such special patrolmen shall be subject to the superintendent and such special firemen to the chief of the fire force. They shall obey the rules and regulations of their respective departments, conform to its discipline and orders, and wear such dress or badge as the commissioners may direct, and shall, during the term of their appointment, possess all the powers, privileges and duties of regular patrolmen or firemen. Such persons so appointed may be removed at any time by said commissioners without notice and without assigning any cause. Said commissioners may also, upon emergency or apprehension of riot, tumult, mob or insur-

rection, pestilence or invasion, appoint as many special patrolmen as may be desirable, to be paid the same rate per day and possess the same powers, privileges and duties as members of the regular force, and be subject to the same ordinances, regulations and orders. Such patrolmen and firemen shall wear badges furnished by their respective departments. Such commissioners may also detail members from the regular forces for the use of the department of health, or any department of the city government.

942. Oaths—Who may administer.—115. Said commissioners and superintendents of fire and police are authorized to administer oaths to any person summoned in any proceeding authorized by this act, or to take any deposition under the rules, regulations or orders of said department of public safety.

943. Duties of policemen.—116. It is hereby made the duty of said police force, at all times within such city, and the members thereof are specially empowered to preserve peace, prevent crime, detect and arrest offenders, suppress riots, mobs and insurrections, disperse unlawful and dangerous assemblages and assemblages which obstruct the free passage of public streets, sidewalks, parks and places, protect the right of persons and property, guard the public health, preserve order at elections and public meetings, direct the movement of teams and vehicles in streets, alleys or public places, remove all nuisances in public streets, parks or highways, arrest all street beggars, provide proper police assistance at fires, assist, advise and protect strangers and travelers in public streets or at railroad stations, carefully observe and inspect all places of business under license, or required to have the same, all houses of ill fame or prostitution, and houses where common prostitutes resort or reside, all lottery or policy shops, all gambling houses, cockpits, dance houses, resorts, and to suppress and restrain all unlawful or disorderly conduct or practices, enforce and prevent the violations of ordinances and laws in force in such city. The superintendent of police and each captain in his precinct shall possess the power of supervision and inspection over all pawnbrokers, venders, junk shop keepers, cartmen, expressmen, dealers in second hand merchandise, intelligence offices and auctions, and any member of such force may be authorized by the superintendent to exercise the same powers, by authority in writing. Said superintendent or any captain may, by written authority, empower any member of such police force, when in search of stolen property, of evidence, or of suspected offenders, to examine the books, business or premises of any of the persons named in this section and to examine property in whosoever possession the same shall be.

944. Gaming houses.—117. If any member of such force, or if any two or more householders in such city shall report in writing, under his or their signature, to the superintendent of police that there are good grounds (and stating the same) for believing that any house, room or premises within such city is kept or used as a common gaming house, room or premises, for therein playing for wagers of money,

at any game or chance, or to be kept for lewd or obscene purposes of amusements, or for the deposit or sale of lottery tickets or policies, it shall be lawful for said superintendent to authorize any member or members of said police force, in writing, to enter the same, who shall forthwith arrest all persons there found offending against law, and seize all instruments of gaming or lottery tickets, and deliver the same to the superintendent, who shall destroy them.

945. Arrest—Duty on making.—118. Whenever an arrest has been made by any member of such police force, it shall be the duty of the officer in making the arrest to forthwith bring the person arrested before the city judge or court having jurisdiction thereof, to be dealt with according to law; if the arrest is made during the hours when such court is not in session, such offender shall be detained in the city prison until there shall be an opportunity for such hearing at the earliest practicable time, or until he shall have given bond for his appearance, and no person shall be detained longer than twenty-four hours without such examination, except when Sunday intervenes, in which case no person shall be detained longer than forty-eight hours; any person or corporation who shall interfere with said commissioners of public safety or their appointees, in the legal discharge of their duties, shall upon conviction be fined not more than one thousand dollars ($1,000), to which may be added imprisonment for not more than ninety (90) days.

946. Bonds of appointees.—119. Said commissioners shall have power, subject, however, to city ordinances, to adopt rules regulating the giving of bond by any appointee or class of appointees in such department for faithful performance of official duty.

947. Board of public works—Performance of duties of board of public safety.—120. The board of public works shall, in addition to their powers and duties as such board, possess all the powers and perform all the duties of the board of public safety, until twelve o'clock noon of the first Monday in September, 1902, except as to the police and police department of such city, which shall be governed and controlled by the laws now and heretofore in force, until said date. On and after twelve o'clock noon of said first Monday of September, 1902, the members of the board of public safety shall possess all the powers and perform all the duties conferred and imposed by the provisions of this act, upon such board: *Provided*, That the mayor of such city shall not appoint a board of public safety until the said first Monday in September, 1902.

948. Pensions and pension fund.—121. The act of the general assembly of the state of Indiana entitled, "an act concerning pensions for disabled or retired firemen and dependents of deceased firemen, providing for pensioning the widows and orphans of deceased firemen; providing for pensioning the dependent wives and children of retired or disabled firemen; providing for pensioning dependent fathers and mothers and dependent brothers and sisters of disabled or retired firemen; providing for a fund out of which such pension shall be

paid; providing for a board of trustees for the management and distribution of such fund; providing and prescribing regulations relative to the mode of obtaining, preserving, using and disbursing such fund; declaring to what cities and fire departments this act shall apply; repealing former acts and declaring an emergency," approved February 23, 1895, shall be and is hereby continued in force as to all cities governed by the provisions of this act, as fully and effectually as if incorporated herein.

See *post*, § 1476, *et seq.*

DEPARTMENT OF ASSESSMENT AND COLLECTION.

949. City treasurer—Office abolished.—122. That on and after the first Monday in September, 1902, the office of city treasurer in all such cities shall be abolished, and the records, books and papers thereof, except as otherwise herein provided, shall be turned over to and preserved by such other officers of said city as the common council of such city may designate.

950. Treasurer of county to be city treasurer—Duties.—123. The treasurer of the county in which any such city is situated shall thereafter perform all the duties which by law or the ordinances of such city were required to be performed by the treasurer thereof, except as herein otherwise provided, in the same manner and with like effects as such duties were required to be performed by such city treasurer; he shall, immediately upon succeeding to the discharge of such duties, and before entering upon the same, take an oath to honestly discharge such duties, and execute a bond, payable to the state of Indiana, with at least four (4) freehold sureties, to the approval of the common council of such city, in a penalty to be prescribed by them, not less than the estimated amount of all taxes, including delinquent, to be levied and collected for municipal and school purposes in such city for the current year, conditioned that he will honestly and faithfully discharge the duties of his office so far as they relate to or affect such city, and safely keep and properly account for and pay over to the proper person or authority all moneys and property of such city which may come into his hands, which bond shall be filed with and preserved by the department of finance.

See *ante*, § 490, and *post*, § 1412 and notes.

For treasurer's duties under the general law of 1867, see *ante*, §§ 97, 103, and *post*, § 1060 and notes.

951. Duties of treasurer.—124. The city treasurer of any such city on the first Monday in September, 1902, shall make settlement with the city clerk for all moneys collected and disbursed by him, and thereupon a statement shall be prepared, which shall be signed by him and attested by such clerk, in which shall be shown the amount of moneys in his hands belonging to the general fund and each other fund of which separate accounts are required to be kept by law or the ordinances of such city, and the total amount of all such funds. A par-

ticular description shall also be given of all bonds and other securities and property in the hands of said treasurer belonging to said city. Said treasurer shall present such statements to the county treasurer, and forthwith pay over to him all the funds of such city in his hands as shown therein, and also deliver to him all the bonds, securities and other property described in such statement; and said county treasurer shall give a receipt therefor, showing the amount of money received on account of each fund, and the total amount received, describing the bonds, securities and other property received, which [receipt] said city treasurer shall deliver to the city clerk, who shall issue a quietus therefor.

952. Settlement by treasurer—Collection of taxes.—125. Said city treasurer shall also, on the first Monday in September, 1902, make a settlement with the city clerk on account of the tax duplicate and delinquent list which may then be in his hands for collection. He shall enter upon said duplicate and list, opposite the name of each person from whom he has collected any taxes, a statement of the fact showing the amount collected, and at the end of such duplicate and list the aggregate amount of all taxes of each kind collected by him shall be deducted from the aggregate amount of each kind of tax shown in said duplicate and said list, and the remainder of each kind of tax shown in said duplicate and said list, and the remainder of each kind of tax uncollected shall be stated, and the same shall be signed by said treasurer and attested by the clerk. Said tax duplicate and delinquent list shall then be delivered by said treasurer to the county treasurer, who shall give him a receipt therefor, stating therein the amount of each kind of tax therein remaining uncollected and the aggregate of all such taxes, which receipt shall be filed with the city clerk. Said county treasurer shall thereupon proceed to collect the taxes contained in said duplicate and list in the same manner as he is required by law to collect taxes for state, county, township, road and other purposes upon the county tax duplicate and delinquent list, and shall make settlement on account thereof with the county auditor at the same time and in the same manner as he is required by law to make his settlements on account of the county tax duplicate.

953. Payment of money into treasury.—126. Whenever by law, or the ordinance of any such city, a license or special tax, or sum of money other than taxes contained upon the tax duplicate, shall be required to be paid by any person into the treasury of such city, such person shall obtain from the department of finance a statement showing the amount to be paid, and on what account, and present the same to the county treasurer, whose duty it shall be to receive and collect said amount, and give to the person paying the same a receipt showing the amount paid and on what account, which receipt such person shall deliver to the department of finance, who shall thereupon issue to such person a license or quietus as may be proper.

954. City treasurer to deliver precepts.—127. The city treasurer of any such city on the first Monday in September, 1902, as herein

provided shall deliver to the sheriff of the county, all precepts for the collection of street, sewer, drain and other assessments of like character which may be in his hands unexecuted; and thereafter all such precepts shall be directed and issued to such sheriff, who shall execute the same and make conveyances in execution of sales made by the city treasurer, the same in all [respects] as such precepts are required to be executed and conveyances made by such city treasurer, for which services such sheriff shall receive the same fees as are allowed by law to the city treasurer, to be paid in the same manner.

955. Taxation—Assessments.—128. Beginning with the year 1900, and thereafter, the assessment and appraisement for taxation for state and county purposes of all real and personal property and polls, subject to taxation within any such city shall be made pursuant to the provisions of the act of the general assembly of the state of Indiana, entitled, "An act concerning taxation," approved March 6, 1891, and all acts amendatory thereof and supplemental thereto, as the same shall have been equalized by the county board of review and the state board of tax commissioners, including all additions made thereto by said boards, or either of them, and all assessments and appraisements made by the auditor of the county in which such city is situated shall be the basis upon which the common council of any such city shall levy and assess the taxes for city, school and library purposes, which they respectively shall deem it necessary to levy, within the limitation hereinafter prescribed and the taxes so levied shall become and continue liens upon the property upon which they are levied at the time, and in the manner and to the extent that taxes levied for state, county and other purposes become and continue liens upon such property by virtue of the provisions of the acts herein referred to.

See *ante*, § 856.

See Taxation, 3 R. S. 1894, ch. 108 (§§ 8408–8677), Burns' Supp. 1897, ch. 108 (§ 8411, *et seq.*), and Acts 1899, pp. 422, 430, 497, 516.

See *ante*, § 212, *et seq.*, and notes.

956. Duty of county auditor.—129. It shall be the duty of the auditor of the county in which any such city is situated to make out and deliver to the department of finance of said city in each year, beginning with the year 1899, a certificate under the seal of the board of commissioners of such county, showing the aggregate assessment and valuation for taxation for state and county purposes, for the year in which such certificate is made, of all taxables, real and personal, and railroad property in such city, and the number of taxable polls therein, as the same shall have been returned by the assessor of the township in which such city, or any part, is situated, and as equalized by the county board of review and state board of tax commissioners, which certificate shall be so made and delivered by said auditor immediately after the assessment and valuation of such property and polls has been completed and returned to his office.

957. Levy of taxes—Limit.—130. Such department of finance

shall lay such certificate before the common council of such city at its regular sitting next held after such certificates are received, and thereupon such common council shall proceed, in the manner hereinbefore prescribed by law, to levy such tax upon the amount of property and polls shown in such certificate as may be deemed necessary by them to supply the needs of such city during the ensuing year for city, school and other purposes for which taxes may be properly levied: *Provided, however*, That it shall be unlawful for the common council to levy a tax or taxes for any one year exceeding in the aggregate one dollar and twenty-five cents ($1.25) upon the hundred dollars ($100) of the assessed and appraised value of the property subject to taxation in such city for the year in which the levy is made, as shown by the assessment returned to and on file in the office of the county auditor and by his certificate herein mentioned.

958. Auditor to put taxes on duplicate.—131. The levies of taxes made as provided in the last section shall be certified by the department of finance under its seal, without delay, to the county auditor, and such auditor shall thereupon proceed to estimate, as he is now required to do in reference to state, county, township, road and other taxes, the amount of tax chargeable according to the rate prescribed by such levies, to each person who is listed for any taxable property or poll in such city upon the assessment and appraisement of property and polls therein made for the year, in which such tax is levied, and returned by the assessor of the township in which such city is located, and equalized by the county board of review and state board of tax commissioners, he shall enter the amount of the tax, including delinquent tax chargeable to each person against the name of such person, as it appears upon the tax duplicate of the county for such city for the current year, in the column in which are entered the current and delinquent state, county, township, road and other taxes with which such person is charged. The aggregate of all taxes with which such person is chargeable, including state, county, township, road and other taxes, shall be carried out and set down opposite the name of such person in a column of totals, and in the recapitulation of the duplicate now required by law to be made by him, he shall set down the aggregate of all taxes contained in the duplicate for such city, said duplicate shall thereupon be delivered to the treasurer of the county as now provided by law.

959. Notice by county treasurer.—132. The county treasurer shall include in the notice now required by law to be given by him of the receipt of the tax duplicate for collection a statement of the amount of tax charged in such city, for city and school purposes, upon each one hundred dollars ($100) valuation of the taxable property, and also for such purposes upon each taxable poll, and such notice shall be the only notice required to be given of the fact of such taxes being in his hands for collection.

960. Duty of county treasurer—Delinquency.—133. It shall be

the duty of the county treasurer to receive and collect all taxes shown upon the duplicate of such city, for city and school purposes, the same as he is required by law to receive and collect the taxes shown thereon for state, county, township, road and other purposes, if one-half of the amount of such city and school taxes for the current year charged to any person, and the entire amount of delinquent school and city taxes, penalty, interest and costs charged to such person and unpaid, be paid on or before the third Monday of April, the payment of the other half of such taxes for the current year may be postponed to the first Monday of November following, but if on or before the third Monday of April payment be not made of that portion of the above specified amount, the entire amount of unpaid city and school taxes charged upon the duplicate to such person shall become due and be returned delinquent and collected as such, with like penalty, interests and costs as is provided where the first installment of state, county, township and road taxes are not paid by the time prescribed. If such taxes remain delinquent after the first Monday of November following, there shall be an additional penalty of six (6) per centum added to all such taxes that become delinquent at the preceding April and November settlements, but a penalty of ten (10) per centum only shall be added to the current delinquency occurring on the first Monday of November. After payment by any person of taxes charged to him, the treasurer shall give to such person a receipt in the form prescribed by law, which shall include all taxes paid by him, the city and school, as well as other taxes. Any partial payment of either current or delinquent taxes shall be prorated among the different taxes charged to the person paying in proportion to the amount of such taxes respectively.

961. Failure to pay installment—Effect.—134. If either installment, or any part thereof, of such taxes for such city and school purposes remain unpaid after expiration of the time limited for payment thereof, the county treasurer shall have the same power and be under a like duty to collect the entire amount of such taxes remaining unpaid by levy and sale of personal property and by suit as is granted to and imposed upon him for the collection of delinquent state, county, township, road and other taxes.

962. Settlement by county treasurer.—135. The county treasurer shall at the time of making his annual settlement with the county auditor, on the third Monday of April, as now required by law, make settlement with said auditor for the amount with which said treasurer is to stand charged on account of city and school taxes, in the manner prescribed for his settlement of state, county, township, road and other taxes, and for all of such city and school taxes appearing upon the tax duplicate, and not shown upon such settlement to be uncollected, said treasurer shall be held liable as having been collected and received by him. Immediately upon such settlement being made, the auditor shall make out statements in duplicate, showing in one the aggregate amounts separately of all current and delinquent taxes, for

city purposes, including with the delinquent taxes, the penalties and interest thereon, which appear upon the tax duplicate for said city, the amount of each class of such taxes, penalty and interest that remains uncollected at the time of such settlement, and the amount of each class, including penalty and interest, that has been collected by such treasurer; in the other statement shall be shown, in the same manner, the aggregate amounts of current delinquent taxes, including penalty and interest, for school purposes, that appear upon the duplicate for such city; the amount thereof that has been collected by such treasurer, and the amount thereof that remains uncollected at the time of settlement. Said settlements shall be signed and sworn to by said treasurer, and certified by the county auditor, under the seal of the board of commissioners, to be corrected abstracts of the treasurer's settlement on account of such city and school taxes. One copy of the first mentioned statement shall be delivered by the county auditor to the department of finance of such city, who shall thereupon charge the amount shown thereby to have been collected to such county treasurer as cash in his hands.

963. Payment of school taxes.—136. The county treasurer, immediately upon such settlement being made, shall pay over to the treasurer of the board of school trustees of such city, the full amount for which he is liable as shown by such settlement on account of school taxes, interest and penalty collected by him, for which he shall take a receipt from such treasurer, which receipt he shall deliver to the secretary of said board of school trustees, who shall give him a quietus therefor and credit him with the amount thereof, and charge such amount to the treasurer of the board.

964. Delinquent list.—137. The county auditor shall include in the delinquent list required by law to be made by him after the annual settlement with the treasurer on the third Monday of April the amount of all city and school taxes shown by such settlement to be uncollected, and carry the same out and include it in the total of all taxes due from the person liable therefor as shown in said list, and such list when delivered to the county treasurer, shall empower him, and it shall be his duty, to collect all delinquent city and school taxes embraced therein, in the same manner, and with the same penalty and interest, as the state, county, township, road and other taxes contained therein.

965. Settlement for delinquent taxes.—138. On the first Monday of each year the county treasurer shall make settlement with the county auditor for the amount of delinquent city and school taxes, penalty and interest shown upon said delinquent list in the same manner as he is now required by law to make in such settlement for delinquent state, county, township, road and other taxes collected by him, and upon such settlement, statements signed, sworn and certified to by said treasurer and auditor. In the same manner prescribed in section 135 of this act shall be prepared in duplicate, showing in one the aggregate amount of city delinquent taxes, penalty and inter-

est which had been contained in such delinquent list, the amount thereof collected and the amount still remaining uncollected; and in the other, the same showings shall be made with reference to delinquent school tax, interest and penalty, a copy of which statements shall be transmitted to the department of finance as required with reference to the statements mentioned in section 135.

966. Payment of school delinquency.—139. The county treasurer shall immediately thereafter pay to the treasurer of the board of school trustees of such city the full amount of delinquent school taxes, interest and penalty, shown by such statement to have been collected, and shall take a receipt therefor, which he shall deliver to the board of school trustees, who shall give him a quietus therefor, and thereupon charge the treasurer of the board with amount shown by such receipt to have been received by him.

967. Delinquent list—Duty of auditor.—140. The county auditor, in making out the list of lands and lots in such city returned and remaining delinquent for state, county, township, road and other taxes which he is required by law to make between the first Monday of November and the first day of January in each year, shall enter therein against the name of each person remaining delinquent on account of state, county, township, road and other taxes for the city and school purposes for which said lands and lots are liable, including taxes on poll and personalty, and adding interest and a penalty of ten (10) per centum thereon, and also the amount of all taxes for city and school purposes assessed for the current year, for which said lands or lots are liable, including taxes on poll and personalty, which said taxes shall be carried out with the taxes for state, county, township, road and other purposes, into one total.

968. Sale of lands and lots.—141. Payment of such delinquent and current city and school taxes, with interest, penalty and costs, shall be enforced by sale of the lands and lots liable therefor, or so much thereof as may be necessary, which sale shall be made by the county treasurer in the same manner, at the same time and place, and upon the same notice as is prescribed by law for the sale of lands and lots for the payment of delinquent state, county, township, road and other taxes, the property to be offered for sale and sold for the payment of all taxes of every kind for which the same is liable, with interest, penalty and costs thereon, as one entire sum, and not separately, for said city and school taxes. Nor shall notice of the sale be given separately for the city and school taxes, but it shall be stated in the notice required to be given of the sale of the lands and lots for state, county, township, road and other taxes that the sale thereof will also be for the payment of the city and school taxes, which shall be the only notice required to be given.

969. Payment of bids—Enforcement.—142. Payment of the bid upon the sale of any such lands and lots, shall be enforced, so far as it relates to city and school taxes, by the same officer, and in the same manner, and with the same penalty and costs, as is provided by

law for the enforcement of the payment of a bid made upon the sale of lands and lots for state, county, township, road and other taxes alone. The guaranty required by law to be indorsed by the county treasurer upon each certificate given by him upon a purchase of lands and lots for state, county, township, road and other taxes, shall in every case where such sale is made for city and school taxes, also apply to and embrace the amount of city and school taxes for which sale was made; and the holder of such certificate shall have the same remedy upon such guaranty as to the city and school taxes embraced therein that he has as to state, county, township, road and other taxes to which the same relates.

970. Provisions of law applicable.—143. All provisions of law in reference to the certificate to be issued to a purchaser of lands and lots upon sale for state, county, township, road and other taxes; the effect of such sale and the rights of the purchaser; redemption therefrom; the making of deeds upon failure of redemption, and as to the force and effect of such deeds; for the quieting of titles acquired thereunder; for transferring to the purchaser the original lien for the taxes for which the sale was made, and subsequent taxes paid; and for the enforcement of such lien by judicial proceedings, when the purchaser fails to acquire a valid title by virtue of the purchase; and as to the interest and penalties to be collected upon redemption from such sales before deed is made, or upon judicial proceedings to quiet the title or enforce the lien of the purchaser; and all other provisions of law relating to levying, assessing, collecting and accounting for state, county, township, road and other taxes, shall, so far as the same are applicable, apply with like force and effect in case of city and school taxes in cities of the class referred to in this act.

971. Salary of county auditor.—144. The county auditor, for all services required to be performed by him under this act, shall receive an annual salary of three hundred dollars ($300) to be paid quarterly out of the funds of the city, upon allowance by the common council thereof. The county treasurer, for all services required to be performed by him under this act, shall receive an annual salary not exceeding five hundred dollars ($500) to be fixed by an ordinance of the council to be paid quarterly out of the funds of the city upon allowance by the common council thereof. He shall receive no percentage for receiving, collecting or disbursing any of the funds of such city, whether derived from taxes, current or delinquent, or from special assessments, taxes, licenses, or other source: *Provided*, That the common council may, by ordinance, allow him a certain percentage, to be fixed in the ordinance, for collecting delinquent taxes.

DEPARTMENT OF HEALTH AND CHARITIES.

972. Board of health and charities—Appointment—Salary—Duties.—145. The department of health and charities shall be under the control of three (3) commissioners, who shall be practicing phy-

sicians to be appointed by the mayor, as hereinbefore provided. Said commissioners shall each receive a salary of one hundred and fifty dollars ($150) per year. Said commissioners shall have charge of all matters relating to public health and the enforcement of laws in relation thereto. Said commissioners shall elect one of their number registrar of vital statistics, who shall be secretary and executive officer of their board, and shall attend to the proper registration of births, marriages and deaths and such other statistical information as the department may require. Said registrar of vital statistics shall receive for his services the sum of one hundred dollars ($100) in addition to his salary as health commissioner. Said health commissioners shall nominate for appointment by the department of public safety, as special sanitary officers, if in their judgment they deem it necessary, skilled and competent persons for live-stock and meat inspectors and food inspectors, whose duty it shall be to inspect all live stock, meat and food offered for sale for human food in such city, and to attend the public markets and carefully watch over the same and prevent the selling or offering to sell, for human food, any and all articles unfit for use, and said commissioners are hereby authorized to require from the department of public safety special detail of policemen or firemen to execute orders of such department of public health whenever needed. Said department of public safety shall detail policemen who shall be constantly subject to the orders of such department of public health. In case of disagreement as to the number of sanitary officers required, between said two departments, or as to the number or duration of service of such details of firemen and policemen, the mayor shall decide the question.

973. Preparation of ordinances.—146. Said health commissioners are hereby authorized and directed to prepare ordinances for the protection of public health, for securing the proper registration of births, marriages and deaths, and such other statistical information as the department may require, with penalties for their violation; for the removal and burial of the dead, and the destruction or fumigation of infected property or premises; for the registration of plumbers and the inspection of plumbing and house drainage in all buildings, both public and private, erected after the passage of this act, and in all buildings, both public and private, erected prior thereto, wherein changes in or additions to the plumbing or drainage are to be made; for the appointment of an inspector of plumbing and house drainage, who shall be a practical plumber, who shall be required to pass an examination as to his qualifications by a board of three (3) practical plumbers doing business and residing in such city, said board to be selected by the health commissioners of such city. Such ordinances shall be submitted to the council for passage as other ordinances.

974. Powers of officers and boards—Mode of exercise—Laws and ordinances.—147. Wherever there is a grant of authority or power, conferred by this act upon any officer or board created by the provisions hereof, and no method is provided herein for the exercise of

such authority or power and a method for the exercise of such authority or power is necessary to be provided by law to make such grant of authority or power effectual; and a method for the exercise of such or similar authority or power is provided by any other law of this state in relation to the government of cities generally but not of a particular class, then such other law, so far as the same provides a method for the exercise of an authority or power herein conferred, may be followed as fully as if incorporated in and made part of the provisions of this act. And, wherever there is a grant of authority or power conferred by this act and no method is provided by this act or any other general law as herein referred to, for the exercise of such authority or power, the common council may by ordinance provide such method.

975. Laws repealed.—148. All laws and parts of laws in conflict with any of the provisions of this act are hereby repealed on and after the first day of July, 1899, in so far as they relate to cities of the class referred to in this act and are in conflict with its provisions.

976. Words and phrases construed.—149. Wherever the terms "police judge" or "judge of the police court" are used in this act the same shall be construed to mean and refer to the judge of the city court of such city; and wherever the term "police court" is used it shall be construed to mean the city court of such city. Wherever the term "treasurer" or "city treasurer" is used in this act the same shall be construed to mean and refer to the person or officer designated by this act to perform the duties of treasurer of said city for the time being. Wherever the title "comptroller" is used in this act the same shall be construed to mean and refer to the person or officer designated by this act to perform the duties of comptroller of such city for the time being.

977. School laws not repealed.—150. Nothing contained in this act shall be construed to affect or repeal by implication the general laws of this state now and heretofore in force in relation to the government and control of the common school system of such city, but such laws shall remain and continue to be in force as to such city, except where provision is otherwise expressly made by this act.

CHAPTER 6.

CITIES AND TOWNS.

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[R. S. 1852, p. 373. In force June 10, 1852.]

978. Qualifications for office.—1. No property qualification shall be necessary to render any citizen eligible to hold any office of any municipal incorporation in the state. R. S. 1894, § 4191.

979. Qualifications of voters.—2. In all municipal elections under town or city charters in this state, no other qualifications shall here-

after be required of any voter than such as are made necessary under the constitution of the state, except that the voter shall reside in the ward or district where he may offer to vote. R. S. 1894, § 4192.

[Acts 1889, p. 157. In force May 10, 1889.]

980. Precincts—Number of voters.—1. That the county commissioners of each county in this state shall, at their first session after the taking effect of this act, divide the townships of their respective counties into election precincts, and establish the boundaries of the same. Such board of commissioners shall designate at least one place of holding elections in each township, and every township in which only one place of holding elections is designated shall constitute a precinct. There shall be but one voting place in a precinct. Each precinct shall contain, as nearly as practicable, two hundred electors, based on the number of votes cast at the last election for presidential electors; but no precinct shall contain more than two hundred and fifty electors. If at any election hereafter two hundred and fifty or more votes shall be cast at any voting place, it shall be the duty of the inspector in such precinct to report the same to the board of county commissioners, who shall, at their next regular meeting, divide such precinct as equally as possible so that the new precincts formed thereof shall each contain two hundred electors, as nearly as practicable; but no precinct shall contain more than two hundred and fifty electors, and shall report such division to the clerk of the circuit court of such county, and to the governor of the state, together with the estimated number of votes in each of the new precincts. If such board shall fail to act as herein directed, any qualified voter of the county may apply for a writ of mandamus to compel a performance of this duty. R. S. 1894, § 6198.

981. Boundaries of precinct—Change.—2. The board of commissioners of any county may change the boundaries of any precinct within such county, or divide any precinct into two or more precincts, or consolidate two or more precincts into one, or change any place of holding elections whenever public convenience or the public good may require it: *Provided*, That no such change, division or consolidation shall be made after the June term of such commissioners' court next preceding an election: *And, provided further*, That no such change, division or consolidation shall be valid without giving due notice, at least one month before any election, by one publication in two newspapers published in said county, representing the two political parties which cast the highest number of votes in the state at the last general election, and by posters put up in four of the most public places in each precinct: *And, provided, further*, That no precinct shall be enlarged so as to contain more than two hundred and fifty electors. [As amended, Acts 1891, p. 124. In force June 3, 1891.] R. S. 1894, § 6199.

Change of boundaries.—If a change of boundaries of a township after the June term

requires a change of precincts to be made, the commissioners may make the same. Duncan v. Shenk, 109 Ind. 26.

982. Town and city elections.—65. Where any town or city shall hold an election at any time other than a time of a general election, such election shall be held in conformity with the provisions of this act, except the duties herein required of the county clerk shall be performed by the town or city clerk; the duties herein required of the board of county commissioners shall be performed by the town trustees or city council; the duties of the county sheriff shall be performed by the town marshal or chief of police, and the rights of nomination of election officers by political parties shall be exercised by the chairman of the town or city committees of such parties, if any such there be. Town and city officers are hereby required to perform the various duties herein prescribed for the county officers in whose stead they act, subject to the same penalties and provisions herein prescribed as to such county officers. The town and city boards of election commissioners shall provide the necessary stamps and ink pads for such elections, and shall cause as many classes of ballots to be printed as there are wards or districts entitled to separate officers, ballots of each class having printed uniformly on the back of the same, the name or number of the ward or district in which it is to be used, and containing the names of all lawfully nominated candidates for all officers that the voters of such ward or district are entitled to vote for at such election. The commissioners of county and trustees of townships in which such towns or cities are situated shall furnish what is necessary for use in such elections of the election furniture in their custody: *Provided*, that such town or city shall pay the expense of moving such furniture to and from the polling places, and also for any damage to, or loss of such furniture. The boards of town or city election commissioners shall perform all the duties in providing and preparing polling places that are required of county commissioners in county elections, subject to the same provisions and penalties. [As amended, Acts 1891, p. 134. In force June 3, 1891.] R. S. 1894, § 6261.

See *ante*, § 61, *et seq.*; also general election law, R. S. 1894, ch. 60 (§§ 6190-6339), Burns' Supp. 1897, ch. 60 (§ 6198, *et seq.*), and Acts 1899, pp. 60, 365, 381, 539, 540.

Municipal elections—Contests—Right of appeal.—Section 6323, R. S. 1894, providing that all contests for municipal offices shall be tried in the manner provided by law for the contest of county and township offices, is construed with section 644, R. S. 1894, providing generally for appeals from the circuit court to the supreme court, and an appeal will lie from the circuit court from contested municipal elections. Weakley v. Wolf, 148 Ind. 208.

[Acts 1899, p. 365. In force March 2, 1899.]

983. Authorizing use of voting machines.—1. That at all state, county and city, town and township elections, hereafter held in the state of Indiana, ballots or votes may be cast, registered, recorded and counted by means of voting machines, as hereinafter provided.

984. Authorizing the purchase of voting machines.—2. Hereafter

the board of county commissioners of any county, or the common council of any city, or the board of trustees of any incorporated town in the state of Indiana may, by a majority vote, authorize, purchase and order the use of voting machines in any one or more voting precincts within said county, city or town, until otherwise ordered by said board of county commissioners, common council or board of trustees: *Provided*, That, before such purchase or ordering of any voting machine they shall thoroughly test the same by every means within their knowledge, and shall satisfy themselves that said machines are thoroughly reliable and correct in their operation, easily understood and operated, and can not be fraudulently manipulated, and that the secrecy of the ballot shall be unquestionably maintained.

985. Capacity of machines.—3. Said voting machines shall have the capacity to contain the tickets of seven political parties, with the names of candidates thereon, and said machines shall be constructed of such materials and in such manner as that the votes cast by means thereof shall be registered; and so as that each may readily and understandingly and within the period of not more than three minutes, cast his vote for all the candidates of his choice, and the secrecy of his vote may be secured, and said machines shall be provided with all reasonable and practicable safeguards for the prevention of frauds in the casting, registering, recording and counting of the votes cast.

986. Existing election laws continued in force.—4. The present law on the subject of chutes, booths and rooms for the holding of elections is continued in force, except there shall be only one machine booth provided, instead of three, as now required. Before the voting begins, the inspector and judges shall examine the machine to see that the counters or registers are properly set, and the said machine shall be locked with two locks of different kinds and combinations, so that the key of one will not unlock the other, and one key thereto shall be retained by the inspector and the other key delivered to the judge, of politics opposite to that of the inspector, and the same shall not be again opened until the polls are closed and the board is ready to immediately ascertain the number of votes registered or counted for the candidates.

987. Time limit for voting.—5. No person shall remain in the voting machine booth longer than three minutes, and if he shall refuse to leave the said machine after the lapse of three minutes, he shall be removed by the inspector.

988. Duties of election officers.—6. When the polls are closed, the inspector and judges holding the keys to the locks of said machine shall unlock the same and ascertain the total number of votes registered and recorded for each candidate and direct the poll clerks to enter upon [the] poll books the number of votes registered for each candidate. After the total vote for each candidate has been ascertained, and before leaving the room or voting place the inspector shall make and sign written statements of election, required by the general election laws now in force, except that such statements of the canvass need

not contain any ballots, official or defective, when the said voting machines are used. The written statements so made, after having been so signed by the board of election, shall be read in the hearing of all persons present, and ample opportunity given to compare the results so certified with the machine record exposed to public view. All provisions of the election law not inconsistent with this section shall apply with full force to all counties, townships, precincts, towns and cities adopting the use of voting machines.

989. Voting precincts.—7. The board of county commissioners of the state of Indiana, wherein voting machines are to be used, may at any regular session, term or meeting of said board, subdivide each township into voting precincts, each of such voting precincts to contain not to exceed four hundred voters as nearly as may be ascertained from the votes of the last preceding general election, and it shall be the duty of the county auditor in each county where such subdivision or redistricting has been made to publish notice of the same as now provided for and required under existing laws.

990. Care and use of machines.—8. Said county board of election commissioners shall make rules and regulations for the care, custody and use of said voting machines, but the arrangement of the room in which the election is being conducted, the duties of the election board and election officers before, during and after the election and canvassing the votes thereat, shall not be changed except as is necessary in consequence of substituting the voting machine in lieu of ballot boxes, booths, etc., and this act shall not be construed as repealing any part of the election laws now in force except as may be entirely inconsistent with the use of the voting machine. It being the purpose of this act to be supplementary to and in aid of all existing legislation on the subject thereof.

991. Use of machines in city elections.—9. In case there shall be any city election held in any county where the county commissioners have so provided voting machines, the said machines shall be delivered by the clerk of the circuit court to the mayor and city clerk of such city, who shall receipt in writing therefor, and such machines may be used in such city election under the conditions and according to the provisions of this act in so far as the same are applicable: *Provided*, That all such machines so delivered to such mayor and city clerk shall be returned to such clerk of the circuit court within five days after such election has been held. And if, during any such election, any of such machines shall be lost, broken or in any wise injured, the municipal authorities of such city shall forthwith deliver in the place thereof a new machine in all respects similar to that so lost, broken or injured.

992. Penalty for tampering with machines.—10. Any unauthorized person found in possession of any such voting machines shall be deemed guilty of a misdemeanor and fined in any sum not less than twenty-five nor more than one hundred dollars, and imprisonment in the county jail not less than ten nor more than thirty days, and any

person tampering or attempting to tamper with, disarrange, deface or impair in any manner whatsoever, or destroy any such voting machine, or the registration or record made by the same, shall be deemed guilty of a felony, and on conviction thereof shall be imprisoned in the penitentiary at hard labor for not less than three nor more than ten years.

[1861 S., p. 21. In force September 7, 1861.]

993. Prisons.—1. Any incorporated town or city shall have power to erect a prison within the limits of such town or city; and it shall be lawful to imprison therein persons convicted of offenses against the laws of such incorporation, or for offenses against the penal laws of this state, and also, persons charged with offenses punishable by indictment or presentment, temporarily, until they can be conveniently removed to the county jails; so far as the same shall be applicable, the law governing county jails shall be the law of such town or city prison, and all cases where the county jails are convenient, they may be used for town purposes until a town or city prison shall be erected. R. S. 1894, § 4194.

Expense in county jail—Liability.—A city is liable for the expense of receiving, boarding and discharging a prisoner convicted of a breach of a provision of its charter or by-laws, and confined in the county jail. Board, etc., v. Chissom, 7 Ind. 688.

994. Licenses by cities and towns.—6. No city or incorporated town shall charge any person who may obtain a license under the provisions of this act, more than the following sums for license to sell within their corporate limits: cities may charge two hundred and fifty dollars, and incorporated towns, one hundred and fifty dollars in addition to the sum provided for hereinbefore. [As amended, Acts 1889, p. 395. In force May 10, 1889.] R. S. 1894, § 7282.

See *ante*, § 124, clause 13, and § 210; also *post*, § 1200, clause 7.

For full text of laws regulating sale of intoxicating liquors, see R. S. 1894, §§ 7276-7288; General Statutes 1895; Burns' Supp. 1897, ch. 87 (§ 7276, *et seq.*).

The above act is not invalid as violating § 21, art. 4, of the state constitution. Bush v. City of Indianapolis, 120 Ind. 476; Moore v. City of Indianapolis, 120 Ind. 483.

[Acts 1899, p. 59. In force February 17, 1899.]

995. Ex-Union soldier or sailor—License to vend, hawk and peddle.—1 That any ex-Union soldier or sailor of the United States who served honorably in the military or marine service of the United States during the war of the rebellion, or any soldier or sailor of the Spanish-American war, and who holds an honorable discharge from such service issued by the proper authorities, shall be entitled to a license to vend, hawk and peddle goods, wares, fruits and merchandise in any county, city or town within this state without the payment of any fee therefor. Upon the presentation of his certificate and papers of discharge, properly executed, to the auditor of any county in this state, and proving his identity as the person named in his said certifi-

cate of honorable discharge, said auditor shall issue to such ex-soldier or sailor a license to vend, hawk and peddle goods, wares, fruits and merchandise within said county, and in all cities and towns therein situate, which license shall be free, and no fee shall be charged to the holder of such license by such auditor, nor by the authorities of any city or town in such county, nor by any other officer, but such license shall be full and complete authority to vend, hawk and peddle as aforesaid, without the payment of any sum of money, any municipal ordinance or by-law to the contrary notwithstanding.

[Acts 1875, p. 28. In force March 9, 1875.]

996. Removal of garbage, etc.—1. The common councils of the cities and the trustees of the incorporated towns of this state are empowered and authorized to pass by-laws to secure the removal of slops, garbage, the carcasses of dead animals, and other waste material from their corporate limits, and to appoint and contract for such removal, and provide that the persons appointed, or contracted with, shall have the exclusive right to remove the same, and to provide such penalties for the violation of by-laws, in accordance with the general laws for the incorporation of cities and towns, now in force, or which may hereafter be adopted. R. S. 1894, § 4195.

Garbage ordinance.—An ordinance prohibiting owners or tenants of premises from hauling away garbage from their premises, requiring them to put such garbage into receptacles convenient for removal by a public contractor, requiring such owners or tenants to pay a certain specified amount per pound, but not prohibiting the destruction of such garbage on the premises, is valid, and authorized by the provisions of a statute empowering the common council to enact ordinances "to prevent the deposit of any unwholesome substances, either on private or public property, to compel its removal to designated points, and to require slops, garbage, ashes, waste or other material to be removed to designated points, or to require occupants of premises to place them conveniently for removal." Walker v. Jameson, 140 Ind. 591.

997. Local board of health—Secretary.—8. The trustees of each town, the mayor and common council of each incorporated city, except where a regularly constituted board of health, by ordinance of such city exists, or may hereafter be created, and the board of commissioners of each county shall constitute a board of health *ex officio*, for each town, city, and county respectively of the state, whose duty it shall be to protect the public health by the removal of causes of diseases, when known, and in all cases to take prompt action to arrest the spread of contagious diseases, to abate and remove nuisances, dangerous to public health, and perform such other duties, as may from time to time be required of them by the state board of health, pertaining to the health of the people. They shall annually at their first meeting in December, elect a secretary, who shall be the executive officer of the board who shall serve as such health officer for one year, from the first of January next ensuing, his election. He shall receive such compensation from the town, city, or county treasury respectively as the board electing him may determine. The records

of the county board of health shall be kept at the county seat. R. S. 1894, § 6718.

See R. S. 1894, §§ 6711–6725.

[Acts 1861 S., p. 20. In force May 10, 1861.]

998. Security for arms.—1. Whenever the mayor and common council of any incorporated city or the trustees of any town in the state of Indiana shall obtain from the state authorities arms of any kind, to be used by the military organizations of such cities or towns; or whenever any volunteer military organization shall obtain arms from the state,—it shall be lawful for the mayor and common council of such city or the trustees of such town to cause to be executed and delivered to the governor of the state of Indiana, a bond, conditioned, according to law, for the safety and delivery of such arms. R. S. 1894, § 4196.

999. Distribution of arms.—2. The governor may, in his discretion, distribute public arms, as herein provided, to any incorporated town or city, notwithstanding any other law in conflict herewith. R. S. 1894, § 4197.

[Acts 1865 S., p. 104. In force December 20, 1865.]

1000. Planting shade trees.—1. The incorporated cities and incorporated towns of this state are hereby invested with full power to compel the owners of lots and parts of lots bordering on any street, alley, public square or common of said cities and towns, to plant and maintain shade trees along said streets, alleys, public square or common, under the same regulations and in the same manner in which the grading and paving of streets and sidewalks are now enforced. When such owners shall petition the common council for the planting and maintaining of any particular kind of tree, said council shall, in making the order for the same, designate the kind of tree named in said petition; but when the kind of tree shall not be designated in said petition, or where shade trees are required to be planted and maintained on order of the council without petition, then the council, in making the proper order, shall designate therein the kind of tree to be planted and maintained. The common council are hereby invested with full power to pass by-laws and ordinances for the protection and preservation of trees established in pursuance of this act, and to designate the distances at which shade trees shall be established, and the kind of boxing or other protection for the same, the cost of which shall be assessed and collected in the same manner in which the cost of establishing and maintaining shade trees is assessed and collected. R. S. 1894, § 4198.

[Acts 1881, p. 12. In force March 7, 1881.]

1001. Issuance of funding bonds.—1. Any city or town in this state, having a voting population of less than sixteen thousand, as shown by the votes cast for governor at the last preceding election,

and having an indebtedness evidenced by bonds, notes, or other obligations heretofore issued or negotiated by such city or town, may for the purpose of funding such indebtedness, or any part thereof, and reducing the rate of interest thereon, and canceling so much thereof as may be due or shall hereafter become due, upon the vote of two-thirds of the members of the common council of such city or the board of trustees of such town, issue its bonds, with interest-coupons attached, for an amount not exceeding, in the aggregate, the whole amount of the indebtedness of such city or town, which bonds may be of any denomination not less than fifty dollars nor more than one thousand dollars, and shall be payable at any place, after two years, in equal annual installments, not exceeding in all the period of fifteen years, and shall bear any rate of interest not exceeding six per cent. per annum, payable semi-annually; and such city or town may negotiate such bonds at any market or place at not less than par. R. S 1894, § 4199.

See *ante*, §§ 39, 143, 144 and notes.

May issue funding bonds—Constitutional limitation.—The constitutional provision limiting the power of cities to create indebtedness, does not prohibit cities from issuing bonds to fund the indebtedness and interest thereon that existed at the time of the adoption of such provision. Powell v. City of Madison, 107 Ind. 106, 114; City of Logansport v. Dykeman, 116 Ind. 15, 22; City of Laporte v. Gamewell, etc., Co., 146 Ind. 466, 474; Ætna, etc., Co. v. Lyon county, 44 Fed. Rep. 329; Coffin v. City of Indianapolis, 59 Fed. Rep. 221; Myers v. City of Jeffersonville, 145 Ind. 431; Hainer Munic. Securities, § 297.

The only effect which the adoption of article 13 of the state constitution, § 220, R. S. 1894, had upon §§ 4199, 4200, R. S. 1894, which provide for the funding of the indebtedness of cities and towns, was to limit their application to debts contracted prior to March 14, 1881, and to such as have been since incurred, not in excess of the two per centum limit upon the value of their taxable property. Powell v. City of Madison, 107 Ind. 106, 114.

1002. Sinking fund and interest.—2. The common council of such city or the board of trustees of such town shall add to the tax duplicate thereof annually a levy sufficient to pay the yearly interest on said bonds and to provide a sinking fund for the liquidation of the principal thereof as they become due, which sinking fund, together with all interest, increase or profit thereon, shall be applied to the payment of said bonds, and to no other purpose: *Provided, however*, That in all cases where bonds have heretofore or may be hereafter issued for the purposes contemplated by said act there shall remain any surplus after the payment of all the principal and interest of said bonds, said surplus may, by a vote of two-thirds of the members of the common council of such city or the board of trustees of such town, be paid over to any other fund belonging to or controlled by such city or town as such common council or board of trustees may by such vote direct, and such surplus may then be used in the same manner as if originally collected for the fund to which it may be paid over as aforesaid. [As amended, Acts 1893, p. 373. In force March 6, 1893.] R. S. 1894, § 4200.

[Acts 1893, p. 136. In force February 24, 1893.]

1003. Funding bonds.—1. That cities and towns in this state, being or becoming indebted to an amount beyond the ability of the current levies of taxes to meet are hereby authorized for the purpose of funding such indebtedness, or any part thereof, to issue its bonds, with interest coupons attached, for an amount not exceeding in the aggregate the whole amount of the indebtedness of such city or town, deducting current levies, and to sell the same with which to raise money to pay off such indebtedness, which bonds may be in denominations not less than fifty dollars nor more than one thousand dollars, and shall be payable at any place in equal installments, not exceeding in all, the period of fifteen years, and shall bear any rate of interest not exceeding six per cent. per annum, payable semi-annually, and may be negotiated at any market or place at not less than par. The amount of such bonds in no event to exceed the constitutional limit of indebtedness. R. S. 1894, § 4201.

See *ante*, §§ 39, 143, 144 and notes.

1004. Taxes to pay interest and principal.—2. The common council of such city or the board of trustees of such town shall add to the tax duplicate thereof annually, a levy sufficient to pay the yearly interest on said bonds, and to provide a fund for the liquidation of the principal thereof as they become due, and it shall be unlawful for the common council or the board of trustees to apply the funds arising from such levy to any other purpose. R. S. 1894, § 4202.

[Acts 1895, p. 87. In force March 2, 1895.]

1005. Refunding bonds of cities and towns.—1. That any city or town, in this state, being indebted, or hereafter becoming indebted, which indebtedness is evidenced by bonds, notes or other obligations heretofore or hereafter issued, or negotiated by such city or town, may for the purpose of funding or refunding such indebtedness, or any part thereof, reducing the rate of interest thereon, extending the time of payment thereof, and cancelling so much thereof, as may be due, or which shall hereafter become due, upon the vote of two-thirds of the members of the common council of such city, or board of trustees of such town, issue its bonds with interest coupons attached, for an amount not exceeding in the aggregate, the whole amount of the indebtedness of such city or town, which bonds may be of any denomination, not less than fifty dollars, nor more than one thousand dollars, and shall be payable at any place named therein, and at a time not later than twenty-five years from the date thereof, and shall bear any rate of interest, not exceeding six per centum per annum, payable annually or semi-annually, and such city or town may negotiate such bonds at any market or place, at not less than par. Burns' Supp 1897, § 4202*a*.

See *ante*, §§ 39, 143, 144, 1001, *et seq.* and notes.

1006. Tax levy to pay interest and principal.—2. The common council of such city, or board of trustees of such town, shall add to the tax duplicate thereof, annually a levy, sufficient to pay the yearly interest on said bonds, and may provide a sinking fund for the liquidation of the principal thereof, when it shall become due, which sinking fund, together with the interest, increase or profit thereon, shall be applied to the payment of said bonds, and to no other purpose: *Provided*, This act shall not authorize the issuance of bonds for the purpose of funding, or [nor] to levy any tax to pay any indebtedness of such city or town which has been held to be illegal by any court of competent jurisdiction, or shall this act be construed to have the effect of liquidating [legalizing] any illegal debt of, or any bonds illegally issued by such city or town. Burns' Supp. 1897, § 4202*b*.

Sinking fund.—See *ante*, §§ 146, 201, 203, 1002, *et seq.*, and notes.

1007. Interest coupons good for taxes.—3. The interest coupons attached to any bonds issued by authority of this act, may by order of the common council, or board of trustees, when due, be made receivable for taxes levied or assessed in any such city or town, or other municipal corporation for the payment of such interest, and when so ordered and so expressed upon the face of the coupons, they shall be receivable in payment for any taxes thereof [thereafter] levied or assessed in the city, town or other municipal corporation issuing the same for the payment of said interest. Burns' Supp. 1897, § 4202*c*.

The above act re-enacts but enlarges the provisions of act approved February 15, 1887 (R. S. 1894, §§ 4204–4206), and said former act, though not expressly repealed, is omitted.

[Acts 1883, p. 101. In force June 5, 1883.]

1008. Sinking fund—Investment.—1. That the municipal corporations of this state shall have the power and authority to temporarily invest their sinking fund, or any other specific fund held for any purposes whatever, in the bonds of the government of the United States, the state of Indiana, or any of the counties of Indiana, during such time as the said sinking funds can not be advantageously used in taking up or paying off the city bonds or indebtedness, or said other specific fund can not be or is not used for the purpose for which it is intended. R. S. 1894, § 4203.

[Acts 1855, p. 130. In force August 17, 1855.]

1009. Notices.—5. All notices now required by law to be given by the trustees of any incorporated town or city, may hereafter be given by written notices, to be posted up in three of the most public places within such incorporated town or city. R. S. 1894, § 4207.

[Acts 1899, p. 80. In force April 27, 1899.]

1010. Allowance of claims and issue of warrants.—1. That it shall be unlawful for the board of trustees of any incorporated town, or the

common council of any incorporated city in the state, or any member thereof, to make any allowance or to allow any claim against said town or city, or to order the issue of any town or city warrant or order for the payment of money, except at a regular or special session of said board of trustees or common council, and it shall be unlawful for any clerk of any city or town to draw or issue any town or city order or warrant to any person, except that the same has been ordered and allowed as in this act provided.

1011. Claims verified.—2. No claim shall be allowed by said board of trustees of an incorporated town, or common council of an incorporated city, unless such claim, setting forth the particular items and amounts claimed, and duly verified by claimant or by some person having knowledge of the facts on his behalf, shall have been filed in the office of the clerk of said town or city, by said clerk placed on the claim docket more than five days before the holdings of such session of the board of trustees or common council.

1012. Claim docket kept by clerk.—3. The clerk of said town or city, shall at the expense of said town or city, procure a suitable book to be used as a claim docket. He shall when a claim is filed as herein provided enter the same on said docket, stating the name of the claimant, the amount claimed, and in general terms for what claimed and the date of the filing thereof. And when a claim is acted upon, said clerk shall briefly upon said docket state the action of the board of trustees, or city council. Said docket shall at all times be open to the inspection of any and all citizens.

1013. Oaths and affirmations by clerk.—4. The clerks of incorporated cities and towns are hereby authorized to administer all oaths and affirmations by this act required, for which they shall charge no fee.

1014. Penalty.—5. Any clerk of an incorporated town, or clerk of an incorporated city, or any member of a board of trustees of an incorporated town, or any member of a city council, who shall violate any of the provisions of this act, shall, upon conviction thereof, be fined not less than fifty dollars for such offense.

1015. Act not to apply to cities of more than 35,000.—6. The provisions of this act shall not apply to cities having a population of 35,000 or more according to the census of 1890.

[Acts 1899, p. 515. In force March 6, 1899.]

1016. Payment of unskilled labor—Minimum wage.—1. That from and after the passage of this act, unskilled labor employed upon any public work of the state, counties, cities and towns shall receive not less than fifteen cents an hour for said labor.

ARTICLE 2.—ANNEXATION—BOUNDARIES.

SEC.
1017. Union of cities and towns.
1018. Terms and conditions.
1019. Agreement made public.
SEC.
1020. Election.
1021. Tickets.
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SEC.
1023. Name.
1024. Name.
1025. Effect of union.
1026. Property and debts.
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1037. Disannexing territory.
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1040. Survey and plat.
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1042. To be kept by the city clerk.
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1044. Additions to cities and towns—Plats.
1045. Penalty.
1046. Plats—Submission for approval—Recording—Penalty.
1047. Legalized plats.
1048. Plats of additions to cities and towns legalized.

[Acts 1857, p. 22. In force February 16, 1857.]

1017. Union of cities and towns.—1. Where an incorporated town and an incorporated city adjoin each other, they may be consolidated or united, or the town annexed to the city, provided a majority of the qualified voters of the town and a majority of the qualified voters of the city shall vote in favor thereof, at elections to be held as hereinafter provided. R. S. 1894, § 4208.

See *ante*, § 253, *et seq.*, and *post*, § 1280, *et seq.*

Union of city and town—Election—Vote required.—This act, as to the number of votes requisite for a consolidation, only contemplates a majority of the persons voting upon the proposition for union, and the fact that the day fixed for the special election upon the question of union, is a day upon which the general municipal election is required by the law to be held, and that the votes cast in favor of such proposition do not constitute a majority of the votes cast for municipal offices, does not affect the result. City of South Bend v. Lewis, 138 Ind. 512.

1018. Terms and conditions.—2. The common council of the city and the president and trustees of the town shall first agree on the terms and conditions upon which such union, consolidation, or annexation shall take place, and also upon a day when an election shall be held for the people of such town and city to vote upon the question of union, consolidation, or annexation, upon the terms specified in such agreement. R. S. 1894, § 4209.

1019. Agreement made public.—3. Such agreement shall be made public at least three weeks before the time agreed upon for such election, by publishing the same at least three times in each newspaper printed and published in the county where such town and city are situated, and by posting printed hand-bills, containing said agreement, in three of the most public places in each ward of such town and city. R. S. 1894, § 4210.

1020. Election.—4. The election above provided for shall be held at the time agreed on, as above provided, and at the places where other city and town elections are usually held in such city and town respec-

tively, and be governed by the laws and regulations governing other city and town elections in such city and town respectively. R. S. 1894, § 4211.

1021. Tickets.—5. Those who vote in favor of union or annexation according to the agreement aforesaid shall have on their tickets the word "union," and those who vote against it shall have on their tickets the words "no union," or equivalent words. R. S. 1894, § 4212.

1022. Report of election—Annexation.—6. The inspectors and judges of the election shall report to the common council and president and trustees, respectively, the result of such election. And the report of the inspectors and judges of the town election shall be entered on the records of the president and trustees, and a certified copy thereof delivered to the clerk of the city; and the report of the inspectors and judges of the city election shall be entered on the records of the common council, and a certified copy thereof delivered to the clerk of the town. And if a majority of the votes given in the town as well as a majority of the votes given in the city are in favor of union or annexation, then the president and trustees of the common council shall meet at the council chamber of the city council, and, by resolution, declare that the town is annexed to the city or the two united, as the case may be, according to the agreement aforesaid. And such resolution shall be entered on the records of the city council, and such record, and certified copies thereof, shall be conclusive evidence of such union or annexation, and a copy of such resolution shall also be recorded in the recorder's office of the county where such city is situated, and copies of such record shall be good evidence in all courts. R. S. 1894, § 4213.

1023. Name.—7. If the agreement aforesaid should be to annex the town to the city, and the election and resolution aforesaid shall be in favor thereof, then the town shall be deemed a part of the city to all intents and purposes, and the city shall continue its corporate name and existence. R. S. 1894, § 4214.

1024. Name.—8. If the agreement aforesaid be to unite or consolidate, then the agreement aforesaid shall contain also a stipulation as to the name of the consolidated or united town and city. R. S. 1894, § 4215.

1025. Effect of union.—9. When a town and city shall be consolidated or united as aforesaid, they shall constitute one city, by the corporate name agreed on as aforesaid. R. S. 1894, § 4216.

1026. Property and debts.—10. In case of annexation, as aforesaid, the city shall be liable for all debts, contracts and liabilities of the town, and shall be entitled to all the rights, credits, moneys, effects and property of the town; and may sue and be sued in relation thereto in the name of the city. And in case of a union or consolidation, the new city shall be liable for all debts, contracts and liabilities of the town and city consolidated, and be entitled to all the rights, credits, moneys, effects and property of the town and city consolidated

or united, and may sue and be sued in relation thereto in the name agreed on and adopted for the consolidated city as aforesaid. And in case of either annexation or consolidation, all actions pending may be prosecuted to final judgment and execution, and all judgments heretofore rendered may be executed and enforced without any change of the parties and without any change of the name of plaintiff or defendant. R. S. 1894, § 4217.

[Acts 1893, p. 42. In force February 18, 1893.]

1027. Annexing territory in adjoining counties.—1. That wherever a majority of the resident land or lot owners in a county adjacent to the county in which a town or city is situated desires to be annexed to said town or city in said adjoining county for municipal purposes, they may do so by filing a petition before the board of trustees of said town or the common council of said city, praying to be annexed to and made a part of said town or city, for municipal purposes only. R. S. 1894, § 4218.

1028. Survey and plat.—2. It shall be the duty of said land or lot owners, prior to making application for annexation, to survey, or cause to be surveyed, platted and numbered by a competent engineer, the tract or tracts of lands or lots to be annexed, and have the same recorded in the recorder's office of the county in which said lands or lots are situated, and file said plat with the board of trustees of said town or common council of said city at the time of filing said petition. R. S. 1894, § 4219.

1029. Notice of petition.—3. Said petitioner or petitioners shall give notice ten (10) days prior to the filing of said petition, by posting in three (3) public places, on or near the lands or lots to be annexed, of his or their intention to file said petition with the said board of trustees or common council. R. S. 1894, § 4220.

1030. Action of trustees or council.—4. Upon the presentation of such petition, the board of trustees or common council of such town or city may, by ordinance, declare said platted lands or lots a part of said town or city for municipal purposes only. R. S. 1894, § 4221.

1031. Effect of annexation.—5. All persons owning property or residing in said amended territory shall be subject to all the ordinances and by-laws of said town or city. R. S. 1894, § 4222.

1032. Jurisdiction—Taxes.—6. The board of trustees, common council and all other officers of said town or city shall have full and complete jurisdiction, and are hereby vested with full authority to collect taxes for municipal purposes, make arrests and enforce all the ordinances that may now be in force in said town or city, and any and all ordinances that shall hereafter be passed for the government of said town or city, in said annexed territory, in as full a manner as is guaranteed by the statutes of Indiana providing for the government of cities and towns. R. S. 1894, § 4223.

[Acts 1879 S., p. 94. In force May 31, 1879.]

1033. Appeal from county board.—1. In proceedings before the board of county commissioners for the annexation of territory to cities and towns against the will of the owner, the petitioner and the owner of any portion of the territory proposed to be annexed may appeal to the circuit court from the final decision of the board by filing within thirty days, with the auditor, a bond or undertaking for the due prosecution of the appeal and payment of all costs that may be adjudged against the appellant, with sureties, to be approved by the board or the auditor. But no appeal shall be dismissed for want of a sufficient bond or undertaking, if one shall be filed, under the direction of the court, at any time before the trial. R. S. 1894, § 4224.

Appeal—Trial de novo.—Upon an appeal from the board of county commissioners to the circuit court the proceedings are tried *de novo*. Wilcox v. City of Tipton, 143 Ind. 241, 246; Chandler v. City of Kokomo, 137 Ind. 295; Paul v. Town of Walkerton, 150 Ind. 565.

Amended petition on appeal, excluding certain territory included in original petition.—Upon appeal from an order of annexation by the commissioners' court, the petitioners may be permitted to amend the petitions so as to exclude certain territory included in the original petition. Wilcox v. City of Tipton, 143 Ind. 241.

Sufficiency of reasons not reviewable on appeal—Discretion of county commissioners.—The sufficiency of the reasons stated in a petition for the annexation of territory to a town can not be considered upon appeal, at least in the absence of a plain abuse of the discretion necessarily vested in the county board of commissioners, by the omission of the statute to prescribe what reasons shall be set forth. Windfall, etc., Co. v. Emery, 142 Ind. 456.

Appeal—Injunction—Notice—Jurisdiction.—An answer in an action to enjoin the annexation of plaintiff's territory to defendant city need not allege notice to plaintiff of an appeal from an order of annexation by the commissioners' court to the circuit court, where the jurisdiction of the latter court was not questioned by the complaint. Wilcox v. City of Tipton, 143 Ind. 241.

Annexation of territory—Legislative character—Judicial examination.—The legislative character of the function of annexation of territory to a city does not preclude judicial examination and decision on questions as to preliminary steps and truth and sufficiency of the petition for annexation. The action of the board of county commissioners upon a petition filed for such annexation is judicial in its character, and the legislature may provide for an appeal from such proceedings. Forsythe v. City of Hammond, 142 Ind. 505; see Forsythe v. City of Hammond, 68 Fed. Rep. 774; Forsythe v. City of Hammond, 166 U. S. 506; Paul v. Town of Walkerton, 150 Ind. 565.

The power to create, enlarge, and regulate municipal corporations is a legislative power, but general laws authorizing common councils of cities, and the boards of trustees of towns, by resolution, without notice to any one, to annex contiguous territory which has been platted into lots, and the plat recorded, are upheld. Paul v. Town of Walkerton, 150 Ind. 565.

General laws providing the conditions upon which contiguous territory can be annexed, and the mode of procedure, and vesting the power in boards of commissioners and courts to hear and determine the same, and order or refuse such annexation, are also upheld. Paul v. Town of Walkerton, 150 Ind. 565.

1034. Auditor's duty.—2. Within twenty days after filing the appeal-bond or undertaking, the auditor shall deliver it, with all the

other papers in the cause and a complete transcript of the proceedings of the board, to the clerk of the circuit court, who shall docket it with the other causes pending therein. R. S. 1894, § 4225.

1035. Trial.—3. The appeal shall stand for trial, when taken during the session of the board, at the first term after the papers shall have been filed ten days, and, when taken in vacation, at the first term after summons shall have been served upon the appellee ten days before the first day of such term. The appeal shall be tried and determined as an original cause. R. S. 1894, § 4226.

1036. Effect of appeal.—4. All further proceedings in the annexation of territory shall be suspended until the final disposition of the appeal. The court may make a final determination of the proceeding and compel its execution, or may send its decision to the board, with direction how to proceed, and require compliance. R. S. 1894, § 4227.

[Acts 1881 S., p. 91. In force September 19, 1881.]

1037. Disannexing territory.—1. Cities and towns of this state desiring to disannex territory, or to reduce their city or town limits, shall have power to do so in the manner following: The common council of cities and boards of trustees of towns desiring the relief under this act shall cause a petition to be filed with the board of commissioners of the county in which such city or town is situated, reciting the fact of the desire of such city or town to disannex certain territory and surrender jurisdiction over and control of the same, particularly describing the same and, in such petition, formally surrendering all claims to control of and jurisdiction over such land. Notice of the filing of such petition and the substance thereof shall be published, for three weeks successively, in some newspaper printed and published in such county, previous to the first day of the meeting of such board of commissioners. If the facts in such petition be found to be true, said board shall cause an order to be made upon their record, declaring such property disannexed from such town or city from the date of such order, and that the same shall be relieved from the control of such city or town, and no longer be subject to such jurisdiction; which said order, when so made, shall be published for three weeks successively in some weekly newspaper printed and published in said county: *Provided*, That nothing herein contained shall release the territory so disannexed and surrendered from any taxes or other liens existing against such city or town at the time of, or prior to, the order of such county board disannexing such territory. R. S. 1894, § 4228.

See *post*, § 1039.

[Acts 1893, p. 44. In force February 18, 1893.]

1038. Vacation of lots, streets and alleys.—1. That the owner or owners of real estate which may or has been disannexed from any city or town of this state, according to the provisions of section 3247 of the revised statutes of 1881, may have the lots, streets and alleys

vacated on petitioning the board of commissioners of the county in which said city or town is situated reciting the fact of the desire of such owner or owners to have the lots, streets and alleys of such disannexed territory vacated. Notice of the filing of such petition and the substance thereof, shall be published for one week in some newspaper printed and published in such county, twenty days previous to the first day of the meeting of such board of commissioners. If the facts in such petition are found to be true, and there is no valid objection thereto by the owner or owners of real estate affected thereby, said board shall cause an order to be made upon their records, declaring the lots, streets and alleys in said disannexed territory vacated, and that such territory thereafter be described as unplatted land. R. S. 1894, § 4229.

[Acts 1877, p. 22. In force July 2, 1877.]

1039. Disannexing territory.—1. The common council of any city or the board of trustees of any incorporated town of this state is hereby authorized and impowered, at any regular meeting of the same, on the application of any owner of any suburban lot or tract of land not laid out in lots, by a two-thirds vote of such common council or board of trustees, so to modify the boundaries of such city or incorporated town, as to exclude therefrom such lots or tracts of land, upon such terms as such common council or board of trustees may impose. R. S. 1894, § 4230.

See *ante*, § 1037.

Disannexation—Jurisdiction.—Where land-owners petitioned under this section the board of trustees of a town, asking said board to modify the boundaries of the town so as to exclude therefrom certain tracts of land, and the board of trustees refuse to act upon said petitions, a circuit court has not thereafter jurisdiction of an action commenced in such court by said land-owners to disannex said tracts of land from said town. Woolverton v. Town of Albany, Ind. Sup. Ct., Jan. 5, 1899.

[Acts 1872 S., p. 14. In force December 27, 1872.]

1040. Survey and plat.—1. Any city incorporated under the authority of this state that has no sufficient survey and plat thereof, may, by a resolution of the common council thereof, adopted by a vote of ayes and nays (providing two-thirds of all the members of such council shall vote therefor), order and direct that a survey and plat of such city shall be made by competent persons, to be chosen by such council. And when any such survey and plat shall have been made, the common council of such city may adopt such survey and plat, by resolution, by a vote of ayes and nays, providing three-fourths of all the members of such common council shall vote therefor. And when a certified copy of the resolution ordering such survey and adopting the same, with the vote thereon, and the names of the members voting for and against the same, signed by the mayor and clerk, and attested by the seal of such city, shall have been recorded, together with the survey and plat, in the office of the recorder of the

county in which such city may be located, the said survey and plat shall be deemed and taken as adopted by such city for all purposes whatsoever; and the original, or the record thereof, or any duly certified copy thereof, shall be admissible in evidence in any judicial proceeding in all courts of justice, in all cases and for all purposes. R. S. 1894, § 4231.

See *ante*, §§ 380, 381; also, Towns, *post*, §1157, *et seq.* and notes.

1041. Survey and plat.—2. Whenever any survey and plat of any city shall have heretofore been made, and such city may desire to adopt the same, it shall be competent for such city to do so by resolution of the common council thereof by a vote of ayes and nays, providing three-fourths of all the members of such common council shall vote therefor. And when such resolution adopting the said survey and plat, with the names of the members voting for and against the same, duly authenticated as provided in the preceding section, shall have been recorded, with the said survey and plat, in the office of the recorder of deeds of the county in which such city is located, the same shall be deemed and taken as adopted by such city for all purposes whatsoever, and the original plat and survey, or the record thereof or any copy thereof, duly authenticated by the mayor and clerk, under their hands and attested by the seal of such city, shall be admissible in evidence in any judicial proceeding in all courts of justice, in all cases and for all purposes. R. S. 1894, § 4232.

1042. To be kept by the city clerk.—3. The original survey and plat, when recorded by the recorder, shall be deposited in the office of the clerk of such city for safe-keeping. R. S. 1894, § 4233.

1043. Law applies to towns.—4. The provisions of this act shall extend to all towns incorporated under the authority of this state. In such incorporated towns as have a board of trustees instead of a common council, the duties required by this act to be performed by the mayor shall be performed by the president of the board of trustees, and the duties required to be performed by the common council shall be done and performed by the board of trustees thereof. R. S. 1894, § 4234.

[Acts 1885, p. 150. In force July 18, 1885.]

1044. Additions to cities and towns—Plats.—1. That hereafter whenever any lands are platted for the purpose of being attached to any city or incorporated town as an addition thereto, a plat of such addition shall be submitted to the common council of such city or board of trustees of such town before the same is placed on record, and such council or board of trustees may require that the streets and alleys of such addition shall be made to correspond in width, and be co-terminous with the streets and alleys of that part of the city or town which it adjoins. R. S. 1894, § 4235.

1045. Penalty.—2. Any person violating the provisions of section

one (1) of this act shall be fined in any sum not to exceed the sum of twenty-five dollars. R. S. 1894, § 4236.

[Acts 1891, p. 368. In force June 3, 1891.]

1046. Plats—Submission for approval—Recording—Penalty.—1. That whenever any property owner in any incorporated city or town of this state shall plat any unplatted realty lying within the corporate limits of said city or town into in-lots or out-lots, or shall plat any out-lot within any city or town into in-lots, he shall before recording the said plat, submit the same to the common council of such city or the board of trustees of such town for approval. And such common council or board of trustees, shall, by special committee thereof, and without expense to such property owner, carefully examine the said plat and the territory platted, and shall have authority to approve or disapprove the same. And the county recorder is hereby prohibited from recording any such city or town plat without the same be accompanied with the certificate of such town or city clerk, attested by the corporate seal certifying that the plat has been approved by the common council or board of trustees, as the case may be. For any violation of this act the recorder shall upon conviction be fined in any sum not more than three dollars. R. S. 1894, § 4237.

[Acts 1881, p. 56. In force March 3, 1881.]

1047. Legalized plats.—2. The acknowledgments of all plats of towns and cities, and of all additions thereto, heretofore taken and certified by any officer provided for in section 3374, are hereby legalized; and the recording of such plats and additions as have heretofore been acknowledged before and certified by any officer provided for in said section is hereby declared to be valid and effectual in law to all intents and purposes. R. S. 1894, § 4238.

Plat-books—Judicial notice of—Public record.—Judicial notice will be taken that books known as *plat-books* are kept by the county recorders in the various counties of the state, in which are recorded the plats of the towns and cities and the additions thereof, and that such books are kept as public records. Certified copies of such records are competent evidence. Miller v. City of Indianapolis, 123 Ind. 196.

[Acts 1895, p. 382. In force March 15, 1895.]

1048. Plats of additions to cities and towns legalized.—1. That all plats of additions to cities and towns and of subdivisions of sections which have heretofore been recorded in the recorder's office of any county without the owner or owners thereof having signed the same or without having the execution thereof acknowledged and certified as required by law, but under which lands and lots have been sold or conveyed, or where such additions or subdivisions have been entered upon the tax duplicate for the purposes of taxation in accordance with the descriptions contained in such plats, are hereby legalized and declared valid to all intents and purposes from the date of the recording of such plats, to the same extent as if the same had been

duly signed and the execution thereof had been duly acknowledged and certified before they were recorded. Burns' Supp. 1897, § 4238*a*.

ARTICLE 3.—TAXATION.

SEC.
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1060. Levy and collection of taxes in cities and towns of less than seventy thousand.

[Acts 1873, p. 214. In force March 4, 1873.]

1049. Bank stock.—1. The shares of capital stock owned or held by any person or body corporate in any bank or banking association chartered or organized under the laws of this state, or chartered or organized under the laws of the United States, shall be taxed for municipal purposes by the corporate authorities of the incorporated towns and cities of this state in which any such bank or banking association may have its banking house or place of business; and such shares of stock shall be taxed by the corporate authorities of the town or city in which such bank or banking association may be located, at the same rate as is or may be lawfully assessed by the corporate authorities of such town or city on other taxable property. R. S. 1894, § 4239.

See *ante*, § 216, and general law, Taxation, R. S. 1894, ch. 108 (§ 8408, *et seq.*), Burns' Supp. 1897, ch. 108 (§ 8411, *et seq.*), and Acts 1899, pp. 422, 430, 431, 491, 516.

General laws.—Some of the provisions of the statutes compiled under this title, and decisions cited thereunder, may not now be applicable. The general laws of the state upon the subject of taxation control municipal taxation so far as applicable. See *post*, § 1057.

Deduction of debts—National bank stock—Discrimination.—Where the tax law of a state allows tax-payers to deduct their debts from the assessed value of a class of credits which constitute a material portion of the moneyed capital of the state in the hands of its citizens, but denies to owners of national bank stock the right to deduct their debts from the assessed value of such stock, it is such a discrimination, in view of the provisions of § 5219, R. S. United States, relating to national banks, as renders the said law to that extent inoperative. Wasson v. First National Bank, 107 Ind. 206.

Right of owner to deduct indebtedness.—The owner of national bank stock is entitled to deduct from its value, if he have no other credits from which the deduction can be made, the amount of the bona fide debts owing by him. City of Indianapolis v. Vajen, 111 Ind. 240; Wasson v. First National Bank, 107 Ind. 206.

Refusal to allow deduction—Refunding by the city.—If the assessor refuses to allow such indebtedness to be deducted, demand being made by the owner of the stock for such deduction, both of the assessor and the treasurer, the tax-payer is entitled to have the excess of taxes collected refunded, whether paid voluntarily or not, and without appearing before the board of equalization and there attempting to have the assessment corrected. City of Indianapolis v. Vajen, 111 Ind. 240.

National bank stock.—The shares of stock of a national bank may be taxed for mu-

nicipal purposes under this section. The validity of such tax is not impaired by the fact that the money paid for such stock may have been taxed for municipal purposes, to the same person, as money on hand. City of Richmond v. Scott, 48 Ind. 568.

When the stock of banks organized under state laws is exempt from taxation, the stock of national banks can not be taxed. Wright v. Stilz, 27 Ind. 338; Root v. Erdelmeyer, 37 Ind. 225; Craft v. Tuttle, 27 Ind. 332.

A tax on the capital stock of national banks for school purposes, or for a donation by a township to aid in building a railroad, is not a tax levied for municipal purposes. Root v. Erdelmeyer, 37 Ind. 225.

Same.—That the capital of a national bank is invested in United States bonds does not affect the right of the state to tax the shares under the act of congress. A tax upon the shares of a bank is not a tax upon the property or capital of the bank. Wright v. Stilz, 27 Ind. 338.

Assessment in name of owner.—Corporation stocks, including bank stock, as other personal property, are taxable to the individual owners where they reside, unless the statute provide otherwise. Conwell, etc., v. Town of Connersville, 15 Ind. 150; City of Madison v. Whitney, 21 Ind. 261; Whitney v. City of Madison, 23 Ind. 331; Seward v. City of Rising Sun, 79 Ind. 351; City of Evansville v. Hall, 14 Ind. 27.

Assessment in name of bank—Effect.—Where bank stock is assessed and a valuation put upon it by the proper officer, and an entry made of the assessment upon the tax duplicate, the fact that the assessment was made in the name of the bank, instead of the individual stockholders, will not invalidate the lien or relieve the respective stockholders from the payment of the tax for which it is liable. Small v. City of Lawrenceburg, 128 Ind. 231.

State banks.—Under the act of March 11, 1861, it is competent for cities organized under the general municipal law of the state to assess and collect taxes upon stock in any of the free banks of the state located in such cities, whether owned by persons residing in such cities or elsewhere. DePauw v. City of New Albany, 22 Ind. 204.

[Acts 1881 S., p. 696. In force April 15, 1881.]

1050. Auditor's duty.—2. It shall be the duty of the auditor of every county in this state in which there is an incorporated town or city having within its corporate limits any bank or banking association contemplated by the preceding section, on or before the first day of May in each and every year, to furnish to the mayor or other principal officer of such town or city, on the demand of such mayor or other principal officer, a certified copy, under his hand and seal of his office, of the sworn statement in writing which may have been delivered to him by the president or cashier of any such bank or banking association in pursuance of the provisions of the seventy-seventh section of an act entitled "an act concerning taxation," approved March 29, 1881; which copy, so to be furnished by such auditor, shall be a copy of the sworn statement made and delivered, for the current year, to such auditor by such president or cashier, under the provisions of said section. R. S. 1894, § 4240.

The act of March 29, 1881, referred to in the above section, was repealed by the act of 1891 on the subject of taxation. (See R. S. 1894, § 8677.) Section 8471, R. S. 1894, which is virtually a re-enactment of the seventy-seventh section of the repealed act, should instead be construed in connection with section 4240.

1051. Auditor's statement.—3. If no such sworn statement as contemplated by the foregoing section shall have been made and delivered to such auditor, then it shall be his duty to make and certify, under his hand and seal of his office a full and true statement of all the information which he may have obtained, in relation to such bank or banking association, its stockholders, and the number and value of shares of stock held or owned by them respectively, by or under the proceedings prescribed by section seventy-eight of an act entitled "an act concerning taxation," approved March 29, 1881. R. S. 1894, § 4241.

Section 8472, R. S. 1894, should be construed in connection with section 4241, for reasons similar to those given in the preceding note.

[Acts 1873, p. 214. In force March 4, 1873.]

1052. Assessment.—4. On receiving the certified copy of the sworn statement mentioned in the second section of this act, or the certified statement mentioned in the preceding section, such mayor or other principal officer of such town or city shall file the same in the office of the clerk of such town or city; and the assessor or assessors, or other proper officer of such town or city, shall, from the information thus obtained, proceed to enter in the assessment-roll and tax duplicate of such town or city, for the current year, the names of the stockholders of such bank or banking association, and the number of shares and value of the stock held or owned by each stockholder respectively, and shall assess thereon to the owner or holder thereof the proper amount of corporation or municipal taxes according to the rate that may at the time be chargeable on other personal property subject to taxation by such town or city; and if any such stockholder shall be assessed on said duplicate for either real or personal property, other than such stock, the amount and value of his said stock shall be added to his assessment as personal property. R. S. 1894, § 4242.

1053. Collection of taxes.—5. The taxes assessed under this act shall be paid by the owners or holders of such stock, respectively, in the same manner as upon other personal property. And all laws and ordinances in force in such town or city in relation to the collection of taxes, and all penalties provided for the non-payment of the same, shall apply to the taxes assessed under the provisions of this act; but nothing herein contained shall be construed to prevent the president, cashier or other proper officer of any such bank or banking association from paying such taxes, and charging the amount so paid against the owner or holder of such stock, but such taxes may be so paid and charged, and the amount thereof may be deducted from any dividends on such stock which have or may be declared thereon. And on notice given by the proper collecting officer of such town or city, that any such taxes have not been paid when due, the same shall be paid by the president, cashier or other proper officer of such bank or banking association out of any dividends due or to become due on such stock. R. S. 1894, § 4243.

1054. Tax, a lien.—6. Taxes assessed upon any share or shares of bank stock under the provisions of this act shall be and remain a lien against such stock until the payment of such tax; which lien shall attach on the first day of April of each year for which the assessment is made; and every transfer of such stock shall be subject to such lien. R. S. 1894, § 4244.

1055. Bank stock, how valued.—7. In making the assessment and ascertaining the value of any shares of bank stock under the provisions of this act, there shall be deducted, from the gross cash value of such shares, the proper proportionate part of the value of any real estate held or owned by any such bank or banking association in this state, and taxed under the laws thereof, in which any part of the capital stock of such bank or banking association may be invested; and in making such deduction, the valuation of such real estate for taxation shall be the criterion. R. S. 1894, § 4245.

Agricultural lands—Statute repealed.—Section 3261, R. S. 1881, Acts 1881, Spec. Sess., p. 698, regulating the taxation of unplatted lands in cities and towns, was repealed by the act of 1891. Acts 1891, p. 398. Said section was construed prior to its repeal as hereinafter stated.

Under said repealed section, unplatted agricultural lands containing five (5) acres or more, lying within the limits of a city or incorporated town, were not taxable by the city or town for general city or town purposes at a higher aggregate percentage than the aggregate percentage of the tax levied in the civil township for general township purposes; but such lands were subject to all special assessments which affected them in common with other property of the city or town. Leeper v. City of South Bend, 106 Ind. 375; Taber v. Grafmiller, 109 Ind. 206; Dickerson v. Franklin, 112 Ind. 178; City of South Bend v. Cushing, 123 Ind. 290.

For cases construing the similar statutes, Acts 1877, Spec. Sess., p. 74, Acts 1879, p. 94, and Acts 1852 (1 G. & H., p. 610), also repealed, see Stilz v. City of Indianapolis, 81 Ind. 582; Thomas v. Town of Butler, 139 Ind. 245; City of South Bend v. University, 69 Ind. 344; Conklin v. Town of Cambridge City, 58 Ind. 130; Blain v. Bailey, 25 Ind. 165; Hamilton v. City of Ft. Wayne, 40 Ind. 491.

Recovery of taxes illegally assessed under above statutes.—See Fleming v. City of Indianapolis, 6 App. 80; Leonard v. City of Indianapolis, 9 App. 262.

[Acts 1879, p. 15. In force March 10, 1879.]

1056. Assessment.—1. The office of assessor in cities may be, and in incorporated towns in this state shall be, abolished, and the assessment of personal and real property, as made and returned by the township assessors to the county auditor, as is now provided by law in cities, may, and in incorporated towns shall, constitute the assessment for taxation for city and town purposes, in like manner as for county and state taxes. And the city and town clerks shall have access to the assessor's books in the county auditor's office, and they shall transcribe, therefrom, on their tax duplicates, an accurate list of the taxable property assessed in each city and town, as it appears to have been equalized by the county board of equalization, and thereon compute the taxes levied by the city and town authorities. R. S. 1894, § 4246.

By § 8672, R. S. 1894, the office of city assessor is abolished.

See *ante*, § 216.

[Acts 1881 S., p. 697. In force September 19, 1881.]

1057. State tax-law to govern—Proviso.—2. Hereafter all general laws of the state for the uniform assessment and collection of taxes, and matters connected therewith or growing out of the same, shall apply to all incorporated cities and towns not having special charters, so far as the same shall be applicable: *Provided*, That all city taxes not paid on or before the third Monday of April in each year shall then become delinquent: *Provided, further*, That nothing herein contained shall be held or construed to prevent cities from exercising their discretion as to making assessments by city assessors instead of by county commissioners [township assessors]. R. S. 1894, § 4247.

See, *ante*, § 216, and for general tax-law, see R. S. 1894, ch. 108 (R. S. 1894, § 8408 *et seq.*), Burns' Supp. 1897, ch. 108 (§ 8411, *et seq.*), and Acts 1899, pp. 422, 430, 431, 491, 516.

Taxes—When payable.—By § 8570, Burns' Supp. 1897, taxes are made payable on or before the first Monday in May, and on or before the first Monday in November.

Private sale by marshal.—This section does not authorize town marshals to sell lands at private sale for taxes. Stevens v. Williams, 70 Ind. 536.

Private sale—Void—Recovery of purchase-money.—The doctrine of *caveat emptor* applies to fullest extent to tax sales. Upon private sale by town marshal of land for taxes, purchaser can not recover the purchase-money from the town. Worley v. Town of Cicero, 110 Ind. 208.

Fees of city treasurer.—This section did not have the effect to change the fees or compensation of city treasurers for selling property for delinquent taxes. Board, etc., v. Wasson, 74 Ind. 133.

Interest and penalty.—Under the general tax law of 1872, which was made applicable to cities and towns, purchasers of property at tax sales made by cities and towns, are entitled to the same rate of interest and penalty as purchasers at sales made by county officers for delinquent taxes. Barton v. McWhinney, 85 Ind. 481; Schissel v. Dickson, 129 Ind. 139.

City taxes paid by purchaser at county sale.—Under the general tax law of 1872, made applicable to cities and towns, subsequent city taxes, paid by a purchaser at a sale for state and county taxes to protect his lien, may, in an action by the purchaser to quiet title, be decreed a lien on the real estate as part of the original claim for the purchase price. Millikan v. Ham, 104 Ind. 498; Schissel v. Dickson, 129 Ind. 139.

[Acts 1881 S., p. 696. In force April 15, 1881.]

1058. Non-resident's personal property.—3. All personal property, notes, bonds, or other evidences of debt, which are or may be in the hands of any resident of any town or city as guardian of persons not residing therein, or as executor or administrator of the estate of a person who did not reside therein, and in which such guardian, executor or administrator has no beneficial interest, shall not be subject to taxation by such town or city for municipal purposes. R. S. 1894, § 4248.

[Acts 1899, p. 117. In force February 24, 1899.]

1059. County treasurer—Surplus gravel road or railroad aid tax.—1. That whenever any county treasurer has in his hands, as such officer any unexpended balance of any fund collected from the tax payers of any township, city or town, by special levy for the purpose of

purchasing gravel roads, or assisting in the construction of railroads, such treasurer is hereby authorized and directed to pay over such unexpended balance to the trustee of such township, or the trustees of such city or town, to be applied by such trustee to the township fund, and trustees of city or town to their general funds.

[Acts 1885, p. 199. In force April 11, 1885.]

1060. Levy and collection of taxes in cities and towns of less than seventy thousand.—1. That the board of trustees of any incorporated town in this state, and the common council of any city in this state containing a population of less than seventy thousand, as shown by the last census of the United States, in which the office of city assessor has been previously abolished, may, by a provision contained in the ordinance or resolution fixing the tax levy for any year, provide that the taxes so levied shall be entered by the auditor of the proper county upon his duplicate, and collected by the treasurer of such county as other taxes for state and county purposes are collected, instead of being collected by the officers of such town or city. A certified copy of such ordinance or resolution shall be by the clerk of such town or city, filed with the auditor of the county on or before the first Monday in June of each year; and said auditor shall assess said taxes against all the property and polls within the corporate limits of such town or city subject to taxation and enter the same upon his tax duplicate; and the treasurer of such county shall collect such municipal taxes upon such duplicate as other taxes thereon are collected, and pay the same over when collected to the proper officer of such town or city. When town or city taxes are collected by county officers under this act, the same may be paid in installments on the third Monday in April and on the first Monday in November in like manner as similar taxes for state, county and township purposes are payable, and shall become delinquent in like manner and subject to the same penalties upon non-payment as other taxes. And all provisions of the law concerning the collection of state, county and township taxes by county officers, shall apply to the collection of town and city taxes by county officers under the provisions of this act. R. S. 1894, § 4249.

See *ante*, § 97.

ARTICLE 4.—WATER-WORKS.

SEC.		SEC.	
1061.	May issue water-works bonds—Vote.	1069.	Bond—May issue.
1062.	Location and condemnation.	1070.	Taxation for extensions, payment of bonds, mortgage, etc.
1063.	Assessment and report.	1071.	Control of.
1064.	Tender of damages.	1072.	Trustees abolished in certain cities and towns.
1065.	Appeal.	1073.	Control of water-works by city or town.
1066.	Trustees of water-works.	1074.	Duties and pay of trustees.
1067.	Purchase of water-works—Valuation.		
1068.	Purchase subject to mortgage.		

SEC.
1075. By-laws and rules.
1076. Water rents.
1077. Application of fund.
1078. Reports.
1079. Funds, how kept.
1080. Contracts.
1081. Investigating committee.
1082. Water free for public uses.
1083. Attachments regulated.
1084. Advertising.
1085. Bonds.
1086. Tax to pay loans.
1087. Lien of tax.
1088. Preventing pollution.
1089. Bonds to pay for stock in water-works companies.

[Acts 1879 S., p. 88. In force March 25, 1879.]

1061. May issue water-works bonds—Vote.—1. The common council of any city or board of trustees of any incorporated town having a population of less than forty-five thousand, which shall, by ordinance or resolution, decide to erect water-works, or to make extensions or improvements where works have heretofore been constructed, are hereby authorized, for the special purpose of furnishing the inhabitants of such city or town with pure and wholesome water and for fire protection, to issue bonds of such city or town, in denominations not less than fifty nor more than one thousand dollars, and payable at any place that may be designated in the bonds, the principal in not less than five years nor more than twenty years after the date of such bonds, and the interest annually or semi-annually; and such council or trustees may, from time to time, negotiate and sell as many of such bonds as may be necessary for such purpose, in any place and for the best price that can be obtained therefor in cash: *Provided,* That such bonds shall not be sold at a price less than ninety-four cents on the dollar: *Provided,* That the common council of any city or town trustee of any incorporated town, contemplating building water-works under this act, shall, before actually embarking therein, submit the question to the qualified voters thereof, at a special or general election; and voters desiring water-works may vote, "For water-works," or, if opposed, "Against water-works." Such election may be ordered upon a petition of one hundred freeholders and resident tax-payers of such city or incorporated town; and in no case shall the common council of any city or town trustee of any incorporated town erect water-works except upon a majority of all the votes cast at such election upon the said question of water-works, as provided for in this act. Such bonds shall be issued under the provisions of the present law regulating the issue and sale of bonds, so far as the same can be made applicable: *Provided, however,* That the provisions of said act that the entire money borrowed by a city shall not at any time exceed two per cent. of the taxable property of such city shall not apply to this act: *Provided, further,* That notice of such election, and submission of said question of water-works thereat, shall be published for three weeks successively before the day of such election, in some newspaper printed and published in such city or town, and of general cir-

culation therein; which said notice shall be signed by the clerk of such city or town. R. S. 1894, § 4250.

See *ante*, § 124, clauses 26 and 43, and § 138; *post*, § 1089.

For water-works companies, powers, etc., see *post*, § 1377.

Statute not repealed—Contract.—This act did not in terms, or by implication, repeal the twenty-sixth clause of the general act for the incorporation of cities. Contract with water company not *ultra vires* and void. City of Vincennes v. Callender, 86 Ind. 484.

Power to borrow money—Bonds.—Under Acts 1871 and 1873, where a city negotiated her bonds to raise means to construct water-works, and the city treasurer misapplied a part of the funds so realized, leaving debts unpaid on account of such works, it was competent for the city council to issue and sell other bonds to make up such deficiency, and it might provide for paying ten per cent. interest on such bonds. Daily v. City of Columbus, 49 Ind. 169; State v. City of Columbus, 63 Ind. 155.

The act of 1871 legalized bonds issued theretofore for the construction of water-works, and authorized further issue and sale of bonds to complete construction of water-works. State v. Hauser, 63 Ind. 155.

Water-works bonds issued by a city when its total indebtedness, including school house bonds issued under R. S. 1894, § 5975 (*post*, § 1518), equaled or exceeded the constitution limit of two per cent, are void. Wilcoxon v. City of Bluffton, Ind. Sup. Ct., June 14, 1899.

1062. Location and condemnation.—2. The common council of any city or board of trustees of any incorporated town, which shall so determine to build water-works, or to make extensions of such water-works where they have heretofore been constructed or commenced, shall have authority to locate such works with all appendages, and lay such lines of pipe as may be required And in case the use of any lands, town lots, water-rights, or easements; or use of any water from any pool, lake, or natural stream of water, or if such pool, lake, or natural stream of water shall be found necessary for the building, maintaining, or operating of such works, it shall be lawful for such common council or board of trustees, by themselves or agent, to enter upon and take possession of and condemn the same for these uses, and, for the supply with water, of any conduit pipes, stand-pipes, storage reservoirs, and settling and filtering basins. No artificial provision made for water by any person or corporation, or owned by any person, association, or body, shall be used or condemned without consent of the owner: *Provided*, That any such lands, town lots, water-rights, easements, pools, lakes, and natural streams of water shall not be used for any other purpose than for the use of said water-works. For the purpose of such condemnation and use, such common council or board of trustees shall have jurisdiction for ten miles beyond the limits of such city or town: *Provided, further*, That before such common council or board of trustees shall proceed to take possession of such lands, lots, water-rights, easements, pools, lakes, and natural streams of water, for the purpose above mentioned, they shall appoint three commissioners, residents of such city or town, who shall be disinterested freeholders, to appraise and assess the damages accruing to the owners of any lands, lots, water-rights, easements, pools, lakes, and natural streams of water, so taken and condemned for said work. Said commissioners shall, before they proceed to perform their duties as appraisers, take and subscribe an oath or affirmation faithfully to

perform all their duties as such appraisers (which shall be indorsed upon or attached to their appointment), and file the same with the clerk of such city or town. Ten days' notice shall be given such commissioners by said council or board of trustees, through the city or town clerk, of the appraisement to be made, giving a complete description of the premises to be viewed. A like notice shall be given by personal service, or by leaving the same with some person of suitable age at their places of abode, to each of the owners or agents of lands, lots, water-rights, easements, pools, lakes, or natural streams to be so taken for such water-works, as in civil cases. If the owners are unknown or non-residents of this state, publication of the same in one or more newspapers of the town, of general circulation, or by posting up written or printed notices in six public places in such city or town (if there be no newspaper published therein) for three weeks, shall be deemed equivalent to such personal notice. R. S. 1894, § 4251.

Constitutional.—This section is not unconstitutional because the city or town is given authority to appoint commissioners to assess the damages to property taken. Bass v. City of Ft. Wayne, 121 Ind. 389.

Proceedings to establish water-works—Collateral attack.—Where, in a proceeding to establish a system of water-works, there is jurisdiction and a right of appeal, defects or irregularities in the proceedings are not available in a collateral attack. Bass v. City of Ft. Wayne, 121 Ind. 389.

Route determined by the council.—The question as to which is the most practicable and expedient route for the line of pipes is one exclusively for the common council, and its decision is not subject to review by the courts. Bass v. City of Ft. Wayne, 121 Ind. 389.

Condemnation of property—Injunction.—If proceedings are instituted for the purpose of appropriating a specifically described parcel of property an injunction will lie to restrain the city from appropriating property of an entirely different character from that specified in the proceedings. Bass v. City of Ft. Wayne, 121 Ind. 389.

Same—Construction of statute.—A city, by merely taking water from a reservoir above a dam, does not condemn any provision made for water within the meaning of this section. Bass v. City of Ft. Wayne, 121 Ind. 389.

Mill-owner's right—Easement.—The right of mill-owners in a pond of water created by a dam which they have constructed is a limited easement, not an absolute right to the water, and a city may take from it its supply of water so long as it does not interfere with the easement—the right to use the water in the propulsion of machinery. Bass v. City of Ft. Wayne, 121 Ind. 389.

Corpus of water—Injunction.—Where the corpus of the water is taken without authority or jurisdiction, no injury being done to the easement of the mill-owner, only the owner of the fee may maintain injunction. Bass v. City of Ft. Wayne, 121 Ind. 389.

1063. Assessment and report.—3. Such commissioners, or a majority of them, shall at the place and time indicated in such notice, proceed to an examination of such lands, lots, water rights, easements, pools, lakes and natural streams so desired to be taken or condemned for the use of such water-works; and shall then and there estimate the damages accruing to the owner. They shall view the premises and receive any evidence touching the questions before them; and may, for that purpose, administer oaths to witnesses examined in

relation thereto. They shall make a report in writing of the amount of damages, if any, accruing to each owner, and within ten days thereafter, file the same with the clerk of such city or town. R. S. 1894, § 4252.

1064. Tender of damages.—4. When such report is filed, as in the preceding section required, the common council or board of trustees (if they accept the assessment so made) shall tender, or cause to be tendered, to the owner of such lands, lots, water rights, easements, pools, lakes or natural streams, or their heirs or representatives, the damage awarded by such commissioners; or if not found within the city or town, or if the award is not accepted, then the same shall be kept by the treasurer as a special deposit, subject to the order of such owner or his heirs or representatives. R. S. 1894, § 4253.

1065. Appeal.—5. The common council or board of trustees shall, within twenty days from the filing of said report, either accept or reject the terms of the same in whole or in part. And all parties aggrieved by such report may appeal therefrom, at any time within thirty days after the filing thereof, to the circuit court of the county, upon filing the usual bond with the clerk of such city or town for the payment of costs; but no such appeal shall prevent any such city or town from proceeding with said appropriation, construction and improvement, as if no appeal had been taken. No other question shall be determined than the regularity of the proceedings in the suit and the amount of damages sustained. R. S. 1894, § 4254.

Pipes laid in highways—Appeal—Injunction.—The right of compensation for pipes laid in highways upon which the property owner's land abuts is triable on appeal, and injunction will not lie. Bass v. City of Ft. Wayne, 121 Ind. 389.

1066. Trustees of water-works.—6. The common council of any city or incorporated town in which water-works have been constructed or are now in process of construction or extension, or where water-works shall hereafter be ordered, shall establish a board of three trustees, to be known as the trustees of the water-works. Said trustees shall be elected at the annual city election by the qualified votes of such city or incorporated town, and shall hold their office for the term of three years; except that, at the first election under this act, one shall be chosen for one year, one for two years, and one for three years, and thereafter one of the trustees shall be elected annually. R. S. 1894, § 4255.

Election of trustees—Statute construed.—The establishment of the board of trustees is not a necessary prerequisite to the election of those officers by the voters of a city. City of Lafayette v. State, 69 Ind. 218.

Same—Notice of election—Ignorance of law.—If the election of such trustees is otherwise regular, the want of any notice thereof, previously given, will not invalidate it. Nor will the ignorance of the people as to the existence of the law providing for the election of such trustees affect the validity of the election, as they are bound to take notice of the existence of such law and of the election thereunder. City of Lafayette v. State, 69 Ind. 218.

Establishment of board of trustees—Notice.—No notice of the proceedings by the common council to establish the board of trustees of the water-works is necessary to give validity to the proceedings. City of Lafayette v. State, 69 Ind. 218.

Charges against—Investigation—Removal—Injunction.—The common council has power to entertain and inquire into the truth of charges of malfeasance in office, preferred against trustees of the water-works, and to remove any or all of these officers for cause shown. The council can not be enjoined from proceeding to hear and investigate charges preferred against the trustees, and from removing them from office. Muhler v. Hedekin, 119 Ind. 481.

[Acts 1899, p. 568. In force March 7, 1899.]

1067. Purchase of water-works—Valuation.—1. That any city, or town, within this state having a population less than thirty thousand by the census of 1890 whose inhabitants are supplied with water by any person, corporation or company under contract heretofore made, whether by ordinance, resolution or otherwise, is hereby authorized and empowered to purchase such waterworks plant with all the lands, buildings, machinery, mains, hydrants, contracts, privileges and property owned by the person, corporation or company supplying such water, and to take conveyance for the same in the name of the city or town. The valuation of any such water works may be ascertained in the manner provided in any ordinance or contract heretofore made and now in force, or in any manner that may hereafter be determined upon by the common council, or board of trustees, of such city or town, and the owner of any such waterworks, and the purchase price of such property shall not exceed the valuation thereof when so determined.

1068. Purchase subject to mortgage.—2. That any such city or town, may purchase any such waterworks subject to any part of an existing mortgage debt upon the same, and in such case such city or town shall not assume or become directly or indirectly liable for the payment of such incumbrance, but such debt shall not be affected by the transfer: *Provided*, That such city or town may pay, and is hereby empowered to pay, in the discretion of its common council or board of trustees, the interest upon such mortgage debt in lieu of fire hydrant rentals now paid, and pay at its option any part of the principal of such debt out of any moneys remaining in the treasury and not otherwise appropriated.

Municipal corporations can not avoid constitutional or statutory restrictions upon power to contract debts by purchasing property subject to liens. 2 Beach Conts., § 1168; Ironwood Water-Works Co. v. Ironwood City, 99 Mich. 455; Mayor v. Gill, 31 Md. 375; Litchfield v. Ballou, 114 U. S. 190.

1069. Bonds—May issue.—3. That for the purpose of paying the consideration for any such water works purchased as herein provided, any such city or town is hereby authorized to issue its bonds, with interest coupons attached, for an amount not exceeding the appraised value of any such water works, which bonds may be in denominations of not less than fifty dollars and not more than one thousand dollars,

and shall be payable at any place to be named in such bonds in installments not exceeding in all twenty years, and shall bear any rate of interest not exceeding six per cent. per annum, payable semi-annually, and such bonds may be negotiated in any market at not less than par. The amount of such bonds in no case shall exceed the constitutional indebtedness of such city or town.

1070. Taxation for extensions, payment of bonds, mortgage, etc.—4. For the purpose of making extensions and repairs to such water works and of paying the principal and interest of any such bonds, and of any incumbrance remaining upon any such water works, a tax of sufficient amount shall be assessed on all the taxable property of any such city or town, and collected each and every year, in the usual manner of levying and collecting taxes in cities or towns: *Provided*, That the additional tax hereby authorized shall not exceed fifty cents on each one hundred dollars of taxable property at one dollar on each poll.

1071. Control of.—5. When any such water works shall have been purchased as herein provided, it shall be owned, controlled and managed in all respects by such city or town, as if built originally by the city or town, under the laws now in force in reference to the construction and operation of water works by cities and towns in this State.

[Acts 1891, p. 64. In force June 3, 1891.]

1072. Trustees abolished in certain cities and towns.—1. That the office of and board of water works trustees in cities and incorporated towns of less than fourteen thousand (14,000) population by the last United States census be and the same is hereby abolished. [As amended, Acts 1895, p. 149. In force March 7, 1895.] Burns' Supp. 1897, § 4256.

1073. Control of water-works by city or town.—2. That in cities and incorporated towns of less than fourteen thousand (14,000) population according to the last United States census, having water works established, or in which water works may hereafter be constructed or established, the city common council or the trustees of incorporated towns, may construct, conduct, maintain, manage and control their own respective systems of water works and may establish rules and ordinances for their management and control and may appoint such committees of the common council of cities or town trustees of incorporated towns to direct and supervise the same, but the members of such committees shall not receive any pay in addition to their regular salaries, for services on such committees, and they may employ such agents and employes, with the consent of the common council of cities, or the town trustees of incorporated towns, to manage and conduct the same as they shall deem necessary and proper, and for such compensation as may be agreed upon or as shall be fixed by rule of the common council of cities or the town trustees of incorporated towns; *provided*, that in all cities to which this act applies, the work of making duplicates of water rents and keeping all accounts, books of record

and other necessary clerical work pertaining to the water works of such cities and incorporated towns, shall be performed by the treasurer thereof, and all water rents and incomes from whatever source of such water works system, shall be collected by such treasurer, who shall be the custodian of all funds belonging to such water works system, whether derived by direct taxation, by appropriation by the common council of cities, or board of trustees of incorporated towns, or from rents and other incomes of such water works system, and such water works funds shall be kept as a separate fund as now provided by law and shall not be appropriated to any other use or purpose than for the use and benefit of such water works system and the payment of employes and the general running expenses thereof. [As amended, Acts 1895, p. 149. In force March 7, 1895.] Burns' Supp. 1897, § 4257.

Superintendent of water-works—Bond—Sureties.—The town of Salem employed C as superintendent of water-works by a written contract defining his duties, including the collection of water rents, and took a bond conditioned for the faithful and impartial discharge of his duties as such superintendent. Prior to the amendment of said section by act of 1895, in the absence of any resolution or ordinance of the trustees of the town fixing the duties of C, and in the absence of any condition in the bond extending said C's authority to the collection and accounting of water rents, and in the absence of any statement in the bond mentioning or identifying any additional obligation imposed upon C, other than that of such "superintendent," C was not a town officer, the bond was a non-official bond, and the sureties upon the same could not be charged with water rents collected by C, which he appropriated to his own use and failed to account for. Town of Salem v. McClintock, 16 App. 656. See City of Lafayette v. James, 92 Ind. 240.

[Acts 1879 S., p. 88. In force March 25, 1879.]

1074. Duties and pay of trustees.—7. Said trustees shall receive such compensation as the common council or board of trustees may determine; and shall give bond in such sum as the common council or board of trustees shall order, for the faithful performance of their duties and the strict accounting for any funds that shall come into their hands; and they shall manage, conduct, and control the works, furnish supplies of water, collect water rents, appoint all necessary officers and agents and determine the tenure of office and amount of salaries of the officers and agents so appointed. R. S. 1894, § 4258.

Trustees' bond—Mandate.—It is the duty of the common council to determine, by an order, the sum in which the trustees shall give bond, and this duty may be enforced by mandate. City of Lafayette v. State, 69 Ind. 218.

Audit of accounts—City orders.—The board of water-works trustees of a city, and not the common council, are the proper officers to audit, allow and direct the payment of claims against the water-works; but for debts incurred for water furnished the city prior to the appointment and qualification of a board of water-works trustees, the common council may rightfully issue warrants on the city treasurer. City of Connersville v. Connersville, etc., Co., 86 Ind. 184; City of Connersville v. Connersville, etc., Co., 86 Ind. 235.

1075. By-laws and rules.—8. Said trustees shall be authorized to make such by-laws and regulations as they may deem necessary for

the safe, economical, and efficient management and protection of the water-works; and such by-laws and regulations shall have the same validity as ordinances, when not repugnant thereto or to the constitution and laws of the state. R. S. 1894, § 4259.

1076. Water-rents.—9. For the purpose of paying the expenses of managing and operating the water works, the trustees of the water-works shall have power to assess and collect, from time to time, a water rent of sufficient amount, in such manner as they may deem most equitable, upon all tenements and premises supplied with water, and from manufacturing establishments and railroad shops, and for the supply of boilers, locomotive engines, and for all other purposes tending to increase the income of the works. R. S. 1894, § 4260.

1077. Application of fund.—10. Should there be any surplus money after paying the expenses of operating the water-works, the sum may be applied to the repair, enlargement, or extension of the works or of the reservoirs, the payment of the interest of any loan made for their construction, or for the creation of a sinking fund for the liquidation of the debt. R. S. 1894, § 4261.

1078. Reports.—11. The trustees of the water-works shall make monthly reports to the common council or board of trustees of the receipts and disbursements of money belonging to the water-works, and an annual report of the condition of the same; and all money collected for water-works purposes, they shall cause to be deposited, weekly, with the treasurer of the city or town; and the receipt therefor shall be, by such collectors, deposited with said trustees or their authorized agent. R. S. 1894, § 4262.

1079. Funds, how kept.—12. All moneys so deposited shall be kept a separate and distinct fund, subject to the order of said trustees. And all orders drawn by said trustees on the treasurer of the city or town shall be signed by at least two of the trustees, and countersigned by the clerk of the water-works. R. S. 1894, § 4263.

1080. Contracts.—13. Said trustees shall be authorized to make contracts for the erection of water-works buildings, and construction of settling basins and other appendages, and the enlargement and repairs thereof; for the purchase of machinery and the manufacture and laying down of pipe; for the furnishing and supplying with connections of all necessary fire-hydrants for fire department purposes, and for keeping the same in repair; and for all other purposes necessary to the full and efficient management and construction of the water-works; and such contracts shall be subject to the ratification by the common council [or board of trustees]. R. S. 1894, § 4264.

City's duty as to streets—Construction of water-works.—It is the duty of municipal corporations to see that the streets are not left in a dangerous condition while water-works are being constructed by a contractor. City of Logansport v. Dick, 70 Ind. 65.

1081. Investigating committee.—14. The common council or board of trustees of any city or incorporated town in which water-works are or may be situated or in process of construction, shall be

authorized to appoint a committee of investigation of all books and papers together with all matters pertaining to the management of the water-works, at least once a year, and oftener, if necessary by reason of any neglect of duty or malfeasance on the part of any officer of the works; and any officer of the works found, by said committee, so offending shall be liable to removal from office by the council [or board of trustees]. R. S. 1894, § 4265.

Power to investigate charges against water-works trustees.—The common council has power to entertain and inquire into the truth of charges of malfeasance in office, preferred against trustees of the water-works, and to remove any or all of these officers for cause shown. Muhler v. Hedekin, 119 Ind. 481; City of Madison v. Korbly, 32 Ind. 74.

1082. Water free for public uses.—15. No charge shall be made by the trustees of the water-works for supplying water for the extinguishment of fires, or for furnishing and supplying connections for fire-hydrants, and keeping the same in repair for fire department purposes; or for the cleansing of market houses; or for the use of any public buildings belonging to the city or town; or for flushing out sewers or other sanitary purposes. R. S. 1894, § 4266.

1083. Attachments regulated.—16. All attachments of whatever nature made to the water-pipes or other fixtures belonging to the water-works, and intended for public use, shall be subject to the same supervision, rules, and regulations as are made for the protection of water-works against abuse, destruction, and inordinate or unnecessary use or waste of water; or the trustees may make general or special rules and regulations for such purposes. R. S 1894, § 4267.

1084. Advertising.—17. Said trustees, before entering into any contract for work to be done, shall cause two weeks' notice to be given in one or more daily newspapers of general circulation within the city or town, that proposals will be received by the trustees for performing the work, or the several parts of the same specified in said notice; and the trustees shall contract with the lowest bidder, if in their opinion said lowest bidder can be depended on to do the work with ability, promptness and fidelity; which contract shall be subject to ratification by the common council [or board of trustees], as heretofore provided. But if such be not the case, said trustees may give the contract to the next lowest bidder, or decline to contract, and readvertise. Or if no daily newspaper be published in such city or town, then such notice shall be published three weeks consecutively in a weekly newspaper of general circulation within such city or town. R. S. 1894, § 4268.

1085. Bonds.—18. Said trustees shall require bond to be given, with good and sufficient security for the faithful performance of the work; but no member of said board of trustees shall be such security; nor shall any trustee be a contractor, or in any wise, either directly or indirectly, be interested in any such work to be contracted for. Such bonds shall be submitted to the common council [or board of trustees] for approval. R. S. 1894, § 4269.

1086. Tax to pay loans.—19. For the purpose of paying the principal and interest on the money borrowed for the erection and completion of any water works or for the extension or improvement of such works, a tax of sufficient amount shall be assessed on all the taxable property of the city or incorporated town, and collected, each and every year, in the usual manner of levying and collecting taxes in the city or town: *Provided, always,* The additional special tax hereby authorized shall not, in any year, exceed fifty cents on each one hundred dollars of taxable property and one dollar on each poll. R. S. 1894, § 4270.

1087. Lien of tax.—20. The said tax, when levied and assessed, shall be a lien upon the property upon which it is levied and charged against the owners thereof, and shall be placed on the city or town duplicate in a separate column thereof, and be collected as other taxes. R. S. 1894, § 4271.

1088. Preventing pollution.—21. The jurisdiction of any city or incorporated town owning water works shall extend, for the purpose of preventing and punishing any pollution of the water, five miles beyond the corporation limits: *Provided,* If any person owning a water-power or mill property within the limits herein prescribed, in the use or management of which any stream is polluted to such an extent that the water thereof is thereby rendered unfit for use for such city purposes, such property or water-power may be condemned for the benefit of such city; but, before the same is done, such mill property shall be appraised by three disinterested resident freeholders of the county in which such property is situate, one of whom shall be selected by such trustees, one by the owner of such property, which two shall select a third. Said appraisers shall appraise such property at its fair cash value; and upon the tender of the same by the city [or town], and refusal by the mill-owner to accept the value appraised as aforesaid, such business may be injoined in any court of competent jurisdiction. R. S. 1894, § 4272.

1089. Bonds to pay for stock in water-works companies.—1. That whenever any city or incorporated town by ordinance or resolution of the common council of such city or board of trustees of such incorporated town shall have authorized any incorporated company or association to construct water-works for furnishing such city or incorporated town with wholesome water and such city or incorporated town shall have become a part stockholder in such water-works company or association by subscribing to the capital stock thereof, such city or incorporated town shall have the power to borrow money to pay for the stock so subscribed, and the common council of such city or the board of trustees of such incorporated town is hereby authorized to issue the bonds of such city or incorporated town payable at such time as the common council of such city or the board of trustees of such incorporated town may direct, and bearing interest at the rate of not exceeding six per cent. per annum, and may negotiate and sell the same at not less than face value and the proceeds of such bond shall

be applied only to the payment of such stock subscribed. [As amended, Acts 1895, p. 140. In force March 7, 1895.] Burns' Supp. 1897, § 3614.

See *ante*, § 124, clauses 26 and 43; also *ante*, § 1061.

ARTICLE 5.—SEWERS.

SEC.
1090. Local sewers.
1091. General sewers.
1092. Assessments for sewers in cities and towns.
1093. Construction of sewers—Condemnation of land for.
1094. Ditches and drains under drainage laws.
1095. May convert into sewers.

[Acts 1893, p. 332. In force March 4, 1893.]

1090. Local sewers.—1. That whenever the board of trustees or common council of any town or city shall desire to construct sewers or make sewer improvements, and whenever any such sewer shall from its size and character be intended and adapted only for local use by property-holders along the line of the street or alley on which it is constructed, and in the opinion of such board or common council is not intended or adapted for receiving sewerage from collateral drains, then, and in that case, the whole cost of the improvement shall be paid for by the property-holder abutting on such street or alley in the same manner and to the same extent as street improvements are paid for, except that such town or city shall not be liable for the portions of such local sewer which cross other streets or alleys, but the total cost shall be apportioned pro rata against property-holders. R. S. 1894, § 4273.

See *ante*, § 124, clauses 26 and 43; also, §§ 127 and 183, *et seq.*, and *post*, § 1107, *et seq.*

Street improvement assessment according to lineal measurement.—With reference to a sewer constructed before the enactment of this statute, an assessment for a public sewer made under the statute for street improvements, and placing the assessment not according to the benefits received but according to the lineal measurement of the property fronting on the sewer, is void. Crawfordsville, etc., Assn. v. Clements, 12 App. 464.

Power to build sewers a continuing one.—The power in the municipal officers to determine when they shall act in the matter of constructing a sewer, carries with it the power of determining how frequently they shall act; and if it be found that one local sewer is inadequate to furnish sufficient drainage, the city has the power to construct additional sewers, and to assess the costs against the property benefited. Coburn v. Bossert, 13 App. 359.

1091. General sewers.—2. Whenever in the opinion of such board or common council any sewer or drain ordered to be constructed, or any enlargement of one already constructed, shall from its size and character be intended and adapted not only for use by abutting property holders along the line of such drain or sewer, but it is also intended and adapted for receiving sewerage from collateral drains already constructed, or which may be constructed in the future, then, and in that case, such board or common council shall make a division

of the cost of such work. So much of such cost as shall be equivalent to the construction of an adequate local sewer not adapted to receive sewerage from collateral drains or sewers shall be paid for exclusively by the abutting property holders, in the same manner and to the same extent as local sewers are paid for by them. The excess of cost over and above what would be equivalent to the cost of a local sewer shall be assessed against each piece of property beneficially affected in proportion to the benefits received, including abutting property holders, as well as the holders not situated on the line of such drain or sewer, but in the opinion of the board or common council beneficially affected by the construction of such sewer, either directly or immediately or indirectly, and by way of the advantage which shall be realized in the future when collateral drains may be constructed from such property to such main sewer. R. S. 1894, § 4274.

1092. Assessments for sewers in cities and towns.—3. The provisions of the acts of the general assembly of the state of Indiana relating to the assessment for street improvements shall govern such board, or common council, in making assessments for the cost of any local sewer or drain, or the equivalent thereof. In the construction or enlargement of any sewer or drain adapted for more than local use the provisions of the acts of the general assembly of the state of Indiana relating to the assessments of benefits in the laying out of streets shall govern such board or common council in assessing benefits: *Provided*, That in the case of sewers the assessments may be made to run twenty years, and the bonds issued to anticipate said assessments, may also be issued payable, during a period of twenty years: *Provided, further*, That none of the provisions of this act shall apply to cities having more than 100,000 inhabitants as shown by the last census of the United States. [As amended, Acts 1895, p. 87. In force March 2, 1895.] Burns' Supp., 1897, § 4275.

Act construed—Council's jurisdiction to let contract—Assessments—Barrett law. —This act has reference only to the proper mode of making the assessments after the contract has been let and the work completed, and does not affect the jurisdiction of the common council in the letting of the contract for the construction of a sewer under the Barrett law. The common council is not required to submit to the city commissioners, before taking steps for the construction of a sewer, the matter of appraisement of benefits and damages to the property to be affected by the proposed improvement. Alley v. City of Lebanon, 146 Ind. 125.

[Acts 1899, p. 541. In force March 6, 1899.]

1093. Construction of sewers—Condemnation of land for.—1. That the common council of any city or board of trustees of any incorporated town in this state shall have full power and authority to construct and maintain sewers along any street or alley, or along any part of street, block or square in any town or city in this state, or along or across any lots or tracts of land, or along or across the right of way of any railroad in any incorporated city or town in this state; and the common council of any city or the board of trustees of any incorporated town shall be the sole judges of the necessity or utility of

the construction of such sewers. And for that purpose may enter upon, seize, appropriate and condemn any lot or part of lot, or any tract of unplatted land, or any part of any tract of unplatted land, or the right of way or other lands of any railroad company, person or corporation either within or without the corporate limits of said town or city, for the construction of any such sewer or sewers upon the payment of damages as provided under and pursuant to the provisions of an act entitled "an act in relation to the laying out, opening, widening, altering and vacation of streets, alleys and highways, and for straightening or altering of water courses by the cities of this state, and providing for the appointment of commissioners to assess the benefits and damages, and prescribing their duties and the methods of procedure and providing for the collection of benefits and payment of damages and prescribing the duties of city officers in relation thereto, and providing remedies in such matters," approved March 17, 1875, and the amendments thereto.

[Acts 1899, p. 429. In force April 27, 1899.]

1094. Ditches and drains under drainage laws.—1. That such parts of public ditches or drains constructed, or that may be constructed under any drainage laws of this state, that are within the corporated limits of any city or town, shall be kept in repair by the marshal of such city or town, he performing the same duties, exercising the same powers and receiving the same compensation as township trustees under the laws of this state relating to the repair of public ditches.

1095. May convert into sewers.—2. The common councils of cities and the boards of trustees of towns are hereby vested with power to convert the parts of public ditches and drains constructed under any drainage law of this state, that are within the corporate limits of such city or town, into sewers and to that end may change and vary the location of any such part of a public ditch or drain, providing that no change of location or conversion into a sewer will effect the general purpose of such ditch or drain, and providing further that no lands lying outside of the city or town, shall be charged with any additional burden by reason of such change.

ARTICLE 6.—CEMETERIES.

SEC.
1096. Conveyance by county board.
1097. Control.
1098. Power to protect.
1099. May vacate.
1100. Petition and finding.
1101. New cemeteries—Expense of removal.
1102. Removal and re-interment.
1103. Title not affected.
1104. Appropriation of lands for cemetery.
1105. Appraisers.
1106. Report—Exceptions—Trial—Payment.

[Acts 1867, p. 31. In force March 4, 1867.]

1096. Conveyance by county board.—1. It shall be lawful for the

board of county commissioners of any county in this state to convey to the board of trustees of any incorporated town or to the common council of any city, and the successors in office of such trustees or councilmen, any cemetery adjoining to or within the corporate limits of such town or city, upon the application of a majority of the citizens of such incorporated town or city, or on petition of the president and trustees of such incorporated town or the mayor and common council of such city to such county board, notice of which application shall have been given by publication in a newspaper of general circulation printed and published in such city or incorporated town, by posting up not less than three written advertisements of such intended application in public places therein, for not less than twenty days before any regular session of such board of county commissioners. R. S. 1894, § 4276.

1097. Control.—2. Upon such conveyance being made of any such cemetery to any town or city, it shall be their duty to accept and record the same upon their records, and also have the same recorded upon the records of deeds by the recorder of the county in which such town or city may be situated; to take possession of and control, improve and protect and preserve such cemetery; and lay out lots, and make all necessary regulations for interments therein. R. S. 1894, § 4277.

1098. Power to protect.—3. The board of trustees of such incorporated town or mayor and city council of such city shall have full power to make and enforce all necessary ordinances for the control and protection of such cemetery, and for the prosecution and punishment of any person, for the commission of any waste or trespass within or upon such cemetery, or upon any grave, monument, tomb, or tombstone, inclosure or ornament thereof, or any shrubbery or flowers thereon. R. S. 1894, § 4278.

Cemetery by dedication—Estoppel.—Land may be dedicated to the public for use as a cemetery. Such dedication may arise out of the conduct of the owner of the land and the acts of those who rely thereon, and the owner will be estopped to interfere with the use which he has occasioned. Redwood, etc., Ass'n v. Bandy, 93 Ind. 246.

City's power of control, etc.—For city's power of control beyond city limits, and authority to determine the necessity of establishing cemeteries within city limits, under certain charter provisions, see Bogert v. City of Indianapolis, 13 Ind. 134; Begein v. City of Anderson, 28 Ind. 79; City of Greencastle v. Hazelett, 23 Ind. 186.

Bodies of the dead—Ownership—Removal by city—Damages—Rights of lot-owners, etc.—Upon these subjects see Renihan v. Wright, 125 Ind. 536; Hamilton v. City of New Albany, 30 Ind. 482; Dwenger v. Geary, 113 Ind. 106; Bogert v. City of Indianapolis, 13 Ind. 134.

[Acts 1881, p. 17. In force September 19, 1881.]

1099. May vacate.—1. Where any cemetery within or adjoining the corporate limits of any city or incorporated town in this state has been or shall hereafter be conveyed to such city or town by the board of commissioners of the county in which such city or town is situate; or when any such cemetery exists wherein burials have been made by

the license or permission of the owner or owners of the lands wherever [whereon] such cemetery is located, or when any such cemetery exists by the dedication of the lands wherever [whereon] situated by the owner or owners thereof for burial purposes, the common council of such city or the board of trustees of such town may vacate such cemetery as hereinafter provided. R. S. 1894, § 4279.

1100. Petition and finding.—2. When five resident freeholders of such city or town shall, in writing, petition the common council of such city, or the board of trustees of such town, to vacate such cemetery, the same shall be entered at length in the proper record of proceedings of such common council or board of trustees. And if, upon considering such petition, such common council or board of trustees shall find that such cemetery has fallen into neglect and disuse; that remains of deceased persons have been from time to time exhumed and removed therefrom on account of such neglect, and that the same hinders and obstructs the growth of such city or town, or any part thereof; or that the same is injurious to the health of the neighborhood in which the same is located, such finding shall be entered at length in said record of proceedings, together with an order that such cemeteries be vacated. [As amended, Acts 1891, p. 298. In force June 3, 1891.] R. S. 1894, § 4280.

[Acts 1891, p. 298. In force June 3, 1891.]

1101. New cemeteries—Expense of removal.—2. The common council of such city or board of trustees of such town are authorized and empowered to receive by gift, or to purchase, ground within or without such city or town, whereon to re-inter bodies removed from such vacated cemetery, and such ground shall be held and maintained as a city or town cemetery. Such city or town shall assign and convey for burial purposes, to each owner of a lot or lots in such vacated cemetery, a lot or lots in such new burial ground equal in number to the lots owned by him in such vacated cemetery, which lot or lots in such new burial ground shall be taken and held by such lot owner in lieu of, and as compensation for, all his rights, title and interest in said vacated cemetery. If the cemetery so vacated shall be a private cemetery, the expense of removing and re-interring the bodies buried thereon, with their proper monuments or grave-marks, together with the cost of purchasing so much of new burial grounds, if the same be purchased, as will equal in area the land embraced in such vacated cemetery, shall be a lien upon the lands embraced in such vacated cemetery in favor of such city or town, which lien may be foreclosed according to the same procedure and upon like notice as required for the foreclosure of mortgages. R. S. 1894, § 4281.

[Acts 1881, p. 17. In force September 19, 1881.]

1102. Removal and re-interment.—3. Such common council or board of trustees shall thereupon prepare, as nearly as may be, a complete list of the names of the deceased persons remaining interred in

such cemetery, and shall publish the same for three weeks successively in some newspaper of general circulation printed and published in the county, together with a notice to all persons interested, that on and after the time stated in such notice (which shall not be less than thirty days after the last publication thereof), such common council or board of trustees will proceed to exhume the remains in such cemetery. The remains of such persons as may be claimed by their relatives or friends shall be delivered to such claimants for removal and re-interment. The remains of all persons remaining unclaimed shall be removed and properly re-interred in some suitable cemetery or burial ground in the vicinity of such city or town, by and at the expense of such city or town; and all monuments, grave-stones or other distinguishing marks shall be removed with such remains, and placed in proper position. Such common council or board of trustees shall also record in the proper record of their proceedings, the names, as ascertained, of all deceased persons re-interred by them, together with a description of the place of re-interment. R. S. 1894, § 4282.

1103. Title not affected.—4. The title to the cemetery grounds where the same has been or shall be conveyed by the board of commissioners of the county to any city or town, after such cemetery shall have been vacated, shall in nowise be disturbed thereby, but the same shall continue in and be preserved to such city or town. R. S. 1894, § 4283.

1104. Appropriation of lands for cemetery.—1. That whenever in the opinion of the common council of any city, or the board of trustees of any incorporated town, or the trustees of any corporation, owning or controlling a public cemetery in any county in Indiana, it becomes necessary to purchase real estate for cemetery uses, such common council, or such trustees, may file a petition in the circuit court of said county asking for the appointment of appraisers to appraise and assess the value of said real estate. It is provided that where any cemetery society has heretofore regularly caused its articles of association to be recorded in either the miscellaneous, mortgage or deed records of its county such organization is hereby legalized. [As amended, Acts 1897, p. 309. In force March 8, 1897.] Burns' Supp. 1897, § 4704*a*.

Act constitutional.—The statute relating to condemnation of land for the purpose of a public cemetery is not unconstitutional, in that it delegates to corporation officers judicial power to determine the necessity for such appropriation; nor is it unconstitutional on the ground that it does not provide for trying and determining the question of public necessity. Farneman v. Mount Pleasant Cemetery Ass'n, 135 Ind. 344.

Petition to determine land for an addition—Sufficiency.—The petition to annex land to a public cemetery, which states that the petitioner is a corporation owning and controlling a public cemetery in, etc.; that, in the opinion of its trustees and directors, it has become necessary to purchase the real estate therein described, for its use as an addition to such cemetery, etc., sufficiently shows a purpose to condemn the land for a public use. Farneman v. Mount Pleasant Cemetery Ass'n, 135 Ind. 344.

1105. Appraisers.—2. Upon said petition being filed, the owner or owners of said real estate, having had ten days' notice of the pendency thereof, the court shall appoint three freeholders, residents of the township wherein said real estate is situate, to appraise and assess the value thereof. R. S. 1894, § 4705.

1106. Report—Exceptions—Trial—Payment.—3. Said appraisers, before making said assessment, shall take an oath before the clerk of said court to make a fair, true and honest appraisement of said real estate, and shall then proceed to examine said real estate, hear such evidence as they may consider necessary, and make a report of their appraisement within five days after their appointment. Upon said report being filed the owner or owners of said real estate may except to the same for any cause, and a trial thereon may be had in said court. When the value of said real estate shall finally be determined in said court, said trustees may pay the amount determined to the clerk of said court for the use of the owner or owners of said real estate. R. S. 1894, § 4706.

ARTICLE 7.—STREET IMPROVEMENTS.

SEC.

1107. Petitions for street improvements—Procedure.
1108. Resolution of necessity—Notice to objectors.
1109. Apportionment of costs—Liens—Sale.
1110. Allowance to owner who has improved—Bonds.
1111. Estimates—How paid—Liens.
1112. Final estimate of costs—Report of engineer.
1113. Notice of hearing—Assessments—Liens—Payment in installments.
1114. All persons may pay by installments.
1115. Street and sewer bonds—Lien.
1116. Certificates to contractor—Collecting assessments—Foreclosure.
1117. Precept for sale—Appeal—Sale and conveyance.
1118. Act not to apply to cities of one hundred thousand.
1119. Estimates—Contractors to satisfy of record.
1120. Cost of improvements—Apportionment—Cities less than 5910, etc.
1121. Act supplemental.
1122. Sidewalk improvements—Certain cities.
1123. Grade—Contract—Terms.
1124. Notice.
1125. Contract to lowest bidder.
1126. Assessments—How collected—Foreclosure.
1127. Contractor's receipt.
1128. Change of grade.
1129. Improvements under other laws.
1130. Street improvements in towns and cities of less than 12,000.
1131. Cleaning streets and alleys.
1132. Actions to enforce improvement assessments—Notice.
1133. Attorneys' fees—Amount.
1134. Owner may recover illegal fees and penalty.
1135. Misdemeanor—Penalty.

[Acts 1889, p. 237. In force March 8, 1889.]

1107. Petitions for street improvements—Procedure.—1. That when the owners of two-thirds of the whole line of lots or parts of lots in any city or incorporated town (and measuring only the front line of such lots as belong to such persons resident in such city or town) bordering on any street or alley consisting of one whole

square between any two streets crossing the same, or if the common council of such city, or the board of trustees of such town, deem it expedient for any reasonable distance less than one whole square or block upon any square or alley, shall petition the common council of such city or board of trustees of such town to have the sidewalk graded and paved, or the whole width of the street graded and paved, or for either kind of improvement, or for lighting such streets according to the general plan of improvements in said city or incorporated town, or for constructing a sewer, the common council of such city or the board of trustees of such town may cause the same to be done by contract, given to the best bidder, after advertising for three weeks in some newspaper of general circulation published within the city or incorporated town, to receive proposals therefor, and the common council of such city, or the board of trustees of such town shall have the power to compel the owner or owners of a lot or part of a lot on any street or alley, or upon any part of any street or alley, to repair the sidewalk in front of their respective lots or parts of lots, and in case the owner or owners of any lot or part of a lot on any street or alley, or any part thereof, fail or refuse to repair the sidewalk in front of their lots, or if the owner be a non-resident of said city or town, or can not be found, the common council of such city or the board of trustees of such town may cause such repairs to be made at the cost and expense of the owner or owners of such lot or lots; or if such sidewalk be dangerous, the street commissioner or any officer of said city or incorporated town may cause such repairs to be made immediately, and the city or incorporated town shall have a lien on such lot or lots for the reimbursement to her of the cost of such improvement, and the common council of such city or the board of trustees of such town are hereby invested with full powers to pass by-laws and ordinances providing how and in what manner the repairs or improvements shall be made and in what manner the cost shall be assessed and collected from such owner or owners, and the manner in which the lien of the city or incorporated town for the expense incurred by her may be enforced against the lot or lots of such owner or owners, and the city or incorporated town may bring an action, by its attorney, in any court of competent jurisdiction to foreclose such lien as a mortgage is foreclosed, and in such action may recover, in addition to the amount of such lien and the costs of such proceedings, a reasonable attorney fee, for the use of its attorney, for enforcing such lien, and such property shall be sold without relief from valuation or appraisement laws, and upon the sale of such property, if no other person bid, the amount of such judgment and all costs, the city or incorporated town may purchase said property for such judgment and all costs, and if not redeemed within one year from the time of such sale, the sheriff shall issue to the holder of the certificate of sale a deed for such property, and such city or incorporated town, if such deed be issued to it, shall become the absolute owner of such property: *Provided*, That any city or incorporated town having a population less than ten thousand may,

by a two-thirds vote of all the members of the common council of such city or the board of trustees of such town, cause plank or gravel walks, of such dimensions as such council or such board of trustees may determine, to be constructed either upon the natural grade of the sidewalk therein or any modification thereof established by such council or such board of trustees, and the cost and expense of any such improvement or repairs thereto shall be a lien upon the real estate fronting thereon, and shall be assessed and collected in the same manner as now prescribed by law for collecting assessments for improving streets, alleys and sidewalks: *Provided, further*, That when the state of Indiana is the owner of property on or along the street or streets proposed to be improved, as hereinbefore provided, the common council of such city or the board of trustees of such town shall not contract for the execution of said improvements, involving the state in any liability, without first obtaining the written consent and approval of the auditor and treasurer of state, but such city or incorporated town may make such improvement at its own expense. R. S. 1894, § 4288.

See *ante*, § 219, *et seq.*

For sewers, cities, see *ante*, § 124, clauses 26 and 43, and §§ 127 and 183, *et seq.*; also *ante*, § 1090, *et seq.*

Construction—Repeal.—This act is constitutional. McEneney v. Town of Sullivan, 125 Ind. 407.

This act repealed by implication the act for the improvement of streets in towns, approved April 27, 1869. (R. S. 1894, §§ 4401, 4402, 4403.) Koons v. Cluggish, 8 App. 232; Cluggish v. Koons, 15 App. 599; Allen v. Town of Salem, 10 App. 650.

This act does not repeal the act of 1859 (R. S. 1894, §§ 4394–4397, *post*, § 1250, *et seq.*), for the grading and laying of sidewalks in incorporated towns. Shrum v. Town of Salem, 13 App. 115; Allen v. Town of Salem, 10 App. 650.

Existing remedies.—This act does not affect such remedies as had attached to accrued liabilities previous to the taking effect thereof. Phillips v. Jollisaint, 7 App. 458; Koons v. Cluggish, 8 App. 232; Daggy v. Ball, 7 App. 64.

Purpose of statute.—It is the purpose, spirit and language of the act to enable the city to require improvements, to dictate the character thereof, to contract therefor, to enforce the payment of benefits by property owners, to aid the property owner in deferring such payments by issuing the bonds of the city, from the proceeds of sales of which to pay the contractor, and from the annual payments of the property owners upon their assessments to meet the maturing bonds. Porter v. City of Tipton, 141 Ind. 347.

This statute is supplementary to, and is to be construed in connection with, the general law for the construction of sewers. Chicago, etc., R. Co. v. City of Huntington, 149 Ind. 518; Alley v. City of Lebanon, 146 Ind. 125. And should be construed with the improvement resolution and contract. City of Huntington v. Force, Ind. Sup. Ct., April 4, 1899.

Statute construed—Collateral proceedings—Jurisdiction.—Statutes granting to municipal corporations powers which involve the imposition of burdens upon private property are to be strictly construed, and where such statute requires the doing of some particular thing in its nature jurisdictional, as a condition precedent to the right to impose such burden, the failure to do the thing required will render the whole proceeding void. In matters of local improvement, however, where jurisdiction over the whole subject is conferred upon a municipal corporation, with power to make local assessments for that purpose, any failure to comply strictly with any statutory requirement, not affecting the jurisdiction, will be regarded as a mere irregularity, and in a collateral proceeding will be disregarded. Barber, etc., Co. v. Edgerton, 125 Ind. 455; Sands v. Hatfield, 7 App. 357; Lewis v. Albertson, App. Ct., May 24, 1899; Elliott Roads and Streets, pp. 371, 373, 374.

Improvement without petition.—While it is provided that street and sewer improvements may be made on petition, yet such improvements may also be made in towns and cities, by a vote of two-thirds of the board of trustees or common council, without petition, even against the remonstrance of the property owners. Keith v. Wilson, 145 Ind. 149; McEneney v. Sullivan, 125 Ind. 407; De Puy v. City of Wabash, 133 Ind. 336; Pittsburgh, etc., R. Co. v. Town of Crown Point, 150 Ind. 536.

Petition insufficient.—The fact that there is an insufficient petition does not necessarily render the proceedings void for want of jurisdiction, for the proceedings may not have been founded upon the petition. McEneney v. Town of Sullivan, 125 Ind. 407.

Same—Adjudication of council—Collateral attack.—The determination by the council or board of trustees of the sufficiency of the petition is conclusive against collateral attack. Pittsburgh, etc., R. Co. v. Town of Crownpoint, 150 Ind. 536; McEneney v. Town of Sullivan, 125 Ind. 407; Tucker v. Sellers, 130 Ind. 514; Board, etc., v. Justice, 133 Ind. 89, 93; De Puy v. City of Wabash, 133 Ind. 336; Kiphart v. Pittsburgh, etc., R. Co., 7 App. 122.

Injunction proceedings—Only jurisdictional questions available.—An injunction suit to prevent the improvement of a street at the expense of the abutting owners, is a collateral attack upon the jurisdiction of the corporate officers, and only defects or irregularities affecting the jurisdiction can be made available. Questions as to the manner in which the work was done under the contract, and kindred questions, can not be considered in such suit, for they do not go to the jurisdiction. McEneney v. Town of Sullivan, 125 Ind. 407; Alley v. City of Lebanon, 146 Ind. 125; Elliott Roads and Streets, pp. 296, 440, 442.

Notice to bidders—Assessment.—An assessment for a sidewalk improvement is not invalid because the notice to bidders, required by this section, was published in only one newspaper, when the ordinance provides for two, as the statute only requires publication in one newspaper. City of Connersville v. Merrill, 14 App. 303.

Notice of letting contract—When sufficient.—A notice published May 25, June 1 and June 8, that contract would be let June 16, is for three weeks and sufficient. It is not necessary that the last publication shall be three weeks before the time fixed for the letting of the contract. Bozarth v. McGillicuddy, 19 App. 26.

When the notice given refers to the plans and specifications, which sufficiently describe the proposed work, the notice will, by such reference, be made sufficiently definite and certain, though this notice of itself does not specifically describe the work. Bozarth v. McGillicuddy, 19 App. 26. See Lewis v. Albertson, App. Ct., May 24, 1899.

In a collateral attack upon an assessment the failure of the record to affirmatively disclose the proof of publication of notice does not show that the city proceeded without jurisdiction. City of Bloomington v. Phelps, 149 Ind. 596.

Best bidder—Void award of contract.—The requirement that contracts for street improvements shall be awarded to the best bidder is violated by the award of a contract containing provisions beneficial to the contractor not contemplated by the form of bid supplied to bidders, and which are substantially similar to the conditions incorporated in the bid of the bidder to whom the contract is awarded, although such conditions are stricken out before the acceptance of the bid. Wickwire v. City of Elkhart, 144 Ind. 305. See 2 Beach Conts., § 1183, *et seq.*

Best bidder.—After the improvement is completed a property owner can not object to the proceedings on the ground that the contract for the improvement was awarded to one whose bid was slightly higher than another bid. City of Bloomington v. Phelps, 149 Ind. 596.

Council—Jurisdiction—City commissioners.—The common council has jurisdiction under this act to enter into a contract for the construction of a general sewer without first submitting the matter to the city commissioners for an appraisement of the benefits and damages to the property to be affected by the proposed improvement. The act

of 1893 (R. S. 1894, §§ 4273-4275), has reference only to the proper mode of making the assessments after the contract has been made and the work completed. Alley v. City of Lebanon, 146 Ind. 125.

Street within corporate limits—Presumption.—In the absence of proof to the contrary it will be presumed that a street which the city or town authorities assume to improve is within the corporate limits of the city or town. Town of Woodruff Place v. Raschig, 147 Ind. 517. See Lewis v. Albertson, App. Ct., May 24, 1899.

Street—Sidewalk—Improvement of part.—Under this section the common council can pave the whole or any part of either street or sidewalk it may deem beneficial to the public. Bozarth v. McGillicuddy, 19 App. 26.

Construction of sewer by city—Trespass on abutting land—Damages.—The power conferred upon the municipal corporation to construct a sewer along the street, does not authorize it to go beyond the limits of the street and enter upon abutting premises, nor to put earth upon such premises to the inconvenience and injury thereof; and for any such injury the contractors engaged in doing the work are liable in damages. Kinser v. Dewitt, 7 App. 597.

Sewers—Damages for negligent construction—Nuisance.—If deposits from a sewer constructed and maintained by a city cause peculiar injury to the owner of docks, by preventing or materially interfering with the accustomed and lawful use of such docks, the city is liable in damages. Peck v. City of Michigan City, 149 Ind. 670.

Nuisance—Limitation of action.—Where a nuisance is of a character so permanent that it may fairly be said that the entire damage accrues in the first instance, the statute of limitation begins to run at this time. On the other hand, where the nuisance is a continuing source of injury, there is a continuing right of action. Peck v. City of Michigan City, 149 Ind. 670.

1108. Resolution of necessity—Notice to objectors.—2. Whenever cities or incorporated towns subject to the provisions of this act shall deem it necessary to construct any sewer, or make any of the alley or street improvements in this act mentioned, the council or board of trustees shall declare by resolution the necessity therefor, and shall state the kind, size, location and designate the terminal points thereof, and notice for ten days of the passage of such resolution shall be given for two weeks in some newspaper of general circulation published in such city or incorporated town, if any there be, and if there be not such paper, then in some such paper printed and published in the county in which such city or incorporated town is located. Said notices shall state the time and place, when and where the property owners along the line of said proposed improvement can make objections to the necessity for the construction thereof. R. S. 1894, § 4289.

Resolution—Order of improvement—Jurisdiction.—The failure of the board or council in the resolution ordering the improvement to declare the necessity therefor does not affect the jurisdiction of the board or council to proceed with the improvement. When the improvement is ordered such order necessarily involves a determination of the necessity for the work, and upon proper notice the board or council has jurisdiction to proceed with the improvement under such order. Pittsburg, etc., R. Co. v. Hays, 17 App. 261; Barber, etc., Co. v. Edgerton, 125 Ind. 455.

Resolution of necessity—Notice.—The adoption by the common council of a resolution of necessity under this section, and the causing of notice of same to be given are not essential to give jurisdiction where a notice and a hearing are given to the property

owner before the final assessment is made. Hughes v. Parker, 148 Ind. 692; Hart v. Parker, 148 Ind. 706. See Lewis v. Albertson, App. Ct., May 24, 1899; Willard v. Albertson, App. Ct., May 24, 1899.

Substantial compliance with statute.—It is a substantial compliance with the statute for the common council to declare the necessity for the improvement in the same resolution ordering the improvement. Barber, etc., Co. v. Edgerton, 125 Ind. 455; Quill v. City of Indianapolis, 124 Ind. 292.

Resolution or ordinance.—The order for the improvement may be either a resolution or an ordinance. Sands v. Hatfield, 7 App. 357; Merrill v. Abbott, 62 Ind. 549.

The order entered by a common council for a particular improvement is a mere preliminary step from which it may recede at any time before the contract for the improvement is concluded. Barber, etc., Co. v. Edgerton, 125 Ind. 455.

Passage of resolution—Yeas and nays.—Failure to enter yeas and nays on the record showing passage of resolution upon which improvements are made under this statute does not render proceedings void. New Albany, etc., Co. v. Crumbo, 10 App. 360.

Notice—Not imperative.—While this section provides for the giving of notice of the time and place where objections may be made to the necessity of the improvements, such notice is not imperative. This question may be determined by the council without notice to the property owner who is to be affected by such improvement, but notice of the intention to make the assessment upon the property must be given. Bozarth v. McGillicuddy, 19 App. 26; Barber, etc., Co. v. Edgerton, 125 Ind. 455. See Lewis v. Albertson, App. Ct., May 24, 1899; Willard v. Albertson, App. Ct., May 24, 1899.

"Due process of law"—Notice.—A law which authorizes an assessment against property, but makes no provision for notice to the owner, and gives him no opportunity to be heard in respect to the correctness of the charge lacks the essential element of "due process of law," and is unconstitutional. Garvin v. Daussman, 114 Ind. 429, 432; Kuntz v. Sumption, 117 Ind. 1, 2; McEneney v. Town of Sullivan, 125 Ind. 407, 409; Barber, etc., Co. v. Edgerton, 125 Ind. 455, 463; Elliott Roads and Streets, pp. 151, 154.

The notice and hearing which the constitution demands need only be such as are adapted to the nature of the assessment proposed, and such as afford the property owner an opportunity to show that, according to the method prescribed for making the assessment, the amount charged against him is not correct. Garvin v. Daussman, 114 Ind. 429, 432; Law v. Johnston, 118 Ind. 261, 263.

Proceedings for street improvements, where the cost is to be apportioned among those benefited, although somewhat of a summary character, are within the rule which requires notice and a hearing in order that a charge may be imposed by "due process of law." Garvin v. Daussman, 114 Ind. 429, 434.

Notice.—The notice required by this section is to be published for two weeks, ten days prior to the time fixed for making objections to the proposed improvement. Quill v. City of Indianapolis, 124 Ind. 292.

The finding of a court as to notice need not state date of insertion in newspaper nor length of publication. Dugger v. Hicks, 11 App. 374.

Same—Non-liability.—A land-owner is not liable for an improvement of a street on which his land abuts, where no notice of such improvement was given by publication or otherwise. Stephenson v. Town of Salem, 14 App. 386.

The legislature has the power to fix the kind of notice and the manner in which it shall be given. Klein v. Tuhey, 13 App. 74; Swain v. Fulmer, 135 Ind. 8; McEneney v. Town of Sullivan, 125 Ind. 407; Barber, etc., Co. v. Edgerton, 125 Ind. 455; 2 Dillon Munic. Corp., 4th ed., § 802*a*; Elliott Roads and Streets, p. 153.

Proceedings—When sufficient.—When the declaratory resolution and notice thereof, and the notice to contractors, and the contract itself, each stated that the streets and sidewalks to be improved were in the town of Dunkirk, Ind., and neither the ordinance nor judgment foreclosing the lien in direct terms stated that the improvement was within the corporate limits, but it did appear that the property assessed abutted upon the

street named in the proceedings for improvement, it sufficiently appeared that the property assessed was within the corporate limits. Pittsburgh, etc., R. Co. v. Hays, 17 App. 261.

Ordinance, when sufficient.—An ordinance for a street improvement is not defective on the ground that the nature and extent of improvements are not shown, when the specifications in it require that the street shall be graveled and guttered according to stakes set by the town civil engineer, to a width and depth specified in the ordinance, with the best quality of raked river gravel, and the sidewalks graded to a specified width and graveled to a specified depth with the best quality of sidewalk gravel, and the gutter of each side of the street to be hammered dressed stone, gutter to be four feet wide and seven inches deep, all work to be done to the entire satisfaction of the town civil engineer. Dugger v. Hicks, 11 App. 374.

A recital in an ordinance that the same was passed by a two-thirds vote of the board amounts to a finding that the same was passed by a two-thirds vote and such finding is conclusive against collateral attack. Pittsburgh, etc., R. Co. v. Town of Crown Point, 150 Ind. 536; City of Indianapolis v. Consumers', etc., Co., 140 Ind. 246.

Ordinance—Material.—An ordinance for a sidewalk improvement is not invalid for uncertainty because it provides that the improvement thereby made shall be made of such one of three kinds of stone enumerated therein, as shall be determined by the common council on reception of bids. City of Connersville v. Merrill, 14 App. 303.

Remonstrance—Estoppel.—The appearance of a land-owner to protest against the improvement of one street, will not estop him from disputing the right of the town trustees to improve another street. Stephenson v. Town of Salem, 14 App. 386.

Objections—Notice filed with clerk.—This section contemplates that no action shall be taken by the common council after resolving to make the improvement, until notice is given, and an opportunity afforded the property owners to present for the consideration of the council such objections as they may make to the necessity for the construction of the work. This object is accomplished by requiring objections to be filed with the clerk, to be by him laid before the council. The appointment of a committee to hear the objections is not required. Quill v. City of Indianapolis, 124 Ind. 292.

1109. Apportionment of costs—Liens—Sale.—3. In all contracts specified in the preceding section the cost of any street or alley improvement shall be estimated according to the whole length of the street or alley, or the part thereof to be improved per running foot, and the costs of any such sewer shall be apportioned among the lands, lots and parts of lots, benefited thereby, and according to such benefits without regard to the assessment for taxation of such property, and the city or incorporated town shall be liable to the contractor for the contract price of said improvement, and the owners of lots or parts of lots bordering on such street or alley, or the part thereof to be improved, or of the lots or parts of lots benefited by the construction of such sewer, shall be liable to the city for the proportion of the costs in the ratio of the front line of their lots owned by them to the whole improved line for street and alley improvements, and for the construction of such sewer for the benefit of such lots or parts of lots thereby, and the city or incorporated town shall have a lien upon such lots or parts of lots, respectively, from the time such improvement is ordered, for such costs of improvement, collectible as hereinafter provided, and in all cases where such improvement shall have been made, or may hereafter be made on any street or alley running along or through any

unplatted lands lying within the corporate limits of such city or incorporated town, the cost of such improvement shall be estimated according to the whole length of the street or alley, or the part thereof to be improved per running foot, and the owners of such unplatted lands bordering on such street or alley or the part thereof to be improved shall be liable to the contractor for their proportion of the cost, in the ratio of the front lines of such unplatted lands owned by them to the whole improved line; and in making the assessment against such owners for the improvement of such lots or parts of lots and unplatted lands shall be assessed upon the ground fronting or immediately abutting on such improvement back to the distance of one hundred and fifty feet from such front line, and the city or incorporated town and the contractor shall have a lien thereon for the value of such improvement: *Provided, however,* That where such land is subdivided or platted the land lying immediately upon and adjacent to the line of the improvement and extending back fifty feet shall be primarily liable to and for the whole cost of the improvement, and, should that prove insufficient to pay such cost, then the second parcel and other parcels in their order to the rear parcel of said one hundred and fifty feet shall be liable in their order. Such assessments, with the interest accruing thereon, shall be a lien upon the property so assessed and shall remain a lien until fully paid, and shall have precedence over all other liens, excepting taxes, and shall not be divested by any judicial sale, and if such city or incorporated town shall fail, neglect or refuse to promptly enforce and collect such assessment when due, the owner or holder of any of the bonds or certificates hereinafter mentioned may foreclose such lien or liens as a mortgage is foreclosed in any court of competent jurisdiction, and shall recover in addition to the amount of said bonds and interest and all costs, a reasonable attorney's fee. The amount realized by the sale of any such property, or the payment of such assessment after the payment of the costs of such proceeding shall, to the extent of such assessment, with interest thereon, be applied pro rata to the payment of the then outstanding bonds or certificates herein mentioned without reference to the time of the maturity of the bonds or certificates. Any mistake in the description of the property or in the name of the owner shall not vitiate the lien of such assessment. Such city or town shall be liable and pay for all that part of such street or alley improvement as shall be occupied by the street and alley crossings, and may order that any part of the total cost of any of the improvement in this act mentioned shall be paid out of the general fund. R. S. 1894, § 4290.

Apportionment of cost according to benefits.—Improvements under this statute should be paid for by the owners of property specially benefited thereby. An assessment for a public sewer made under the statute relating to sidewalks, and placing the assessment not according to benefits, but according to lineal measurement of the property fronting on the sewer, is void. Crawfordsville, etc., Ass'n v. Clements, 12 App. 464.

Assessment—Direct attack—Estoppel.—A property owner has a right to assume that his property will be assessed at least under color of the statute, and where the

remedy sought is not a collateral attack but a direct proceeding attacking the assessment, there is no estoppel. Crawfordsville, etc., Ass'n v. Clements, 12 App. 464.

Order of liability—Lots within 150 feet.—Under this act assessments for street improvements can only be made against lots bordering upon the street, and the liability of other lots within 150 feet of the street improved arises only in the event that the bordering lot, against which the whole assessment must be levied, fails to sell for a sum sufficient to pay the assessment, and then only for the deficit, in the order fixed by the statute. City of Terre Haute v. Mack, 139 Ind. 99; Town of Woodruff v. Raschig, 147 Ind. 517; Bozarth v. McGillicuddy, 19 App. 26.

The act of the engineer in apportioning a part of the cost of a street improvement upon a non-bordering lot, and the city common council in assessing such amount against such lot are void, and the collection will be enjoined. City of Terre Haute v. Mack, 139 Ind. 99.

Waiver—Property secondarily liable.—The waiver signed by the abutting property owner in no way affects the rights or liabilities of persons whose property is only secondarily liable. Cleveland, etc., R. Co. v. Edward C. Jones Co., 20 App. 87.

In order to make the whole of the first 50 feet primarily liable, it is necessary that one person should own the whole of the first 50 feet; if two persons each own 25 feet of the first 50 feet, the 25 feet abutting the improved street is primarily liable, and the second 25 feet should be taken only in the event the first is insufficient to satisfy the lien. This secondary liability extends back from the street a distance of 150 feet. City of Terre Haute v. Mack, 139 Ind. 99; Cleveland, etc., R. Co. v. Edward C. Jones Co., 20 App. 87.

Parties—Complaint.—The abutting owners and those owning lots within the limit of 150 feet, may be joined as defendants in the same complaint. Cleveland, etc., R. Co. v. Edward C. Jones Co., 20 App. 87.

Assessment—Quieting title—Injunction.—The title to no part of the first one hundred and fifty feet back from the street under improvement can be quieted against the assessment until the same is paid; but where there are several succeeding parcels within the one hundred and fifty feet, the collection of the assessment against any rear parcel may be enjoined until the front parcel or parcels are first exhausted. Town of Woodruff Place v. Raschig, 147 Ind. 517; City of Terre Haute v. Mack, 139 Ind. 99.

In order that the whole of the first fifty feet back from the front shall be equally liable, it must be owned by one person. City of Terre Haute v. Mack, 139 Ind. 99; Bozarth v. McGillicuddy, 19 App. 26.

First and subsequent improvement—Priority of liens.—Every improvement made increases the security for the payment of assessments previously made, and, therefore, it follows that the last assessment for such improvement must take precedence, as a lien, over those previously made. Burke v. Lukens, 12 App. 648.

Assessment lien superior to mortgage lien.—The assessment lien for improvement is superior to a mortgage lien prior in date. This is upon the theory that the security has been enhanced in proportion to the amount of the improvement lien. City of Bloomington v. Phelps, 149 Ind. 596; Elliott Roads and Streets, p. 433.

City's liability—Secondary.—It is not the purpose of the statute to charge, primarily, the cost of the street improvements against the city. The city's liability is but secondary, and arises only when it has sold bonds, collected assessments, or otherwise realized the amounts owing from the property benefited, and the contractors have not been paid. Porter v. City of Tipton, 141 Ind. 347; Quill v. City of Indianapolis, 124 Ind. 292; Robinson v. City of Valparaiso, 136 Ind. 616; City of Huntington v. Force, Ind. Sup. Ct., April 4, 1899.

Same—Crossings—Indebtedness.—The corporation is liable to pay in cash the expense for so much of the street and alley improvements as shall be occupied by street and alley crossings. Such liability is to be paid in cash upon the completion of the work and final estimate; this being so no debt results on that account. Quill v. City of Indianapolis, 124 Ind. 292, 301.

A municipal corporation is liable for its proportion of the cost of local improvements assessed against it even though the statute exempts public property from taxation. Warner v. City of New Orleans, 172 U. S. 648.

Land reserved for fence.—A strip of land two feet in width, abutting upon a street, reserved in the plat for the location of a fence to be held as the private property of the owners of the several lots in the town, collectively, can not be sold for the improvement of the roadway of the street. Town of Woodruff v. Raschig, 147 Ind. 517.

Constitutionality—Waiver upon appeal.—Where a railroad company appealed to the appellate court from a judgment declaring a lien on its right of way for an assessment for improvement of street, by failure to duly present the question of the constitutionality of the statute upon the original hearing such question was waived, and the appellant could not, thereafter, upon a petition for rehearing present that question for the purpose of defeating the jurisdiction of the court. Pittsburgh, etc., R. Co. v. Hays, 17 App. 261.

Assessment—Bonds—Complaint to foreclose.—The proceedings of the common council and the assessment are the basis of an action to foreclose, not the bonds which have been issued to the contractor. The rights of the assignee of the bonds are no greater than those of the contractor. In either case, in a suit to foreclose the lien a complaint which omits the averment that an assessment was made is bad. The complaint should show that the municipality has taken the necessary steps to fix the lien upon the lots. Cleveland, etc., R. Co. v. Edward C. Jones Co., 20 App. 87.

Assessment liens—Redemption from sale—Recovery of redemption money.—Where a judgment foreclosing an assessment lien for street improvements is set aside as void, money paid by the property owner in redeeming the property from such foreclosure sale pending the action to set aside the judgment is not a voluntary payment, and may be recovered. Keene v. McGillicuddy, 19 App. 427.

1110. Allowance to owner who has improved—Bonds.—4. Whenever the owner of any lot or part of a lot, before the letting of such contract, shall have made any improvement in front of his lot or part of a lot, in accordance with the general plan for the improvement of such street or alley, and under the direction of the city or town engineer, he shall be entitled to a reasonable allowance therefor upon his proportion of the cost of such improvement, which reasonable allowance shall be determined by said engineer: *Provided*, That the common council of such city, or board of trustees of such incorporated town, may require all contractors for street and sewer improvements to give bonds, with good and sufficient freehold surety, for the faithful performance of the work, and that all contracts made by any city or incorporated town, or by any officer under the authority thereof, for public improvements or otherwise, in the profits whereof any officer shall be interested, directly or indirectly, shall be void: *And provided further*, That after receiving bids for the improvement of any street or alley, or the construction of any sewer, as aforesaid, and in case all such bids are rejected as unsatisfactory by reason of the bids being for too great a price, or the bidder failing to give a satisfactory bond, or for any other cause deemed sufficient by such common council or board of trustees, then, and in such case, the common council of any city, or the board of trustees of any incorporated town, may order the work to be done by the street commissioner of such city or the marshal of such town; but in such case the total cost of the work to be assessed

against the property owners, shall not be in excess of the lowest responsible bid for said work, which cost shall be assessed and collected, and bonds may be issued therefor, as provided in case of the letting of the work by contract, or the council or board of trustees may in such case re-advertise for bids for said work. [As amended, Acts 1891, p. 323. In force March 6, 1891.] R. S. 1894, § 4291.

Amendment—Effect.—This section as amended takes the place of the original. All the provisions of the act are to be construed together. Robinson v. City of Valparaiso, 136 Ind. 616.

Improvement by owner—Allowance.—The property owners are entitled to a reasonable allowance, to be determined by the engineer, for improvements made by them, as provided by this section. City of Connersville v. Merrill, 14 App. 303, 307.

1111. Estimates—How paid—Liens.—5. When any such contract shall be made, or shall have been heretofore made, and shall have been in progress of fulfillment, the common council of such city or the board of trustees of such town shall have power to cause estimates to be made from time to time of the amount of work done by the contractor, and to cause the same to be paid out of the treasury, deducting a reasonable amount of percentage to secure the completion of the contract, until the whole shall be finished, and to prescribe the time in which the whole shall be completed, and such estimates shall be a lien upon the several parcels of ground upon which they are assessed to the same extent that taxes are a lien, and shall have the same preferences over other demands, and such liens shall be in favor of the city or incorporated town, and the owner of the certificate or bonds hereinafter mentioned to secure to the city or incorporated town and such owners the reimbursement for such cost of improvement hereinafter provided for. The common council of such city or the board of trustees of such town, with the concurrence of two-thirds of the members thereof, may order or cause any or all of the improvements mentioned in the first section of this act, and repairs of any kinds of streets and alleys to be made in like manner, without such petition, and either charge and cause any or all of the expenses thereof to be assessed and collected, as hereinafter provided, when petition is made, or if it is deemed just and right by the common council of such city or the board of trustees of such town to cause such expenses, or any part thereof, to be paid out of the general revenue of the city or incorporated town. R. S. 1894, § 4292.

Statute construed—Foreclosure by city.—The remedy given hereafter in this act for the collection or foreclosure of liens of assessments for sidewalk improvements is available to the city, although the improvement is not made on petition. City of Connersville v. Merrill, 14 App. 303; City of Lafayette v. Fowler, 34 Ind. 140.

Improvement without petition.—Improvements may be made by a two-thirds vote of the council or board of trustees, without a petition being filed. McEneney v. Sullivan, 125 Ind. 407; Keith v. Wilson, 145 Ind. 149; De Puy v. City of Wabash, 133 Ind. 336.

Money advanced by a city—Not a debt.—Moneys advanced to contractors by the city or town under this section is not such an indebtedness as is prohibited by the con-

stitution when the debts of a city or town amount to the limit allowed. Quill v. City of Indianapolis, 124 Ind. 292.

1112. Final estimate of costs—Report of engineer.—6. When any such improvement has been made and completed according to the terms of the contract therefor made, the common council of such city, or the board of trustees of such town, shall cause a final estimate of the total cost thereof to be made by the city or town engineer, and the common council of such city, or the board of trustees of such town shall require said city or town engineer to report to the common council of such city or the board of trustees of such town the following facts touching said improvement: *First.* The total cost of said improvement. *Second.* The average cost per running front foot of the whole length of that part of the street or alley so improved. *Third.* The name of each property owner on that part of the street or alley so improved. *Fourth.* The number of front feet owned by the respective property owners on that part of said street so improved. *Fifth.* The amount of such cost for improvement due upon each lot or parcel of ground bordering on said street or alley, which amount shall be ascertained and fixed by multiplying the average cost price per running front foot by the number of running front feet of the several lots or parcels of ground respectively. *Sixth.* The full description, together with the owner's name, of each lot or parcel of ground bordering on said street so improved. *Seventh.* In the case of the construction of a sewer, a description of each lot or parcel of lot benefited thereby, together with the owner's name and the fair proportion of the cost of such sewer according to the benefits conferred thereby, that should be assessed against such lot or part of a lot. R. S. 1894, § 4293.

Engineer's report—Assessment.—The assessment of the cost of the improvement must be made upon each lot or parcel of ground separately. An assessment made in a gross sum jointly against two or more lots or parcels is voidable and does not create a lien and can not be enforced. Becker v. Baltimore, etc., R. Co., 17 App. 324; Balfe v. Johnson, 40 Ind. 235; Reeves v. Grottendick, 131 Ind. 107. See Lewis v. Albertson, App. Ct., May 24, 1899.

Description.—The assessment should not be held void or invalid if it sufficiently identifies the lot so that it might be found and located by a competent surveyor; but where the land assessed is described, "Tract of land, north side, between Front St. and O. & M. R. R.," the description is insufficient. Becker v. Baltimore, etc., R. Co., 17 App. 324.

An assessment against 163 feet of a lot described by number in a certain addition is sufficiently definite and certain. Richcreek v. Moorman, 14 App. 370.

Estimate—Assessment—Correction.—A final estimate or assessment may be corrected by the common council or board of trustees. Becker v. Baltimore, etc., R. Co., 17 App. 324; Balfe v. Johnson, 40 Ind. 235; Ball v. Balfe, 41 Ind. 221; Sands v. Hatfield, 7 App. 357; McGill v. Bruner, 65 Ind. 421; Goring v. McTaggart, 92 Ind. 200.

The estimate for improvements can not be increased at the stage of issuing and marketing bonds. Porter v. City of Tipton, 141 Ind. 347.

Assessments—Benefits.—Assessments for street improvements are upheld on the ground that the adjacent property is enhanced in value the amount of the cost of the improvement. Quill v. City of Indianapolis, 124 Ind. 292; Lipes v. Hand, 104 Ind. 503; Barber, etc., Co. v. Edgerton, 125 Ind. 455; City of New Albany v. Cook, 29 Ind. 220; Ross v. Stackhouse, 114 Ind. 200; Norwood v. Baker, 172 U. S. 269; Elliott Roads and Streets, p. 369, *et seq.*

Sewer estimates.—The engineer's estimate under this section when a sewer has been constructed need only contain such data as apply to sewer improvements, viz., data under first and seventh subdivisions. New Albany, etc., Co. v. Crumbo, 10 App. 360.

Sewer assessment—When void.—An assessment for a public sewer made under the statute for street improvements, and placing the assessment not according to the benefits received, but according to the lineal measurement of the property fronting on the sewer, is void. Crawfordsville, etc., Ass'n v. Clements, 12 App. 464.

Part of lot not abutting—Bridge.—An abutting property owner is not assessable for that part of his property which abuts upon a portion of the street which is not improved, and where the lot abuts upon a bridge which is not improved, the part of the lot abutting on bridge can not be assessed. Town of Salem v. Henderson, 13 App. 563.

1113. Notice of hearing—Assessments—Liens—Payment in installments.—2. [7.] Upon the filing of the report provided for in the last preceding section, the common council of such city, or the board of trustees of such town, shall give two weeks' notice in a newspaper printed and published in such city or incorporated town, if any there be, and if there be no such paper, then in a newspaper printed and published in the county in which such city or incorporated town is located, of the time and place, when and where, a hearing can be had upon such report, before a committee to be appointed to consider such reports, and such committee shall make report to the common council of such city, or the board of trustees of such town, recommending the adoption or alteration of such report, and the common council of such city or the board of trustees of such town may adopt, alter or amend such report and the assessments therein. Any person feeling aggrieved by such report shall have the right to appear before such committees and the common council of such city or the board of trustees of such town, and make objection thereto, and shall be accorded a hearing thereon, and the common council of such city or the board of trustees of such town, shall assess against the several lots or parcels of ground the several amounts which shall be assessed for and on account of such improvements, which said amounts shall bear interest at the rate of five per cent. per annum from the time of finding of the completion of said improvements by the common council or board of trustees, as mentioned in § 6 of this act. The owner of any lot or parcel of ground against which said assessment is made, may, if he, within two weeks after the making of such assessments, shall promise and agree, in writing, to be filed with the clerk of such city or town and to be spread of record by him in consideration of the right to pay his or their assessment, or respective assessments in installments, that he will not make any objections to any illegality or irregularity as to their respective assessments, and will pay the same, with interest thereon, at the rate of not exceeding five per centum per annum, as shall by ordinance or resolution of the common council of such city, or board of trustees of such town, be prescribed and required, he shall have the benefit of paying said assessments in ten annual installments, as hereinafter provided. Any owner of any lot who has been assessed, who will not promise and

agree in writing as herein provided, shall be required to pay his or their assessment in full when made, and the same may be collected according to the provisions of amended section ten of this act, or the contractor or his assigns may foreclose such assessment as a mortgage is foreclosed in any court of competent jurisdiction, and shall recover in addition to the amount of such assessment, with interest, all costs, and a reasonable attorney's fee. Whenever any payment shall be made upon any of such assessments, it shall be the duty of the treasurer, contractor or owner of the assessments, bonds, or certificates or installments of assessments, as hereinafter provided, receiving such payment, to enter upon the proper record the receipt of such money, and such receipt shall be a discharge of the lien of such assessment to the extent of such payment, and upon the payment of any bonds or certificates as are issued under this act they shall be surrendered to and cancelled by the treasurer, when bonds have been requested as aforesaid, then the common council of such city or board of trustees of such town shall cause the said assessment and bonds requested therefor to be placed upon the city or incorporated town tax duplicate and charged against the several lots or parcels of ground as follows: ten per cent. for each successive year for ten years, to which several amounts shall be added and placed on the duplicate, interest at five per cent. per annum, payable semi-annually, which shall be calculated from the time of the acceptance of the work by the common council or board of trustees, until the several allowances fall due; and the first ten per cent. shall be due and payable when the first tax falls due, and is payable after such assessment is made; and said assessment, as made, together with the interest thereon, shall be a lien upon the several lots or parcels of ground to the same extent that taxes are a lien upon such property, and shall be collectible in the same way that taxes are collectible, together with such penalty for the non-payment of any assessment, or installment when due as is now provided by law for the collection of delinquent taxes, or in such manner as the common council or board of trustees, by ordinance, shall prescribe and the law governing the collection of taxes shall so far as the same is applicable, regulate and govern the collection of such assessment; and such assessment, and the proceeds arising therefrom, shall constitute a special fund for the payment of the cost of such street, alley and sewer improvement and the bonds and certificate hereinafter mentioned, and for no other purpose. [As amended, Acts 1899, p. 63. In force February 17, 1899.] R. S. 1894, § 4294.

The decisions following were prior to amendment of 1899:

Construction of statute.—This section as amended takes the place of the original. All the provisions of the act are to be construed together. Robinson v. City of Valparaiso, 136 Ind. 616.

Notice.—Property owners have the right to notice and to be heard upon the question of benefit to their property by the improvement, and this section provides for such a notice and hearing, and is not subject to objection on that account. Barber, etc., Co.

v. Edgerton, 125 Ind. 455; McEneney v. Town of Sullivan, 125 Ind. 407; Bozarth v. McGillicuddy, 19 App. 26.

The finding of a court as to notice need not state date of insertion in newspaper nor length of publication. Dugger v. Hicks, 11 App. 374.

The notice provided for in this section gives the lot-owner an opportunity to be heard in respect to the correctness of the charge against his property. Mere irregularities prior to such assessment will not render it void. Sands v. Hatfield, 7 App. 357.

Lien for assessment—Notice.—Notice at some stage of the proceedings prior to a conclusive judgment is requisite in order to authorize the subjection of property to a special lien for a local assessment. McEneney v. Town of Sullivan, 125 Ind. 407, 409; Garvin v. Daussman, 114 Ind. 429; Law v. Johnston, 118 Ind. 261; Kuntz v. Sumption, etc., 117 Ind. 1; Barber, etc., Co. v. Edgerton, 125 Ind. 455; Elliott Roads and Streets, pp. 151, 242.

Notice—Void assessment—Collateral attack.—The statute as to notice of the assessment must be substantially complied with, or the assessment will be void, notice being necessary to give jurisdiction of the property and the person of the owner, and consequently, to the validity of the lien, etc. When the assessments are void, they are subject to collateral attack, but where some notice has been given, and the tribunal making the assessment determines that the notice is sufficient, the property owner will not, as a rule, be permitted to attack such proceedings collaterally. Kiphart v. Pittsburg, etc., R. Co., 7 App. 122; McEneney v. Town of Sullivan, 125 Ind. 407. See Lewis v. Albertson, App. Ct., May 24, 1899.

Notice of time and place for hearing objections to assessments for improvements, signed by the city clerk, which shows, upon its face, that it was ordered by the council, is clearly the council's notice and is sufficient. Klein v. Tuhey, 13 App. 74; Catterlin v. City of Frankfort, 87 Ind. 45.

The legislature has the power to fix the kind of notice and the manner in which it shall be given. Klein v. Tuhey, 13 App. 74; Swain v. Fulmer, 135 Ind. 8; McEneney v. Town of Sullivan, 125 Ind. 407; Barber, etc., Co. v. Edgerton, 125 Ind. 455; 2 Dillon Munic. Corp., 4th ed., § 802*a*.

Publication of notice on September 2, 1892, and upon each day thereafter, except Sundays, up to and including September 16, the day appointed for hearing objections to assessments, is two full weeks' publication and is sufficient. A general notice that the engineer's report has been made, and that a hearing will be had thereon at a specified time and place, is sufficient, without special notice to the land-owner Klein v. Tuhey, 13 App. 74; Swain v. Fulmer, 135 Ind. 8; Murphy v. Beard, 138 Ind. 560.

Engineer's estimate—Amendment of.—Upon the final hearing the council has power to alter or amend the engineer's estimate and report so as to include omitted property. Sands v. Hatfield, 7 App. 357.

Increasing estimate.—The estimates for improvements can not be increased at the stage of issuing and marketing bonds. Porter v. City of Tipton, 141 Ind. 347.

Assessment of benefits—Action of council conclusive.—The question of benefits to property in a city from the construction of a sewer having once been passed upon by the council, no other court or tribunal has any power to review or pass upon it, except for fraud. Klein v. Tuhey, 13 App. 74; Crawfordsville, etc., Ass'n v. Clements, 12 App. 464; City of Ft. Wayne v. Cody, 43 Ind. 197; Robinson v. City of Valparaiso, 136 Ind. 616.

Approval of estimate—Assessment.—When the engineer's estimate is approved and adopted by the city council it becomes the assessment, and direction of the council to the city clerk to prepare an assessment accordingly is not a delegation of authority. New Albany, etc., Co. v. Crumbo, 10 App. 360.

Assessments—How paid.—A city assumes no obligation to pay for the construction of a sewer, but the same is to be paid for out of assessments on the property benefited thereby. Robinson v. City of Valparaiso, 136 Ind. 616; City of New Albany v. McCul-

loch, 127 Ind. 500; Quill v. City of Indianapolis, 124 Ind. 292; Porter v. City of Tipton, 141 Ind. 347.

Estoppel.—Property owners can not stand by while an improvement contract is being executed, and then deny the propriety of the work or object to the manner of its execution or deny the sufficiency of the notice. Robinson v. City of Valparaiso, 136 Ind. 616; De Puy v. City of Wabash, 133 Ind. 336; New Albany, etc., Co. v. Crumbo, 10 App. 360; Jenkins v. Stetler, 118 Ind. 275; Ross v. Stackhouse, 114 Ind. 200; Wiles v. Hoss, 114 Ind. 371; Clements v. Lee, 114 Ind. 397; Taber v. Ferguson, 109 Ind. 227; City of Logansport v. Uhl, 99 Ind. 531; Hiatt v. Town of Darlington, Ind. Sup. Ct., May 19, 1899; Lewis v. Albertson, App. Ct., May 24, 1899; Elliott Roads and Streets, pp. 418–423.

Defenses—Counter claim—Answer in bar.—The fact that the work was not done according to contract is not a matter of counter claim; if such fact can be inquired into at all, in an action to foreclose the lien of the assessment, it must be on answer in bar. Bozarth v. McGillicuddy, 19 App. 26; Darnell v. Keller, 18 App. 103.

Collection of assessments—Two methods.—The statute provides two methods of collecting assessments, one according to the provisions of section 10 (R. S. 1894, § 4298), the other by foreclosure, as a mortgage is foreclosed, in any court of competent jurisdiction. Bozarth v. Mallett, 11 App. 417; Bozarth v. McGillicuddy, 19 App. 26.

Foreclosure—Complaint.—A complaint to foreclose an assessment must contain a copy of the assessment roll, or at least that portion of it which relates to the property affected by the lien, or such copy should be made an exhibit to the complaint. Sloan v. Faurot, 11 App. 689; Van Sickle v. Belknap, 129 Ind. 558.

Exhibits.—The order or resolution for the improvement though filed as an exhibit can not be looked to to aid any defective averments of the pleading in foreclosing an assessment lien. Bozarth v. Mallett, 11 App. 417; Fuller v. Cox, 135 Ind. 46; Dugger v. Hicks, 11 App. 374. See Lewis v. Albertson, App. Ct., May 24, 1899.

Complaint by assignee.—A complaint by the assignee of an assessment in a suit to foreclose, must, to be good, show an assignment to plaintiff. Bozarth v. Mallett, 11 App. 417.

Description.—The property assessed must be so described in the complaint that it could be located or surveyed or the complaint will be bad. Lake Erie, etc., R. Co. v. Walters, 9 App. 684.

As to sufficiency of description in the assessment, see Richcreek v. Moorman, 14 App. 370; Becker v. Baltimore, etc., R. Co., 17 App. 324.

Assessment liens—Redemption from sale—Recovery of redemption money.—Where a judgment foreclosing an assessment lien for street improvements is set aside as void, money paid by the property owner in redeeming the property from such foreclosure sale pending the action to set aside the judgment is not a voluntary payment, and may be recovered. Keene v. McGillicuddy, 19 App. 427.

Assessment for street improvement.—The question whether a city is liable for its proportion of cost of a street improvement, when it is already indebted beyond the constitutional limit, does not affect the liability of a property-holder in a suit to enforce payment of his share of the assessment. Hughes v. Parker, 148 Ind. 692.

Where, in an action to enforce a street assessment lien against the right of way of a railroad company, the complaint only described the property as "a strip of ground one hundred and thirty-four feet long, abutting on North Main street, between Broadway and North streets," such description is insufficient and renders the complaint bad, the land not being capable of being located or surveyed from such description. Lake Erie, etc., R. Co. v. Walters, 9 App. 684, 687.

Precept not necessary under foreclosure—Nor issuance of bonds.—Under this section in the foreclosure of a street assessment lien, it is not required that a contractor, nor any one for him, shall file with the city clerk, nor the common council of the city, an affidavit for a precept to collect assessments; nor is it required that any bonds or

certificates for or on account of the alleged improvement of the real estate, be issued. Bozarth v. McGillicuddy, 19 App. 26; Bozarth v. Mallett, 11 App. 417.

Complaint—Averments.—A complaint is not bad because it fails to aver that the work was done according to contract, when it does appear by the complaint that the contract was let, after council had duly advertised for bids, to the lowest bidder, that thereafter, on a date named, the common council ordered the engineer to make estimates of the work done, and said engineer did make report and estimates in accordance with law for said work, and reported the same to the common council, that said report was accepted and the council adopted the order or resolution making the assessments as reported by the engineer, etc. Bozarth v. McGillicuddy, 19 App. 26.

It will be presumed that the engineer and common council, nothing appearing to the contrary, did their duty, and that the estimates and assessments would not have been made unless the contract had been performed. The same presumption will also arise as to the necessity and benefits of the proposed improvements, and that the property was properly subject to taxation. Bozarth v. McGillicuddy, 19 App. 26; Darnell v. Keller, 18 App. 103.

Complaint—Averments.—In an action to enforce an improvement assessment it is not necessary to aver that the town or city has not paid the assessment if it is averred generally that such assessment is due and unpaid. Dugger v. Hicks, 11 App. 374.

Same—Assessments—Foundation of action.—The assessment is the foundation of the action, and the complaint need not aver width of road or depth of grade, nor set out copy of contract of improvement, or allege its specific terms. Dugger v. Hicks, 11 App. 374; Van Sickle v. Belknap, 129 Ind. 558; Bozarth v. Mallett, 11 App. 417; Sloan v. Faurot, 11 App. 689; Lewis v. Albertson, App. Ct., May 24, 1899.

Wife party defendant.—The wife of the owner of the property is a proper party defendant in an action to foreclose the assessment, to answer as to her interest, and that her inchoate interest in the property may be sold to satisfy the lien. Coburn v. Bossert, 13 App. 360.

Parties—City.—In an action by a contractor for the enforcement of certain sewer assessment liens against a railroad company's right of way and depot lot, the city in which such property is situated having no interest or concern in the question in dispute, there was no error in overruling the defendant's petition to make the city a party to the action. Lake Erie, etc., R. Co. v. Bowker, 9 App. 428.

Complaint—Averments.—While it is essential to plead all the acts done by the municipal officers to show their authority, it is not required that there should be incorporated in the complaint, by reference or otherwise, any written instrument, except the estimate or assessment. The assessment is the foundation of the action. It is not necessary to set out the contract of improvement, nor to allege its specific terms, nor to allege in minute detail what work has been done under the contract, nor to exhibit a copy or refer to the ordinance, resolution or contract. Becker v. Baltimore, etc., R. Co., 17 App. 324; Dugger v. Hicks, 11 App. 374; Van Sickle v. Belknap, 129 Ind. 558; Bozarth v. Mallett, 11 App. 417; Lewis v. Albertson, App. Ct., May 24, 1899.

An averment in the complaint, that the ordinance for the improvement was enacted "by a two-thirds vote of her common council," is a sufficient averment of a compliance with the statute providing that the common council, with the concurrence of two-thirds of the members, must order the improvement. City of Connersville v. Merrill, 14 App. 303.

Same—Assessment—Tax duplicate.—The assessments for improvements are not required to be on the tax duplicate, where no waiver is filed, as provided by this section; therefore a complaint which fails to aver that the assessments have been placed upon the tax duplicate is not for this reason bad. City of Connersville v. Merrill, 14 App. 303.

Same—Not entitled to jury trial.—In an action to foreclose an assessment under

this section the plaintiff is not entitled to a jury trial. Bozarth v. McGillicuddy, 19 App. 26.

Railroad right of way—Assessment of.—The right of way of a railroad company which abuts upon a street may be assessed for the improvement of the street; also for the construction of a sewer. Pittsburgh, etc., R. Co. v. Hays, 17 App. 261; Peru, etc., R. Co. v. Hanna, 68 Ind. 562; Lake Erie, etc., R. Co. v. Bowker, 9 App. 428; Indianapolis, etc., R. Co. v. Ross, 47 Ind. 25; 2 Elliott on Railroads, § 786.

Same—Lien of assessment—Foreclosure—Personal judgment.—In an action to enforce and foreclose the lien of such assessments against the right of way of a railroad company, personal judgment may be rendered against the railroad company for the amount of the lien. Though the road can not be sold upon a decree foreclosing the lien, because forbidden upon the ground of public policy, the judgment may be satisfied by levy and sale upon execution of any of the personal property of the railroad company subject to execution. Pittsburgh, etc., R. Co. v. Hays, 17 App. 261; Louisville, etc., R. Co. v. State, 8 App. 377; Lake Erie, etc., R. Co. v. Bowker, 9 App. 428; Peru, etc., R. Co. v. Hanna, 68 Ind. 563; Louisville, etc., R. Co. v. Boney, 117 Ind. 501; Louisville, etc., R. Co. v. State, 122 Ind. 442; Lake Erie, etc., R. Co. v. Walters, 9 App. 684; see 2 Elliott on Railroads, § 790.

Same—Jurisdiction upon appeal.—A contention that a statute does not contemplate a personal judgment, upon foreclosure of a street improvement lien against a railroad right of way, and that the rendition of such personal judgment is unconstitutional, does not involve a question of the constitutionality of the statute, and jurisdiction upon appeal is in the appellate court. Pittsburgh, etc., R. Co. v. Hays, 17 Ind. 261.

Same—Validity of ordinance.—If an ordinance is questioned because it is unconstitutional, or in conflict with the statutes, or is unreasonable, these are questions concerning the public, and the jurisdiction upon appeal is in the supreme court; but, an objection to an ordinance which goes only to matters of form, or to irregularities in the proceedings of the municipal authorities, is not a question of that grave character and dignity that affects the public, and in such case jurisdiction to determine the validity of the ordinance assailed is entertained by the appellate court. Pittsburgh, etc., R. Co. v. Hays, 17 App. 261; City of Hammond v. New York, etc., R. Co., 5 App. 526; Dugger v. Hicks, 11 App. 375; New Albany, etc., Co. v. Crumbo, 10 App. 360.

The fact that the property foreclosed against can not be sold to satisfy the lien does not change the character of the action from one *in rem* to one *in personam* and does not change the rule that the property must be described in the complaint so that it could be located or surveyed. Lake Erie, etc., R. Co. v. Walters, 9 App. 684.

Attorneys' fees.—A reasonable attorney's fee may be recovered in an action to foreclose an assessment lien for street improvements. Lake Erie, etc., R. Co. v. Walters, 13 App. 275; Dowell v. Talbot Paving Co., 138 Ind. 675.

Statute construed—Contractor—Lien—Foreclosure.—The amendment of this section by the act of 1891, conferring the rights on the contractor to foreclose his lien, and to recover a reasonable attorney's fee, did not impair any vested right or constitutional guaranty. It simply provided a remedy for the enforcement of a right which had been already created by the act of 1889. The amendment being a remedial statute, is retrospective, and applies to causes of action subsisting at the date of its passage. Dowell v. Talbot Paving Co., 138 Ind. 675.

Partial recovery by contractor—When.—Where a city consents to the construction of a railroad switch in the street subsequently to the letting of a contract for a street improvement, rendering strict compliance with the same impossible, the contractor may recover for his work and material expended in executing the contract as far as it was possible under the circumstances. Lake Erie, etc., R. Co. v. Walters, 13 App. 275.

The assessment in such a case should be decreased by amount that would have been required to complete the work under the contract had it been possible to do so. Lake Erie, etc., R. Co. v. Walters, 13 App. 275.

Contractor widening street.—The fact that a contractor, on his own motion or by direction of a town, in improving a street widens it, will not invalidate the proceedings nor bar a recovery of benefits assessed. Dugger v. Hicks, 11 App. 374, 384.

[Acts 1893, p. 283. In force March 3, 1893.]

1114. All persons may pay by installments.—1. That the privilege now granted by law to persons assessed for the construction of street or alley improvements, or sewers, to pay the same in ten years in installments, if such assessment exceed fifty dollars upon any one lot, shall be extended to all persons, without regard to the sum assessed: *Provided*, They shall execute the stipulation waiving objections on account of illegality or irregularities in the proceedings of assessment, as is now required by law in cases of assessments exceeding fifty dollars. R. S. 1894, § 4295.

[Acts 1889, p. 237. In force March 8, 1889.]

1115. Street and sewer bonds—Lien.—8. The common council of such city or the board of trustees of such town, for the purpose of anticipating the collection of such assessments, shall have power to issue street or sewer improvement bonds for the purpose of raising money with which to pay for such improvements made, and in issuing such bonds the common council of such city or the board of trustees of such town, shall be governed by the law now in force relating to the issuing of bonds by cities. The proceeds arising from said bonds shall be applied exclusively to, and appropriated and used for, no other purpose than the liquidation of the cost of the improvements in this act mentioned. Said bonds shall bear the name of the street or alley improved, or the sewer constructed, and shall be payable, in equal installments, out of the special fund hereinbefore provided in one, two, three, four, five, six, seven, eight, nine and ten years from date, and shall bear interest not to exceed 6 per cent. per annum, payable semi-annually. In case such city or incorporated town has any money on hand belonging to any fund, which will not be used within the maturity of any such bonds, such city or incorporated town may invest such money in any of such bonds maturing before such money shall be needed. After the assessment, as herein provided, has been made by the common council of such city or the board of trustees of such town, no suit shall lie to restrain or enjoin the collection of such assessment, and the validity of such assessment shall not be questioned, and such bonds, when issued, shall transfer to the owner thereof all the right and interest of such city or incorporated town in and to such assessments and the liens thereby created, with full power to enforce the collection thereof by foreclosure or otherwise, under any of the provisions of this act. And all such bonds shall be an equal lien upon the property so assessed without priority of one over the other. R. S. 1894, § 4296.

Enjoining assessments.—The provisions of this section as to enjoining the collection of assessments applies only to those who have agreed in writing not to make any ob-

jection to the legality of their assessments. Quill v. City of Indianapolis, 124 Ind. 292; Richcreek v. Moorman, 14 App. 370.

City's liability—Secondary—Sale of bonds.—The cost of improvements under this statute is not to be charged primarily against the city. The city's liability is but secondary, and arises only when it has sold bonds, collected assessments, or otherwise realized the amounts owing from the property benefited, and the contractors have not been paid. Porter v. City of Tipton, 141 Ind. 347; Quill v. City of Indianapolis, 124 Ind. 292.

1116. Certificates to contractor—Collecting assessments—Foreclosure.—9. It shall be lawful for such city or incorporated town to provide by ordinance for the issuance of certificates or bonds to contractors, who, under contract with the city, shall have constructed any such improvement in payment therefor, each of which certificates or bonds shall bear the name of the sewer, street or alley improved, the time the same shall run, not to exceed ten years, the rate of interest the same shall bear, not to exceed six per cent. per annum, payable semi-annually, and such certificates and bonds shall transfer to the contractor and his assigns all the right and interest of such city or town to, in and with respect to every such assessment and the lien thereby created against the property of such owners assessed as shall avail themselves of the provisions of this act to have their assessments paid in installments, and shall authorize such contractor and his assigns to receive, sue for and collect, or have collected, every such assessment embraced in any such certificate or bond, by or through any of the methods provided by law for the collection of assessments for local improvements, including the provisions of this act. And, if the city or town shall fail, neglect or refuse to pay such certificates or bonds, or to promptly collect any such assessments when due, the owner of any of such certificates or bonds may proceed in his own name to collect such assessment and foreclose the lien thereof in any court of competent jurisdiction, and shall recover, in addition to the amount of such bonds or certificates and the interest thereon, a reasonable attorney's fee, together with the cost of such suit. Any number of holders of such certificates or bonds for any single improvement may join as plaintiffs, and any number of owners of the property on which the same are a lien, may be joined as defendants in such suit. And such bonds and certificates shall be equal liens upon the property for the assessments represented by such bonds or certificates without priority of one over another to the extent of the several assessments against the several lots and parcels of lands. R. S. 1894, § 4297.

Constitutional inhibition—Indebtedness—Improvement bonds.—Bonds or certificates issued under this act do not create an indebtedness within the inhibition of article 13 of the constitution. Such bonds are payable out of the special street improvement fund to be accumulated from assessments made against the property benefited; and hence no indebtedness arises against the city. Quill v. City of Indianapolis, 124 Ind. 292; City of New Albany v. McCullough, 127 Ind. 500, 505.

Waiver—Estoppel.—The property owner who executes a written waiver of objection to the legality or irregularity of an assessment for public improvements, under this sec-

tion, can not afterwards be heard to question the irregularity of the assessment. Richcreek v. Moorman, 14 App. 370; Quill v. City of Indianapolis, 124 Ind. 292.

First installment—When due and payable.—The first installment of an assessment payable in ten annual installments, under this section, is due and payable at the next regular time following the completion and acceptance of the work and the making of the assessment that taxes are payable, whether it be April or November installment, although if the assessment had not been made payable in installments it would have been payable in the following April. Richcreek v. Moorman, 14 App. 371.

1117. Precept for sale—Appeal—Sale and conveyance.—10. In case any of the owners of lots or parcels of grounds on which such assessments have been made shall fail, or refuse, for the space of twenty days after the date of the estimate to pay the amount thereof due by such person to such contractor, such contractor shall file his affidavit in the clerk's office of said city, stating that the whole or some part of said assessment remains unpaid, showing the amount paid and the amount due; that the estimate thereof has been duly made, and that the work estimated has been done according to contract, it shall be the duty of the clerk at the next or any subsequent meeting of the common council to report the said affidavit to the council, whose duty it shall be to cause a precept to issue for the collection of such assessment or any unpaid balance thereof, which precept shall be signed by the mayor and attested by the clerk, and sealed with the seal of said city, and shall set forth the name of the person against whom the assessment is made, the description of the lot or land on which it is made, the amount of such assessment and the date of the estimate, which shall be directed to the treasurer of such city, commanding him to make such assessment, or unpaid balance thereof, within ten days after receiving such precept, of the owner in whose name such assessment is made, which precept the clerk shall forthwith deliver to the treasurer, who shall serve the same by reading the same personally to such owner or by leaving a copy of such precept at his last or usual place of residence; or if such owner be unknown or not a resident of such city, then by publication for three successive weeks in a weekly newspaper printed and published in the city, briefly setting forth the facts of the estimate, the amount due, that the work has been done as contracted, the name of the person whose property is to be sold, the description of the property, and the date of the order of said precept by the said council, and giving notice that if such assessment be not paid within twenty days after publication he will proceed to make the same by levy and sale of the lot or lands whereon the same is assessed. Any owner of land or his representatives aggrieved by such precept may appeal therefrom, within twenty days after such demand or publication, to the circuit court of the county wherein such city is situated upon filing sufficient bond with the clerk of said city, conditioned for the payment of whatever judgment may be rendered against such appellant in said court, and such appeal shall stay all proceedings by such treasurer. And the trial of such appeal shall be conducted as other trials of civil causes

are conducted in said courts: *Provided,* That no question of fact shall be tried which may arise prior to the making of the contract for the said improvement under the order of the council. The clerk shall, upon the filing of said bond, forthwith make out and certify, under his hand and official seal, a true and complete copy of all papers connected in any way with the said street improvement, beginning with the order of the council directing the work to be done and contracted for, and including all notices, precepts, orders of council, bonds and other papers filed in said matter, which transcript shall be in the nature of a complaint, and to which the appellant shall answer upon rule; and in case the court and jury shall find, upon trial, the proceedings of said officers subsequent to said order directing the work to be done, are regular, that a contract has been made, that the work has been done, in whole or in part, according to the contract, and that the estimate has been properly made thereon, then said court shall direct the said property to be sold and conveyed by the sheriff thereof as the said treasurer is hereinafter directed to sell and convey property liable to street improvements: *Provided,* That nothing herein shall be so construed as to prevent any person from obtaining an injunction upon the proceedings prior to the making of any such improvements. If no such appeal shall have been taken as aforesaid, it shall be the duty of such treasurer, within ten days after the expiration of said twenty days, to levy said precept upon the lot or land therein described, and to sell the same or so much thereof as may be necessary, to pay such assessment, with costs and charges. But before any such sale he shall give notice of the time and place thereof, by advertising the same for three weeks successively in a newspaper printed and published nearest to such lot or land, if any such be printed and published within the county wherein such city is situated, and by posting up written or printed notices thereof in at least three public places in said city. And every such sale shall be by public auction, and upon or near the premises, or in the city court room of said city, in the discretion of said treasurer; and no sale of said lot or land previous or subsequent to the date of such estimate, and subsequent to the date of such petition or determination of the common council to make such improvement without petition shall invalidate or affect any sale thereof in pursuance of this act. Upon the sale of any lot or land by virtue of such precept, and the payment of the purchase-money, the treasurer (or in case of his death or going out of office, his successor), shall execute, acknowledge and deliver to the purchaser a certificate of conveyance for the premises, which shall be valid and effectual to convey all the rights, title and interest of any such owner or purchaser from him as aforesaid, except as hereinafter provided, and shall be prima facie evidence of all the facts recited therein. In case the purchaser of any real estate under a precept, as aforesaid, having paid the purchase-money therefor, shall die before a certificate of conveyance, as herein provided, shall have been executed to him, the treasurer shall convey the same

to the heirs or devisees of such deceased purchaser. The proceeds of any such sale shall be applied as follows, to wit: *Firstly*, to the payment of such assessment, with interest thereon from the date of such estimate, and all costs accrued thereon by reason of said sale; and, *Secondly*, the residue of such proceeds shall be paid to the owner or his or her heirs or representatives, of such real estate, or, if unknown, it shall be paid into the city treasury; and such city shall at all times be responsible to such owner, heirs or representatives for such residue. The purchaser under such precept shall hold such real estate subject to the lien of the unpaid part of its proportion of the whole cost of the improvement. The treasurer shall be entitled to a commission of five per cent. on the first hundred dollars, and three per cent. on any excess above that sum; but when the money is paid to him without sale, one-half commission only shall be received by him. For levying on the real estate and advertising the same, he shall receive one dollar; for personal demand for payment, twenty-five cents; for return of the precept, with his doings thereon, one dollar; for making certificate of sale on real estate, one dollar. He shall endorse on said precept the time of receiving the same, and, within three months thereafter, he shall make return thereof to the clerk, with his proceedings thereon. Any purchaser failing to pay the purchase-money shall be subject to the like penalties and proceedings as purchasers at sheriff's sale are by the laws of this state. The owner of any lot or land sold as aforesaid, or his agent or attorneys, heirs or representatives, may redeem the same at any time within one year after the day of sale, by paying to the purchaser, or to the city treasurer for the use of the said purchaser, or his heirs or assigns, the sum mentioned in his certificate, and the amount of all subsequent assessments paid by the purchaser, with fifty per cent. on the whole sum, and interest from date of purchase or time of payment: *Provided*, That infants, idiots, insane persons and *femme covert*, may redeem any such lot or land belonging to them, sold for assessment, as aforesaid, within one year from expiration of such disability. Claimants of a part of such land, or of any individual part of the same, may redeem the whole as other owners may redeem. If such owner, or other person on his behalf, shall fail to redeem such land within one year, as aforesaid, at the expiration thereof, and on production of the certificate of purchase, the treasurer shall execute to the purchaser, his heirs or assigns, in the name of the city, a conveyance of the real estate so sold, which shall vest in the grantee an absolute estate in fee-simple, subject, however, to all claims which the city may have thereon for assessments, or liens, or other incumbrances. Such certificate and final conveyance shall resemble, as nearly as may be, the certificate and conveyance for tax sales, and be prima facie evidence of all the facts recited therein. [As amended, Acts 1891, p. 326. In force March 6, 1891.] R. S. 1894, § 4298.

Amendment.—This section as amended takes the place of the original. All the provisions of the act are to be construed together. Robinson v. City of Valparaiso, 136 Ind. 616.

Applies only to cities.—This section as amended by act of 1891 applies only to cities. Dowell v. Talbot Paving Co., 138 Ind. 675.

Two methods for enforcing liens.—The statute provides two methods of collecting assessments, one according to the provisions of this section, the other by foreclosure as a mortgage is foreclosed, in any court of competent jurisdiction. Bozarth v. Mallett, 11 App. 417; Bozarth v. McGillicuddy, 19 App. 26.

Discretion of council—Collateral attack.—The matter of constructing improvements and accepting the same when completed is placed in the hands of the council, and the judgment of the council can not be questioned by collateral attack by way of injunction to restrain the city from accepting a system of sewers and from paying therefor by assessment or otherwise on account of the defective construction thereof. The law affords the property owner a full and complete remedy therefor and injunction will not lie. Robinson v. City of Valparaiso, 136 Ind. 616; Barber, etc., Co. v. Edgerton, 125 Ind. 455; Alley v. City of Lebanon, 146 Ind. 125.

Direct attack—Estoppel.—A property owner has the right to assume that his property will be assessed for improvements at least under color of the statute, and where the remedy sought is not a collateral but a direct proceeding attacking the assessment there is no estoppel. Crawfordsville, etc., Assn. v. Clements, 12 App. 464.

Improvement—Not in strict conformity with contract—Recovery.—Where the construction of a railroad switch in a street, with the consent of the city, subsequently to the letting of the contract for a street improvement, rendered strict compliance with the same impossible, the contractor may recover for his work and material expended in executing the contract as far as it was possible under the circumstances. Lake Erie, etc., R. Co. v. Walters, 13 App. 275.

Acceptance of work.—The city council is the judge that decides whether or not the contract has been, in all requirements, fulfilled. If the work is accepted by the city council, the property owner can, in the absence of fraud, interpose no objection in an action to enforce the lien of the assessment. Larned v. Maloney, 19 App. 199; Bozarth v. McGillicuddy, 19 App. 26; Darnell v. Keller, 18 App. 103.

Bond.—After the improvements are completed, in an action to enforce the lien of an assessment, a property owner can not object that the bond required to be given by the contractor was not filed within the period provided by the contract. A bond filed within the period required by the contract, though bearing a date subsequent to the date limited for the filing, is sufficient. Larned v. Maloney, 19 App. 199.

Appeal.—The statute provides for an appeal, in which "all questions from the making of the contract to the report of the engineer on the final estimate are brought in review." The right of appeal is statutory. The legislature has "authority to deny an appeal, and to make the decision of the municipal authorities final and conclusive." Hughes v. Parker, 148 Ind. 692; Robinson v. City of Valparaiso, 136 Ind. 616; Sims v. Hines, 121 Ind. 534; Chicago, etc., R. Co. v. City of Huntington, 149 Ind. 518.

The provision of this section for appeals to the circuit court from the issuing of a precept against a property owner for the collection of a sewer assessment applies where the contractor has been paid, and the city is substituted to his rights the same as in case the contractor himself applies for a precept, and an appeal taken from such assessment prior to the issuing of a precept is premature. Chicago, etc., R. Co. v. City of Huntington, 149 Ind. 518.

Injunction—Appeal.—An injunction can not be maintained by a property owner to prevent the improvement of the streets after the contract is let, unless it is shown that the common council or board of trustees was absolutely without jurisdiction to enter into the contract for the improvement of the street; after the letting of the contract, where the authorities proceed with jurisdiction, the remedy of the property owner is by appeal in case a precept issues and he is aggrieved thereby. Everett v. Deal, 148 Ind. 90; Alley v. City of Lebanon, 146 Ind. 125; Robinson v. City of Valparaiso, 136 Ind. 616; Elliott Roads and Streets, pp. 296, 440, 442.

In an injunction suit to prevent the improvement of a street, the introduction of town maps and evidence as to names of streets, and their dedication to the public, were all proper for the information of the court; also, the *nunc pro tunc* entry in the minutes of the town board. Everett v. Deal, 148 Ind. 90.

The question whether the yeas and nays were taken on the passage of the ordinance or resolution can not be presented on a complaint for injunction. Such question can be raised only upon appeal or direct attack. Pittsburg, etc., R. Co. v. Town of Crown Point, 150 Ind. 536; Balfe v. Lammers, 109 Ind. 347.

Collateral attack—Injunction.—A suit to enjoin the assertion of a lien after the work is done is a collateral attack, and is not proper as to any defects or irregularities which do not affect the jurisdiction. De Puy v. City of Wabash, 133 Ind. 336; McEneney v. Town of Sullivan, 125 Ind. 407; Sands v. Hatfield, 7 App. 357; Reeves v. Grottendick, 131 Ind. 107; Robinson v. City of Valparaiso, 136 Ind. 616.

[Acts 1891, p. 330. In force March 6, 1891.]

1118. Act not to apply to cities of one hundred thousand.—4. The provisions of this act shall not apply to cities of one hundred thousand population or more, according to the last preceding United States census. R. S. 1894, § 4299.

[Acts 1885, p. 73. In force July 18, 1885.]

1119. Estimates—Contractors to satisfy of record.—1. That the common councils of the cities of this state and boards of trustees of incorporated towns of this state shall have power to pass and enforce ordinances requiring contractors making street or other improvements in such cities, to receipt and fully satisfy the estimate records and other books showing a lien against any one's property in favor of such contractor, within thirty days from the time of the payment of such estimate to said contractor, and to impose penalties for violation of such ordinances. R. S. 1894, § 4300.

[Acts 1899, p. 8. In force February 2, 1899.]

1120. Cost of improvements—Apportionment—Cities less than 5910, etc.—1. That in all cities of this state which had a population of less than fifty-nine hundred and ten and more than fifty-eight hundred inhabitants, as shown by the United States census of 1890, whenever the common council of any such city shall order any street, alley or sidewalk improvement therein, the cost of any such street, alley or sidewalk improvement shall be estimated, according to the whole length of the street, alley or sidewalk, or so much thereof to be improved as is uniform in the extent and kind of the proposed improvement per running foot, and the total cost thereof, exclusive of one-half the cost of street and alley intersections, shall be apportioned upon the lands or lots abutting thereon. The remaining one-half cost of street and alley intersections shall be apportioned upon the lands or lots abutting on the street or alley intersecting the street or alley under improvement for a distance to the street line of the first street extending across the said intersection street or alley improved: *Provided,* That in case of intersections with diagonal streets or avenues

the remaining one-half cost of each intersection shall be apportioned on the lands abutting on each of the intersecting streets for a distance to the street line of the first street extending across each of said intersecting streets in each direction from the street improved. Should a street or alley enter into and not across a street or alley under improvement then the assessment for the cost of one-half of said entering street or alley, measured to the center line of the street or alley under improvement, shall be made on the lots or lands abutting on said entering street or alley for a distance to the street line of the first street extending across the said intersecting street or alley, and such last named assessment shall be made pro rata upon the lots or lands abutting on said street or alley. Such assessment shall be made without regard to the assessment for taxation. Such city shall be liable to the contractor for the contract price of such improvement to the extent of the moneys actually received by such city from the assessments for such improvements and the owners of property bordering on such street or alley shall be liable to the city for their proportion of the cost, exclusive of one-half the cost of street and alley intersections, in the ratio of the front line of their land or lots, whether platted or not, owned by them, to the whole cost of the improvement for that part of the said street or alley on which said land or lots are located, and which is uniform in extent and quality of improvement. And the owners of the lots or lands on the streets or alleys intersecting or entering into such street or alley shall be liable to the city for their proportion of the cost of improving the one-half of the street and alley intersections, in the proportion that their front line on said street or alley bears to the sum of the length of the front lines of said lots or lands abutting on said street or alley for a distance, as provided above, from the street or alley under improvement. Said city shall have separate and several liens upon such lands or lots from the time the contract for such improvement is finally let, for the respective assessments against each lot or parcel of land.

1121. Act supplemental.—2. This act is amendatory of and supplemental to an act concerning the powers and duties of cities and incorporated towns, approved March 8, 1889, Acts of 1889, page 237, commonly known as the "Barrett law;" and it is declared that this act shall not repeal any of the provisions of the said "Barrett law" except in so far as such provisions are inconsistent with the provisions of this act.

[Acts 1899, p. 9. In force February 2, 1899.]

1122. Sidewalk improvements—Certain cities.—1. That whenever the common council of any city in counties having a population of not less than 19,700 and not more than 20,000 by the census of the United States for the year 1890, shall deem it necessary that the sidewalks of any street, or part of street, or part of one side of a street in such city should be paved or graded and paved, such common council may, by resolution or ordinance, compel the owners of real estate

abutting on said street or parts of street, to pave, or to grade and pave the same.

1123. Grade—Contract—Terms.—2. Such ordinance or resolution shall, if a grade is to be established, specify the grade by setting it out, or by reference to the record of such grade, the size and kind of sidewalk to be constructed, and the time within which the same is to be done by the property owner, which shall be not less than three weeks from the passage of such ordinance. Said ordinance or resolution shall also provide the time, manner and terms of the letting of the contracts for doing said work, which letting shall be not less than one week after the time fixed for the building of said sidewalk by the property owner.

1124. Notice.—3. Notice of the matters herein provided for to the owners of the real estate affected by proposed improvements, and the proposed letting of the contracts hereinafter provided shall be given by the publication for one time of said ordinance or resolution for said improvement in a newspaper of general circulation printed and published in said town or city. If no paper be published in said town or city, then by posting copies of said ordinance or resolution in three public places in said town or city.

1125. Contract to lowest bidder.—4. If the respective owner or owners of the real estate abutting on said proposed sidewalks shall fail or refuse to pave, or to grade and pave, the same as required by and within the time fixed by said ordinance, the common council shall let the same to the lowest responsible bidder, said bids being sealed bids. When said paving is completed according to the terms of the ordinance or resolution, the common council, shall accept and receive the same, and shall assess the cost thereof against the respective real estate abutting on said improvements, which assessment shall be a lien on the property so assessed from the date of the passage of said ordinance or resolution, and shall be a lien prior to all other liens or claims, except taxes.

1126. Assessments—How collected—Foreclosure.—5. If the contractor shall so elect in writing, the said assessments may be placed on the tax duplicate, to be collected as taxes are collected; otherwise said contractor, after thirty days from the acceptance of said improvements, and the making of said assessment, may foreclose said assessment and lien in a court of competent jurisdiction as mortgages are foreclosed, and the plaintiff shall, in the event he recover, shall have taxed as costs a reasonable attorney's fee.

1127. Contractor's receipt.—6. Whenever any payment is made on any such assessment the contractor must, on the record thereof, receipt the same.

1128. Change of grade.—7. That whenever improvements are made under this act on the natural surface grade, the city after two years may establish or change the grade, or cause new improvements, under this or any other law, to be constructed without the payment of any damages or liability therefor: *Provided,* That where a sidewalk

built on the natural grade would be dangerous or inconvenient for travel thereon, the common council may change the grade sufficiently to make it safe and convenient, and the same shall be deemed the natural grade.

1129. Improvements under other laws.—8. This act shall not prevent the common council of said city from providing for or causing the paving, or grading and paving, of sidewalks by and under any law now in force.

[Acts 1899, p. 411. In force March 4, 1899.]

1130. Street improvements in towns and cities of less than 12,000.—1. That in no incorporated town or city in this state, of less than twelve thousand inhabitants, shall any assessment be made upon, or any lien attached to, any real estate bordering on, or abutting upon, any street, sidewalk or alley therein, from or on account of any improvement of any kind made upon, or in, any such street, sidewalk or alley pursuant to any order, resolution, ordinance, or other action of the board of trustees of such town, or of the common council of such city, unless such improvement shall have first been ordered to be made by such board of trustees, or by such common council, and not then if a written remonstrance signed by two-thirds of the resident owners of the whole line of the lots and parts of lots (measuring only the front line of such lots and parts of lots as belong to persons resident on such street in such town or city) bordering on, or abutting upon, all that part of such street, sidewalk, or alley upon which, or in which, such improvement shall have been ordered to be made, be filed before the said improvement be advertised for contract: *Provided, however*, That such board of trustees and common councils shall have power to order constructed sidewalks, alley or street improvements of similar character, to connect street, alley or sidewalk improvements already constructed and to require such walks to be constructed or such repairs to be made upon the streets and sidewalks of their respective towns and cities as may be necessary to avoid the liability of such towns and cities for damages on account of accident which might occur if such repairs were not made, and to enforce payment of the cost of such repairs according to provisions of the statutes now in force. *Provided, further*, That the provisions of this act shall not affect any improvement heretofore ordered or an improvement similar in character on a street, alley or sidewalk when both ends have been previously made leaving an intermediate portion unimproved: *And provided, further*, The provisions of this act shall not apply where the proposed improvement is a sidewalk only, which borders or abuts on one lot, part of a lot or parcel of ground only.

2. All laws and parts of laws inconsistent with the provisions of § 1 of this act are hereby repealed.

[Acts 1899, p. 52. In force April 27, 1899.]

1131. Cleaning streets and alleys.—1. That all incorporated cities and towns in this state are hereby authorized and empowered to

provide by ordinance for keeping streets, alleys and public grounds therein in a clean and sanitary condition, and provide for the payment of the costs thereof either out of the general funds of the town or by taxing the same against the property holders abutting upon the streets and alleys, and for collecting the same from such abutting property owners by placing said costs and expenses upon tax duplicates, and to be paid as taxes are paid.

[Acts 1899, p. 88. In force February 22, 1899.]

1132. Actions to enforce improvement assessments—Notice.—1. That no action shall be maintained for the enforcement of any lien or assessment for any benefit accruing to real estate by improvement of any street, alley, sidewalk, or other public place, or by construction of sewer, drain, levee or other public improvement, unless it be shown to the court that reasonable inquiry was made for the full name and address of the owner of the land so assessed, and that at least ten days before the commencement of such suit such owner if found or known was notified of such assessment, including the amount thereof with interest, and where the same is payable. The written receipt of such owner, or of any one of such owners, of any parcel of land for a registered letter, together with testimony that such letter in fact stated the nature and amount of the assessment and all charges, and where the same was payable shall be presumptive evidence of the service of such notice.

1133. Attorney's fees—Amount.—2. In no event shall the attorney's fees in any such action exceed the amount of the assessment or unpaid fraction thereof. No attorney's fees shall be collectible until after suit brought, and only in case where such suit is legally maintainable.

1134. Owner may recover illegal fees and penalty.—3. It shall be unlawful for any attorney or collector to collect from any owner of such real estate so assessed, or other person interested, any attorney's or other fee for the collection of such assessment or installment thereof except such as are specially provided by law. In case any such unlawful collection shall be made the owner or owners of the land, or other person paying the same may recover from the person or persons so collecting such, ten times the amount thereof, with reasonable attorney's fees, all collectible without relief from valuation or appraisement laws, or benefit of exemption laws.

1135. Misdemeanor—Penalty.—4. Any person so collecting any unlawful attorney's or other fees for the collection of any such assessment shall be guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not less than twenty-five dollars, and not more than five hundred dollars.

ARTICLE 8.—PUBLIC LIGHTS.

SEC.
1136. Power of council or trustees as to light.
1137. Poles and wires in streets.
1138. Right to maintain may be granted.
1139. Existing contracts valid.
1140. Right of way.

[Acts 1883, p. 85. In force March 3, 1883.]

1136. Power of council or trustees as to light.—1. That the common council of any city in this state, incorporated either under the general act for the incorporation of cities, or under a special charter, and the board of trustees of all incorporated towns of this state shall have the power to light the streets, alleys and other public places of such city and town with the electric light, or other form of light, and to contract with any individual or corporation for lighting such streets, alleys and other public places with the electric light, or other forms of light, on such terms, and for such times, not exceeding ten years, as may be agreed upon. R. S. 1894, § 4301.

See *ante*, § 124, clause 28, and § 131; *post*, § 1204.

Act constitutional—Power to contract for lights or own plant.—This act is constitutional, and cities and towns may contract for the lighting of the streets and alleys or other public places with electric or other forms of light, on such terms and for such times, not exceeding ten years, as may be agreed upon; or may purchase or construct and own and operate the necessary plant and machinery for the public lighting. A municipal corporation owning and operating its own plant has the power to purchase all the materials, and employ all the labor necessary for carrying it on. Crowder v. Town of Sullivan, 128 Ind. 486; Seward v. Town of Liberty, 142 Ind. 551; Rushville Gas Co. v. City of Rushville, 121 Ind. 206; City of Crawfordsville v. Braden, 130 Ind. 149; Foland v. Town of Frankton, 142 Ind. 546; Rockebrandt v. City of Madison, 9 App. 227.

Same—Contract does not create debt.—When a municipal corporation contracts for light or water, and agrees to pay for it annually as furnished, the contract does not create an indebtedness for the aggregate sum of all the yearly installments, since the debt for each year does not come into existence until the compensation for each year has been earned. Foland v. Town of Frankton, 142 Ind. 546; Crowder v. Town of Sullivan, 128 Ind. 486; City of Laporte v. Gamewell, etc., Co., 146 Ind. 466; City of Valparaiso v. Gardner, 97 Ind. 1; Seward v. Town of Liberty, 142 Ind. 551.

Expense for light, etc., payable from general fund.—The expense for light, water, labor and the like, is essential to the maintenance of corporate existence, and constitutes current expenses, payable out of the current revenues, which may be applied to such purposes, even though the effect is to postpone judgment or other creditors. Foland v. Town of Frankton, 142 Ind. 546; City of Valparaiso v. Gardner, 97 Ind. 1; Town of Fowler v. F. C. Austin Mfg. Co., 5 App. 489.

Municipal discretion, courts can not control.—The power given by the statute to contract for light is purely a business power and is discretionary. Such discretionary power is not subject to judicial control, except in cases where fraud is shown or the discretion is being grossly abused to the oppression of the citizens. Seward v. Town of Liberty, 142 Ind. 551, 552; City of Valparaiso v. Gardner, 97 Ind. 1; City of Crawfordsville v. Braden, 130 Ind. 149.

Power to contract for light a business and not a legislative power—Period.—The power to contract for light, water and the like is purely a business power, and is neither legislative nor judicial. A city has the power to contract for a supply of gas or water for a period extending beyond the tenure of office of the individual members of the common council making such contract. With reference to a contract made prior to the enactment of this statute it can not be said that twenty-five years is an unreasonable time for which to contract for a supply of light and water. City of Vincennes v. Citizens', etc., Co., 132 Ind. 114; City of Indianapolis v. Indianapolis, etc., Co., 66 Ind. 396; City of Valparaiso v. Gardner, 97 Ind. 1.

Power granted by a city to a gas company to lay, maintain and repair gas pipes in its streets is a legislative contract, investing such company with the right of property in the franchise thus granted, which the city, unless the right is reserved, can not take away or impair without the company's consent by any subsequent act. City of Indianapolis v. Consumers', etc., Co., 140 Ind. 107.

Notice.—Notice of letting a contract for public lights is not required, nor is it necessary to invite proposals for bids. Crowder v. Town of Sullivan, 128 Ind. 486.

Municipal ownership—Private consumers.—Municipal corporations may establish works for lighting the streets, and may furnish lights to private consumers under contract. City of Crawfordsville v. Braden, 130 Ind. 149; Thompson Houston Electric Co. v. City of Newton, 42 Fed. Rep. 723.

Inherent power as to light.—The power to light the streets and public places of a municipality is one of its implied and inherent powers, necessary to properly protect the lives and property of its inhabitants, and as a check on immorality. No statute is necessary to give it this power. City of Crawfordsville v. Braden, 130 Ind. 149.

Gas supply—Exclusive privilege—Contract construed.—The defendant passed an ordinance granting to the plaintiff's assignors, for a period of twenty-five years, the privilege of laying gas mains, to supply gas for illuminating purposes, along certain streets of the city. It was provided that the defendant should maintain a certain number of lamp-posts, and such additional lamp-posts and lamps along said mains as the city council might from time to time direct. It was further provided that, upon the erection of said lamps, the city should take sufficient gas from the company to keep the said lamps lighted, and should pay at the rate of $3 per month for each and every lamp. Afterward an extension of the mains was ordered, and the plaintiff submitted a proposition concerning the use and payment of the additional lamps to be provided. The proposition was accepted by the common council, with the stipulation "that it be in force no longer time than the original contract." This subsequent arrangement was referred to as a contract in a number of resolutions passed by the common council in ordering the extension of mains. Although no definite time was mentioned in the ordinance during which the defendant was obligated to take gas for lighting its street lamps, the interpretation of the ordinance by the ordinary rules of construction and the acts of the parties thereunder, show that, by the ordinance, the city contracted to pay for twenty-five years for the gas furnished by the lamps provided for therein and by those afterward erected. The ordinance did not grant an exclusive use of the streets, and a monopoly was not given for supplying the city with gas for street lighting purposes. The contract was not void on account of any supposed surrender by the common council of its legislative power. City of Vincennes v. Citizens', etc., Co., 132 Ind. 114, 121.

Defendant city, by special ordinance, had contracted with plaintiff for lighting its streets with gas, and subsequently, by another ordinance, extended the terms thereof for twenty-five years, under conditions which plaintiff accepted. Under its terms, as the contract then stood, the city might at any time determine upon the substitution of electricity for gas, such change to be made by plaintiff, but leaving the number and price of the lights thus furnished to be fixed by an equitable agreement to be afterward made. It appeared that the common council did so determine, notifying plaintiff that it would receive its competitive bid for the contract, whereupon plaintiff replied that it was ready to make the substitution, and that it was ready to agree upon the "equitable" terms. Plaintiff declined to bid for the contract. It nowhere appeared in the complaint that plaintiff ever offered to furnish electric lights for their reasonable value. The fact that the terms of the whole agreement had not been definitely settled between the parties precluded the issuance of an injunction restraining the city from contracting with any one else to furnish it with electric light. Gaslight, etc., Co. v. City of New Albany, 139 Ind. 660.

Conflict of ordinances—Effect.—In an action brought by the plaintiff to recover for gas supplied to the defendant for public street lighting, under an ordinance, a demurrer was properly sustained to a paragraph of answer which alleged that, at the time of the passage of the ordinance, an ordinance of the defendant was in force which required that proposals for work, the estimated cost of which should exceed $40, should be let to the lowest bidder after a notice for proposals had been given by publication, and that the ordinance in suit was passed in violation of this ordinance. The ordinance claimed to have been violated evidently referred to work done for the city, and not to contracts such as the one in suit. If the passage of the ordinance sued on was within the prohibition of the other ordinance, its passage repealed it *pro tanto*. City of Vincennes v. Citizens', etc., Co., 132 Ind. 114, 128.

Partial annulment of contract.—A paragraph of answer was also bad which alleged that the common council, by resolution, prohibited the plaintiff from supplying gas after a certain date for ten of the lamp-posts specified in the complaint. The contract was mutually binding upon both the contracting parties, and neither could, by its own act, prejudice the position of the other. City of Vincennes v. Citizens', etc., Co., 132 Ind. 114, 121.

Exclusive privilege—Use of streets.—A municipal corporation can not grant to a private corporation the exclusive privilege of using its streets for the purpose of supplying the corporation or its citizens with light, water, fuel, or the like. Crowder v. Town of Sullivan, 128 Ind. 486; City of Rushville v. Rushville, etc., Co., 132 Ind. 575, 578; Indianapolis, etc., R. Co. v. Citizens', etc., Co., 127 Ind. 369; Citizens', etc., Co. v. Town of Elwood, 114 Ind. 332; Westfield, etc., Co. v. Mendenhall, 142 Ind. 538; City of Vincennes v. Citizens', etc., Co., 132 Ind. 114; Elliott Roads and Streets, pp. 566–569.

Special ordinance—When general ordinance necessary—License.—A special ordinance granting a permissive license to a designated corporation is effective. When a municipality attempts to regulate the mode of using its streets it must do so by a general ordinance; but when it simply grants a privilege to use the streets, and does not undertake to regulate the entire subject, a general ordinance is not indispensably necessary to authorize the licensee to use the streets. The rights acquired under a mere permissive license are subject to control under the delegated governmental power vested in the municipality. Crowder v. Town of Sullivan, 128 Ind. 486.

Electric light contract without exclusive privileges.—A city which has granted a private corporation the right to erect and maintain an electric light plant for furnishing light to the city and its inhabitants, but without exclusive privileges, is not thereby precluded from erecting and maintaining a plant of its own for such purpose, under a statute which confers the power to do so. Thompson Houston Electric Co. v. City of Newton, 42 Fed. Rep. 723.

Electric light contract—Bond—Sureties.—Where one enters into a contract with a town to light the streets with electric lights for a term of years, and at the same time enters into a bond as principal with certain others as sureties conditioned that he will well and truly comply with all and singular the terms and conditions of said contract and pay all damages accruing to the town in the event of his failure to carry out the terms of his contract, the persons so joining him in the execution of said bond are sureties and not guarantors. Town of Sullivan v. Cluggage, 21 App. 667.

Same—Notice.—Where a party who has entered into a contract to light a town with electric lights for a term of years, and has given an ordinary bond conditioned as set forth in the preceding note, the abandonment of the contract by the person who has given bond in a penal sum to secure its performance creates a liability for damages recoverable on such bond and the sureties upon the bond become immediately liable without notice from the town. Town of Sullivan v. Cluggage, 21 App. 667.

Injunction—Lighting contract—Price—Fraud.—A town will not be enjoined for making a contract for lighting its streets with gas on the ground of fraud, simply because the price to be paid is three times that paid by private consumers, where it does not appear that the gas plant was sufficient to furnish the necessary gas, or that it can be obtained elsewhere for a less amount, or that the gas to be furnished the town is of the same quality as that furnished to private consumers. Seward v. Town of Liberty, 142 Ind. 551.

Injunction—Against city to prevent breach of contract.—Injunction will not issue to restrain a city which is solvent from committing a breach of an agreement existing between itself and plaintiff, by the terms of which plaintiff is to furnish defendant with lights for a stated period of time, and to prevent its contracting with another than plaintiff therefor. Gaslight, etc., Co. v. City of New Albany, 139 Ind. 660.

Where a gas company violates an order of a court of equity enjoining it from charging the consumers more than a specified sum for gas, it is no defense in a prosecution for contempt, that the officers of the company acted in good faith, and without any intention to violate an order of court. Thistlethwaite v. State, 149 Ind. 319.

Action—Debt for light—Complaint.—In an action against a town, for a sum alleged to be due under the terms of a written contract for electric lights, the complaint containing the averments, that under the terms of the contract the plaintiff furnished the defendant with lights, for which the defendant owed the plaintiff a certain sum which was due and unpaid, the complaint was good against demurrer, the plaintiff not being bound to anticipate and avoid any defense which defendant might have. Town of Petersburg v. Petersburg, etc., Co., 16 App. 151.

1137. Poles and wires in streets.—2. For the purpose of effecting such lighting, the common council of any such city, or the board of trustees of any such town, may provide by resolution or ordinance for the erection and maintenance, in the streets, alleys or other public places of said city or town, of such poles, wires, posts, masts, skeleton towers and other appliances or structures as may be necessary for such purpose. R. S. 1894, § 4302.

Electric light companies occupying streets—Duties and liabilities of company and city.—Where a corporation has been authorized by the city to erect and maintain poles, wires, lamps and cables in the streets for electric lights, it is the duty of such corporation to keep watch over these appliances, and the city is liable only in cases wherein, after actual or constructive notice of the existence of danger growing out of or caused by some defect in the poles, wires, or other appliances, it fails to use diligence in obviating the danger thus created; the corporation occupying the streets for such purpose is not an insurer of the safety of the public against all dangers arising from the lawful placing in the streets of such appliances, but it is bound to know the dangers which may naturally be caused by such use of the streets, and to guard against the same by the exercise of all the foresight and caution which can be reasonably expected of prudent men under such circumstances. City of Denver v. Sherret, 88 Fed. Rep. 226.

Notice of defect.—If an employe of an electric light company occupying the streets, whose duty it is to report defects to the company, while in the line of his employment discovers defects, such discovery is notice to the company. City of Denver v. Sherret, 88 Fed. Rep. 226.

1138. Right to maintain may be granted.—3. Any such incorporated city or town is hereby authorized to grant by resolution or ordinance,

under such restrictions as the common council of such city, or board of trustees of such town, may deem proper, to any person or corporation, the right to erect and maintain, in the streets, alleys and other public places of such city or town, posts, poles, wires, and other necessary appliances, underground in said streets, alleys and other public places, for the purpose of supplying the inhabitants of such city or town with such electric or other light. R. S. 1894, § 4303.

1139. Existing contracts valid.—4. Any contract heretofore made by any such incorporated city or town for the lighting of its streets, alleys, and other public places, with the electric or other form of light, and any grant heretofore made by any such city or town to any person or corporation of the right to erect and maintain poles, wires, masts, posts, or skeleton towers in the streets or other public places of said city or town, for the purposes specified in this act, which does not grant or confer any exclusive privileges, is hereby declared to be as valid for all purposes as if made after the taking effect of this act: *Provided*, That the terms of this section shall affect no pending suit. R. S. 1894, § 4304.

1140. Right of way.—5. Any corporation engaged in the business of lighting cities or towns, or the public or private places of their inhabitants, with the electric light, or other form of light, under the provisions of this act, shall have the right to acquire such real estate and rights of way as may be necessary for its business under the writ of assessment of damages as fully as if the act in relation to said writ were incorporated in this act and made part of the same: *Provided*, That in the assessment of damages, consideration shall be had for damages occasioned by the proximity of such poles, wires, masts, posts, or skeleton towers, to real estate or improvements thereon, as well as to damages arising from the appropriation of real estate for the purposes in this act set forth. R. S. 1894, § 4305.

ARTICLE 9.—NATURAL GAS—LICENSE.

SEC.
1141. Regulation of natural gas—License.

[Acts 1887, p. 36. In force March 7, 1887.]

1141. Regulation of natural gas—License.—1. That the boards of trustees of towns, and the common councils of cities, in this state, shall have power to provide by ordinance, reasonable regulations for the safe supply, distribution and consumption of natural gas within the respective limits of such towns and cities, and to require persons or companies to whom the privilege of using the streets and alleys of such towns and cities is granted for the supply and distribution of such gas to pay a reasonable license for such franchise and privilege. R. S. 1894, § 4306.

Natural gas—Regulation of price.—This section does not confer upon municipal corporations the power to regulate the price at which natural gas shall be furnished, and such corporations have no such power. City of Rushville v. Rushville, etc., Co., 132 Ind. 575, overruled; Lewisville, etc., Co. v. State, 135 Ind. 49.

Same—Gas company—Use of streets for pipes—Ordinance—Maximum price of gas.—A gas company which uses the streets of a town for laying its pipes under gen-

eral permission therefor contained in an ordinance under this section, limiting the price to consumers to a certain maximum, will be enjoined from charging a consumer more than such maximum. Westfield, etc., Co. v. Mendenhall, 142 Ind. 538.

Same—Injunction.—A municipal corporation has no power to grant a natural gas company the exclusive privilege of using its streets, and a town can not enjoin a natural gas company from using its streets upon the ground that it has conferred the exclusive right to their use upon another gas company, but it may do so on the ground that the defendant has not obtained a license so to do. This section requires that a general ordinance shall be adopted by municipal corporations, giving, upon equal terms, substantially the same privileges to all companies. Citizens', etc., Co. v. Town of Elwood, 114 Ind. 332.

Neither a void grant of an exclusive privilege to use the town streets to one company, nor a refusal to grant a special privilege to another company, authorizes the latter company to use the streets. Citizens', etc., Co. v. Town of Elwood, 114 Ind. 332.

Same—Legislative contract—Franchise to lay gas mains in street—Subsequent impairment of contract—Conditions—Police power.—Power granted by a city to a gas company to lay, maintain, and repair gas pipes in its streets is a legislative contract, which the city, unless the right is reserved, can not take away or impair without the company's consent by any subsequent act. If the city grant a franchise it has the right to prescribe and impose terms and conditions, which become, when accepted and complied with, a binding contract. By such grant the city does not part with or bargain away its rights under the police power to protect the public health, the public morals and the public safety. City of Indianapolis v. Consumers', etc., Co., 140 Ind. 107.

Same—Limit of power to regulate streets.—The exclusive power of a city to regulate and control the use of its streets is not restricted to that of transit alone, but also extends to the laying of gas and water pipes, and to the promotion of the public health and convenience. City of Indianapolis v. Consumers', etc., Co., 140 Ind. 107; Cummins v. City of Seymour, 79 Ind. 491.

Ordinance—Amendment—Repeal—Natural gas.—Where there is an ordinance regulating the price to be charged by companies furnishing natural gas to consumers, a subsequent amendatory ordinance which increases the price to be charged by a particular company for a certain time, does not repeal the prior ordinance, and, on the expiration of the time, the prior ordinance controls. Thistlethwaite v. State, 149 Ind. 319.

Eminent domain—Power of regulation, etc.—For a consideration of the powers of eminent domain, and to regulate corporations using streets for the supply and distribution of natural gas, including the power to require such corporations to furnish gas to all consumers along the line of mains whenever applied for, see City of Rushville v. Rushville, etc., Co., 132 Ind. 575, overruled in part by Lewisville, etc., Co. v. State, 135 Ind. 49; City of Indianapolis v. Consumers', etc., Co., 140 Ind. 107; Westfield, etc., Co. v. Mendenhall, 142 Ind. 538.

ARTICLE 10.—PUBLIC PARKS.

SEC.		SEC.	
1142.	Establishing parks—Condemnation of lands.	1145.	Action on report—Appeal.
1143.	Assessing damages—Report.	1146.	Rules for laying out, etc.
1144.	Payment of damages.	1147.	Park tax—Issue of bonds.

[Acts 1891, p. 116. In force March 5, 1891.]

1142. Establishing parks—Condemnation of lands.—1. That the common council of any city or board of trustees of any incorporated

town, which shall by ordinance or resolution decide to establish, locate, lay out or improve any public park, parks or grounds, or to make extension of such parks or ground where they have heretofore been located, established, improved or commenced, shall have authority to locate such parks or public grounds with all appendages and lay out and open such roads, streets, avenues or drives as may be required for such improvement, and in case the use of any lands, town lots, water rights or easements or of any pool, lake or natural stream of water shall be found necessary for the establishment, location, maintenance and improvement of such parks or grounds it shall be lawful for such common council or board of trustees by themselves or agent to enter upon and take possession of and condemn the same for these uses: *Provided*, That such lands, town lots, water rights, pools, lakes and natural streams of water shall not be used for any other purpose than for such public parks or public grounds. For the purpose of such condemnation and use such common council or board of trustees shall have jurisdiction for five miles beyond the limits of such city or town: *Provided further*, That before such common council or board of trustees shall proceed to take possession of such lands, lots, water rights, easements, pools, lakes and natural streams of water for the purpose above mentioned, they shall apply to the judge of the circuit court of the county to appoint three commissioners, residents of such city or town, who shall be disinterested freeholders, to appraise and assess the damages accruing to the owners of any lands, lots, water rights, easements, pools, lakes and natural streams of water, so taken and condemned for said public purpose; and said commissioners shall, before they proceed to perform their duties as appraisers, take and subscribe an oath or affirmation, faithfully to perform all their duties as such appraisers, which shall be indorsed upon or attached to their appointment, and file the same with the clerk of such city or town. Ten days' notice shall be given such commissioners, by said council or board of trustees through the city or town clerk of the appraisement to be made, giving a complete description of the premises to be viewed. A like notice shall be given by personal service, or by leaving the same with some person of suitable age at their place of abode to each of the owners or agents thereof, of lands, lots, water rights, easements, pools, lakes or natural streams to be so taken for such public parks or grounds as in civil cases. If the owners are unknown or non-residents of this state, publication of the same in one or more newspapers of the town, of general circulation, or by posting up written or printed notices in six public places in such city or town, if there be no newspaper published therein, for three weeks, shall be deemed equivalent to such personal service. R. S. 1894, § 4307.

See *ante*, § 347, *et seq.*

1143. Assessing damages—Report.—2. Such commissioners, or a majority of them, shall, at the place and time indicated in such notice, proceed to an examination of such lands, lots, water rights, ease-

ments, pools, lakes and natural streams so desired to be taken or condemned for the use of such public parks or grounds, and shall then and there estimate the damages accruing to the owner. They shall view the premises and receive any evidence touching the questions before them, and may, for that purpose, administer oaths to witnesses examined in relation thereto. They shall make a report in writing of the amount of damage, if any accruing to each owner, and within ten days thereafter file the same with the clerk of such city or town. R. S. 1894, § 4308.

1144. Payment of damages.—3. When such report is filed, as in the preceding section required, the common council or board of trustees, if they accept the assessment so made, shall tender or cause to be tendered to the owner of such lands, lots, water rights, easements, pools, lakes or natural streams, or their heirs or representatives, the damages awarded by such commissioners, or if not found within the city or town, or the award is not accepted, then the same shall be kept by the treasurer as a special deposit, subject to the order of such owner or his heirs or representatives. R. S. 1894, § 4309.

1145. Action on report—Appeal.—4. The common council or board of trustees shall, within twenty days from the filing of said report, either accept or reject the terms of the same in whole or in part, and all parties aggrieved by such report may appeal therefrom at any time within thirty days after the filing thereof, to the circuit court of the county, upon filing usual bond with the clerk of such city or town for the payment of costs, but no such appeal shall prevent any such city or town from proceeding with said appropriation, construction and improvement, as if no appeal had been taken. No other question shall be determined than the regularity of the proceedings in the suit, and the amount of damages sustained. R. S. 1894, § 4310.

1146. Rules for laying out, etc.—5. The common council of any city or board of trustees of any town which may have established, located or laid out any public park or grounds under the provisions of this act, is hereby authorized and empowered to pass such ordinances, rules and regulations with regard to the laying out, improvement, preservation and ornamenting and management of such parks and public grounds as they may deem necessary for that purpose. R. S. 1894, § 4311.

Municipal corporation trustee for public—Change of trustee.—Where there has been laid out and filed a plat of land as an addition to a city, upon which plat a portion of the land is dedicated as a park, and there has been a sale of lots in reference to the plat, the dedication of the park thus effected is to the public and may be asserted by a town subsequently incorporated, which annexes such addition to its corporate limits, for a change of trustees does not defeat the dedication. Rhodes v. Town of Brightwood, 145 Ind. 21.

Dedication.—The principles governing the dedication of highways are equally applicable to parks and other public grounds. Bennett, etc., v. Seibert, 10 App. 369; Doe v. President, etc., 7 Ind. 641; City of Logansport v. Dunn, 8 Ind. 378.

An irrevocable dedication of land is effected by designating certain lands on a map filed in the county recorder's office as a "park," and by selling lots with reference to

the map. Rhodes v. Town of Brightwood, 145 Ind. 21; Bennett, etc., v. Seibert, 10 App. 369.

1147. Park tax—Issue of bonds.—6. The common council of such cities and incorporated towns shall have the power to levy a tax not exceeding one cent on each one hundred dollars of property, to defray the expense of purchasing said park or parks, and for the purpose of improving the same, said common council shall have power to borrow money and issue the bonds of said cities or incorporated towns upon petition of a majority of the resident freeholders of such city or incorporated town, and at a rate of interest not exceeding six (6) per cent. per annum, and the money so borrowed shall not be used or expended for any purpose other than the improvement of such park or parks. The common council of such city shall provide an interest fund by adding annually to the tax duplicate a tax sufficient to pay the interest on any debt created in pursuance of the provisions of this section, and shall, also, create a sinking fund by making and causing to be placed on the tax duplicate annually a levy of not less than one cent on each hundred dollars of the assessed value of property in such city or incorporated town, for the liquidation of the principal of such debt. [As amended, Acts 1893, p. 148. In force February 25, 1893.] R. S. 1894, § 4312.

ARTICLE 11.—PAWNBROKERS.

[Acts 1891, p. 403. In force March 9, 1891.]

1148. Pawnbrokers—License and regulating.—1. That common councils of cities and boards of trustees of incorporated towns, incorporated under the laws of Indiana shall have the power to license and regulate the business of pawnbroking within the corporate limits of their respective cities or towns, and impose upon persons engaging in such business a license fee of not less than ten nor more than one hundred dollars. R. S. 1894, § 4313.

Police power—License—City ordinance—Validity.—The business of a pawnbroker is subject to the police power of the state. Prior to the enactment of above section, as the state had not declared the business of a pawnbroker unlawful, nor conferred on municipal corporations the power so to do, the city had no power to require a license of pawnbrokers, and an ordinance requiring such license was void. Shuman v. City of Ft. Wayne, 127 Ind. 109.

ARTICLE 12.—RAILROADS, RIGHT OF WAY.

[Acts 1865, p. 51. In force March 6, 1865.]

1149. Right of way by cities and towns.—1. The trustees of any town or the common council of any city may grant to any person, corporation or company the right and privilege to locate and run a railroad track through said town or city, on the streets or alleys thereof, for the purpose of conveying coal into or through said town or city, under such restrictions and regulations as the trustees or common council may require. R. S. 1894, § 5398.

See *ante*, § 218, note, Railroads—Street Railways, and *post*, § 1316, *et seq.*

ARTICLE 13.—FIRE COMPANIES.

SEC.
1150. Exemption from juries and militia.
1151. Act cumulative.
SEC.
1152. Exemption from city tax.

[1 R. S. 1852, p. 298. In force May 6, 1853.]

1150. Exemption from juries and militia.—1. Active members of any fire company organized under the corporate authority of any city or town shall be exempt from the performance of military duty in time of peace and from serving as jurors. R. S. 1894, § 6621.

1151. Act cumulative.—2. This act shall be taken as cumulative. R. S. 1894, § 6622.

1152. Exemption from city tax.—3. The real and personal property and the polls of active firemen of regularly organized fire companies, who shall have done the duty of firemen for one year preceding the time of listing, to an amount not exceeding five hundred dollars, shall be exempt from the payment of city or corporation taxes. R. S. 1894, § 6623.

See *ante*, § 260, and *post*, § 1312.

ARTICLE 14.—BOARDS OF HEALTH.

SEC.
1153. Local boards of health—Secretary—Compensation and duties.
1154. Secretary—Duties.
SEC.
1155. Births—Deaths—Contagious diseases—Burial permits.
1156. Misdemeanors—Penalty.

[Acts 1891, p. 15. In force February 19, 1891.]

1153. Local boards of health—Secretary—Compensation and duties—Removals.—8. The trustees of each town, the mayor and common council of each incorporated city, except where a regularly constituted board of health by statute or by ordinance of such city exists or may hereafter be created, and the board of commissioners of each county shall constitute a board of health *ex officio*, for each town, city and county, respectively of the state, whose duty it shall be to protect the public health by the removal of causes of diseases when known, and in all cases to take prompt action to arrest the spread of contagious and infectious diseases, to abate and remove nuisances dangerous to the public health, as directed or approved by the state board of health and perform such other duties as may from time to time be required of them by the state board of health pertaining to the health of the people. They shall elect a secretary who shall be the health officer of the appointing board and who shall be a graduate of a reputable medical college recognized by the state board of medical registration and examination who if not already informed in hygiene and sanitary science shall immediately so inform himself according to the requirements of the state board of health. He shall serve as secretary for four years from the first day of January next ensuing his election and shall receive as compensation from the county, city or town treasury by the

board electing him, to be paid quarterly on the first Monday in March, July, September and December, the sum of 1¼ cents per capita up to and including 100,000 people, but his compensation shall not exceed $1,500 per annum; the population to be determined from the school census of the year of the appointment by multiplying the number of school children as determined by the school census by 3½: *Provided*, That no incorporated town or city shall pay its secretary less than $10.00 per annum, *and provided, further*, That nothing herein shall prevent any incorporated city from establishing and maintaining a city board of health with proper health officers, the compensation of the members of such boards of health and health officers to be fixed by the city council of such city. The secretaries of boards of health who were elected for the term beginning January 1st, 1899, shall serve for four years from that date and shall be subject to this act. The state board of health shall have power to remove at any time, any county, city or town health officer for intemperance, failure to collect vital statistics, obey rules and by-laws, keep records, make reports or answer letters of inquiry of said state board concerning the health of the people. Such removal, however, shall not be made until five days' notice of the charge or charges against such health officer shall have been mailed him, stating a time and place for hearing by the state board of health not less than one week later than the time of mailing such notice to such health officer. In case of death or removal of any town, city or county health officer, the vacancy thereby created, shall be immediately filled by the president of the board of trustees of the town, or the mayor of the city, or the county auditor as the case may be and such appointee shall hold office for the unexpired term of the health officer whose place he takes. The office of the secretary of the county board of health shall be at the county seat. All county, city and town health officers shall have and possess the statutory and common law powers of constables in all matters pertaining to the public health. [As amended, Acts 1899, p. 17. In force April 27, 1899.]

See *ante*, § 124, clause 35.

For full text of law concerning state and local boards of health, see R. S. 1894, § 6711, *et seq.*; Burns' Supp. 1897, § 6416; Acts 1899, p. 17, *et seq.*

1154. Secretary—Duties.—9. The board of health of each county shall be subordinate to the state board of health, and it shall be the duty of the secretary of such county boards to report such facts and statistics as may be required under instructions from and in accordance with blanks furnished by said board; and it shall be the duty of the secretaries of town and city boards of health to make reports of such facts and statistics as may be required under instructions from and in accordance with blanks furnished by the state board to the secretaries of the county boards of health in which such towns and city boards of health are subordinate. It shall be the duty of county boards of health to enforce all rules and regulations of the state board of health in their respective counties which may be issued from time

to time for the preservation of the public health and for the prevention of endemic and epidemic and contagious diseases. [As amended, Acts 1899, p. 17. In force April 27, 1899.]

1155. Births—Deaths—Contagious diseases—Reports of—Burial permits.—10. It shall be the duty of all physicians and accouchers in the state to report to the secretary of the board of health of the town, city or county in which they may occur, all births and deaths and shall immediately report contagious diseases as are specified by the state board, which may occur under their supervision, with a certificate of the cause of death, and such correlative facts as may be required in the blank forms furnished by the state board of health. When any birth or death may occur with no physician or accoucher in attendance, then such birth or death shall be reported by the householder where or under whose observation such birth or death may occur, with the cause of death if such be known. Any death coming under the jurisdiction or supervision of any coroner, shall be by him reported to the secretary of the board of health of the town, city or county in which death may occur, within three days after death for burial purposes, and such death so reported shall not be required to be reported by any other person. No undertaker, sexton or other person shall bury any human body until he has received a permit to do so from the county, city or town board of health or its duly appointed agent. No such permit shall be issued until there has been delivered to such board or agent, a certificate of death according to the form prescribed by the state board of health. In the event of any burial without a permit as herein provided, the coroner of the county wherein the illegal burial was made shall disinter the body, hold an inquest and within three days thereafter, make a return of his findings to the nearest local health officer. [As amended, Acts 1899, p. 17. In force April 27, 1899.]

1156. Misdemeanors—Penalty.—14. Any person or persons, any board of health or the officers of any corporation who shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than ten nor to exceed one hundred dollars. [As amended, Acts 1899, p. 17. In force April 27, 1899.]

CHAPTER 7.

TOWNS.

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2. Government and powers.
3. Taxation.
4. Improvements of streets.
5. Openings and vacations.
6. Annexation of territory.
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ARTICLE 1.—INCORPORATION AND ORGANIZATION.

SEC.
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1159. Survey, map, and census made public.
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[1 R. S. 1852, p. 482. In force May 6, 1853.]

1157. Survey and map.—1. Persons intending to make application for the incorporation of a town, as hereinafter provided, shall cause an accurate survey and map to be made of the territory intended to be embraced within the limits of such town. Such survey shall be made by a practical surveyor, and shall show the courses and distances of the boundaries thereof, and the quantity of land contained therein—the accuracy of which survey and map shall be verified by the affidavit of such surveyor, written thereon or annexed thereto. R. S. 1894, § 4314.

Charter—Rules of construction.—The charter or statute by which a municipal corporation is created or governed is its organic law, and the rules applicable to the interpretation of constitutions may be used in the construction thereof. Newcomb v. City of Indianapolis, 141 Ind. 451.

See *ante*, § 45, general notes.

1158. Census.—2. Such person shall cause an accurate census to be taken of the resident population of such territory, as it may be, on some day not more than thirty days previous to the time of presenting such application to the board of county commissioners, as hereinafter provided; which census shall exhibit the name of every head of a family residing within such territory on such day, and the number of persons then belonging to every such family; and it shall be verified by the affidavit of the person taking the same. R. S. 1894, § 4315.

Census and affidavit—Objection to.—Where, in a proceeding to incorporate a town, objection was made to the introduction in evidence of the census and affidavit thereto, "for the reason that there is no proof except the affidavit attached," the objection does not include the affidavit, but is an objection to the introduction of the census without additional proof of its correctness. Indiana, etc., Co. v. Wagner, 138 Ind. 658.

[Acts 1855, p. 126. In force February 23, 1855.]

1159. Survey, map, and census made public.—3. Such survey, map, and census, when completed and verified as aforesaid, shall be left at some convenient place within said territory, for examination by those having interest in said application, for a period of not less than twenty days. R. S. 1894, § 4316.

[1 R. S. 1852, p. 482. In force May 6, 1853.]

1160. Application to county board.—4. Such application shall be by petition, subscribed by the applicants, and also by not less than one-third of the whole number of qualified voters residing within such territory; and said petition shall set forth the boundaries thereof, the quantity of land embraced according to the survey, and the resident population therein contained, according to said census taken; and the said petition shall have attached thereto, or written thereupon, affidavits verifying the facts alleged therein; and it shall be presented at the time indicated in the notice of such application, or as soon thereafter as the board can receive and consider the same. R. S. 1894, § 4317.

Unplatted lands.—Unplatted lands may be included within the boundaries of a town which it is proposed to incorporate. Indiana, etc., Co. v. Wagner, 138 Ind. 658, 666.

1161. Hearing and order.—5. The board of county commissioners, in hearing such application, shall first require proof, either by affidavit or oral examination of witnesses before them, that the said survey, map, and census were subject to examination in the manner and for the period required by section 3 of this act; and if said board be satisfied that the requirements of this act have been fully complied with, they shall then make an order, declaring that such territory shall, with the assent of the qualified voters thereof, as hereinafter provided, be an incorporated town, by the name specified in the application aforesaid, which name shall differ from that of every other town in this state; and they shall also include in such order a notice for a meeting of the qualified voters resident in said territory, at a con-

venient place therein, to be by them named, on some day within one month therefrom, to determine whether such territory shall be an incorporated town. R. S. 1894, § 4318.

General laws providing conditions upon which cities and towns may be incorporated as municipal corporations, with or without the consent of those interested, and vesting the power in judicial bodies to determine whether such conditions exist, and, if so, to order such incorporation, are valid. Woolverton v. Town of Albany, Ind. Sup. Ct., Jan. 5, 1899; Paul v. Town of Walkerton, 150 Ind. 565; Forsythe v. City of Hammond, 142 Ind. 505, 516, 519; Forsythe v. Hammond, 164 U. S. 706.

In such case the creation of the corporation is not the act of the court or other body, but is the act of the law. If the facts exist under the law, the board of commissioners or the court of appeals has no discretion and can exercise none, but must order the incorporation of such town or city. Woolverton v. Town of Albany, Ind. Sup. Ct., Jan. 5, 1899; Forsythe v. City of Hammond, 142 Ind. 505, 517, 518.

Boundaries—Legislative and judicial functions.—The creation, enlarging and contraction of boundaries of municipal corporations are legislative and not judicial functions, and may be exercised by the legislature without the consent and against the remonstrance of those interested. Woolverton v. Town of Albany, Ind. Sup. Ct., Jan. 5, 1899; Paul v. Town of Walkerton, 150 Ind. 565.

Preliminary steps—Jurisdictional facts—Proof.—The preliminary steps and jurisdictional facts upon hearing before the board of county commissioners may be by affidavits or oral examination of witnesses. Indiana, etc., Co. v. Wagner, 138 Ind. 658.

Commissioners—Jurisdiction—Petition.—The pendency of the petition gives the county commissioners jurisdiction of the subject-matter thereof and that jurisdiction can not be ousted by the adverse action of the city council of an adjoining city. After the filing of a petition for the incorporation of a town, the territory embraced therein can not be annexed to an adjoining city by a vote of the city council. Taylor v. City of Ft. Wayne, 47 Ind. 274.

Same—Proofs—Order.—Where a petition has been filed by proper parties before the board of commissioners for the incorporation of a town, and the petition conforms to the requirements of the statute, it is the duty of the commissioners to hear the proofs, and, if satisfied that the requirements of the law have been complied with, to make an order declaring that the territory embraced in the petition shall, with the assent of the qualified voters thereof, be an incorporated town, by the name specified in the petition; and after the election has been properly certified by the inspectors of the election it is the duty of the commissioners to make an order declaring that such town has been incorporated by the name adopted. Taylor v. City of Ft. Wayne, 47 Ind. 274.

Order of election—Interlocutory order—No appeal.—An appeal will not lie from an order of the board that an election be held to determine whether the town shall be incorporated, as the order is not a final one, but still leaves the case pending in the commissioners' court. Indiana, etc., Co. v. Wagner, 134 Ind. 698.

Former order—Judicial knowledge.—On the hearing of the petition, the board can not take judicial cognizance of its own orders or judgment in a different case on the same subject. Grusenmeyer v. City of Logansport, 76 Ind. 549; La Plante v. Lee, 83 Ind. 155.

Jurisdiction—Collateral attack.—The judgment and proceedings of the board of commissioners, and the regulations of the organization of the town as a corporation can not be attacked or questioned in collateral proceedings. Grusenmeyer v. City of Logansport, 76 Ind. 549; Hon v. State, 89 Ind. 249; City of Delphi v. Startzman, 104 Ind. 343; Town of Cicero v. Williamson, 91 Ind. 541; City of Terre Haute v. Beach, 96 Ind. 143.

Appeal.—An appeal lies from an order of the board for the incorporation of a town,

and from an order dismissing the petition for incorporation. The decision in such cases is judicial, and not merely administrative or legislative. For cases overruled, see Grusenmeyer v. City of Logansport, 76 Ind. 549; Indiana, etc., Co. v. Wagner, 134 Ind. 698.

Same—Appeal—Circuit Court.—Upon appeal the circuit court may make a final determination of such proceeding, and cause the same to be executed, or may send the same down to the board with directions how to proceed, and may enforce compliance by the board. Grusenmeyer v. City of Logansport, 76 Ind. 549.

Preliminary steps—Appeal.—The preliminary steps and jurisdictional facts made to appear before the board of commissioners in a proceeding to incorporate a town may be made to appear in the circuit court on appeal by affidavits or oral examination of witnesses. Indiana, etc., Co. v. Wagner, 138 Ind. 658.

Same—Transcript.—Where a transcript of the case on appeal in the circuit court was introduced in evidence there was no prejudicial error. Indiana, etc., Co. v. Wagner, 138 Ind. 658.

Same—Evidence—Census and affidavit.—Where, in a proceeding to incorporate a town, objection was made to the introduction in evidence in trial upon appeal of the census and affidavit thereto, "for the reason that there is no proof except the affidavit attached," the objection does not include the affidavit, but is an objection to the introduction of the census without proof of its correctness. Indiana, etc., Co. v. Wagner, 138 Ind. 658.

Issues raised before the board of commissioners are amendable upon appeal. Harris v. Millege, 151 Ind. 70.

Appeal bond—Sufficiency.—An appeal bond signed only by the appellants is not a compliance with the statute granting appeals, upon filing bond with surety, and is cause for dismissal. Harris v. Millege, 151 Ind. 70; McVey v. Heavenridge, 30 Ind. 100.

1162. Notice to voters.—6. The board shall give ten days' notice of such meeting by publication in a newspaper, if one be printed in such territory, and by posting up copies of said notice, not less than ten in number, at the most public places in said proposed incorporated town. R. S. 1894, § 4319.

1163. Polls, how long open.—7. At the meeting of the qualified voters, as herein provided, polls shall be opened at nine o'clock in the forenoon of such day, and shall be kept open until four o'clock in the afternoon, when they shall be closed. R. S. 1894, § 4320.

1164. Board of election.—8. The voters at such meeting shall first proceed to the election of three inspectors, who, after being duly chosen and qualified, and having elected one of their number clerk, shall, without delay, proclaim to the meeting that the poll is now opened, and that they are ready to receive the ballots of the voters. R. S. 1894, § 4321.

1165. Election, and effect thereof.—9. The qualified voters of said territory shall vote by ballots having thereon the word "Yes" or the word "No." And if a majority of the ballots given at such meeting shall have thereon the word "No," the voters of such territory shall be deemed not to have assented to the incorporation thereof as a town, and no further proceedings shall be had in relation thereto; but if a majority of such ballots shall have thereon the word "Yes," such territory shall, from that time, be deemed an incorporated town, to have continuance thereafter by the name and style specified in the order made by the board of county commissioners, as hereinbefore provided.

And the inspectors of such meeting shall make a statement showing the whole number of ballots given at such meeting, the number having the word "Yes" thereon, and the number having the word "No" thereon; which statement shall be verified by the affidavit of such inspectors, and shall be returned to such board of commissioners at their next session, who, if satisfied of the legality of such election, shall make an order declaring that said town has been incorporated by the name adopted, which order shall be conclusive of such incorporation in all suits by or against such corporation; and the existence of said corporation, by the name and style aforesaid, shall thereafter be judicially taken notice of in all courts and places in this state, without specially pleading or alleging the same. R. S. 1894, § 4322.

Objections—Appearance.—Parties in interest may appear before the county commissioners and object to the legality of the election. Where persons appear before the commissioners and move to dismiss the proceeding, this will constitute an appearance. Harris v. Millege, 151 Ind. 70.

Incorporation—Evidence—Judicial knowledge.—Courts take judicial knowledge of the incorporation of towns, and proof thereof is not necessary. Town of Albion v. Hetrick, 90 Ind. 545; Stultz v. State, 65 Ind. 492; Pennsylvania Co. v. Horton, 132 Ind. 189, 195; Mode v. Beasley, 143 Ind. 306; 1 Dillon Munic. Corp. (4th ed.), § 83; 1 Beach Pub. Corp., § 74.

Same—Statutes—History—Population.—Courts of this state take judicial notice of its statutes, and also of its history, which includes the population of its cities and towns as shown by the last census of the United States. Stultz v. State, 65 Ind. 492; State v. Gramelspacher, 126 Ind. 398, 403; 1 Beach Pub. Corp., § 74.

Same—Town and city—Special and general charter.—The courts take judicial notice of towns incorporated under a special charter; also, that thereafter the town becomes incorporated under the general law of the state as a city. Stultz v. State, 65 Ind. 492.

Same—Name—Location—Limits and boundary.—The courts take judicial notice of the existence and names of cities and towns, and, in some general sense, of their locations, but not of their exact limits or boundaries. Whether a given location or described territory is within the limits of any town or city in the state, is a matter of averment and proof. Grusenmeyer v. City of Logansport, 76 Ind. 549; Indianapolis, etc., R. Co. v. Stephens, 28 Ind. 429; Louisville, etc., R. Co. v. Hixon, 101 Ind. 337; Strosser v. City of Ft. Wayne, 100 Ind. 443; City of Indianapolis v. McAvoy, 86 Ind. 587; Shea v. City of Muncie, 148 Ind. 14.

Charter of incorporation—Special and general acts.—The charter of a municipal corporation, whether a general or special act, may be amended or repealed at the pleasure of the legislature. Wiley v. Corp. of Bluffton, 111 Ind. 152; Corp. of Bluffton v. Studebaker, 106 Ind. 129; City of Evansville v. Summers, 108 Ind. 189; State v. Kolsem, 130 Ind. 434; Wilkins v. State, 113 Ind. 514.

See *ante*, § 46 and notes.

Incorporation—When complete.—A town does not become incorporated until the result of the election has been reported to the county board and an order made declaring the incorporation established. State v. Arnold, 38 Ind. 41.

School corporation.—An incorporated town is a municipal corporation for school purposes, distinct from the civil town—and as such school corporation may contract. School Town of Princeton v. Gebhart, 61 Ind. 187. See *post*, § 1507 and notes.

Cities—Towns.—The word "town," as used in the constitution of the state, and in some statutes, is generic, and includes cities. City of Indianapolis v. Higgins, 141 Ind.

1; Flinn v. State, 24 Ind. 286; State v. Craig, 132 Ind. 54; State v. Denny, 118 Ind. 449; Harvey v. Osborn, 55 Ind. 535.

A town is not always a city, but a city is always a town. Harvey v. Osborn, 55 Ind. 535.

Action—Presumption as to incorporation.—In an action by or against a town it will be presumed, nothing to the contrary appearing, that the town has been organized under the general law of the state for the incorporation of towns. Town of Centerville v. Woods, 57 Ind. 192; Town of Brazil v. Kress, 55 Ind. 14; Walter v. Town of Columbia City, 61 Ind. 24, 28; Sparling, etc., v. Dwenger, 60 Ind. 72, 80; Cowley v. Town of Rushville, 60 Ind. 327, 331; Kratli v. Larrew, 104 Ind. 363, 365; City of Logansport v. Wright, 25 Ind. 512; Lowrey v. City of Delphi, 55 Ind. 250; Hilgenberg v. Wilson, 55 Ind. 210.

Incorporation—Prescription.—The exercise for twenty years of the corporate powers of a town over a defined territory, with the knowledge of the public, no question having been made as to the authority of the town, was a waiver of irregularities in its organization, and cured inaccuracies in the original survey and map, and was conclusive evidence of its incorporation. Worley v. Harris, 82 Ind. 493, 496; Strosser v. City of Ft. Wayne, 100 Ind. 443, 450.

[Acts 1857, p. 84. In force February 19, 1857.]

1166. Districts.—10. Such inspectors, when they shall have returned the statement as aforesaid, shall next proceed to divide said town into not less than three nor more than seven districts, having due regard to the equitable apportionment of population among the same and the conveniency and contiguity of such district. R. S. 1894, § 4323.

1167. Re-districting.—2. Any town heretofore incorporated under the act approved as aforesaid, may, at any time ten days before the annual election, re-district the town according to the preceding section, for the purpose of electing officers for said town. R. S. 1894, § 4324.

[1 R. S. 1852, p. 482. In force May 6, 1853.]

1168. Notice of corporation election.—11. They shall also give ten days' notice by publication in a newspaper, if one be printed within such town, or, if there be no newspaper, then by posting such notices in five public places therein, of an election to be held in such town, for the purpose of electing officers thereof, naming the place therein and the day upon which the same shall be had; but such day named shall be within twenty days from the posting of such notices. Every subsequent notice of a corporation election shall be given, in like manner, by the clerk of said town. R. S. 1894, § 4325.

1169. Annual election.—12. An election for officers of said town, after the first election, shall be held annually on the first Monday in May of each year; and at every such election the preceding board of trustees, or any three of them, shall act as the inspectors thereof. R. S. 1894, § 4326.

Inspectors—Collateral attack.—Where in a suit by a town to recover the license fee required by a town ordinance to be paid by retailers of liquors, it was answered that the election at which the trustees who passed the ordinance were elected, was not conducted by the then trustees, as inspectors, but by disqualified persons, etc., the answer was bad, as the question of the right of the trustees to exercise their office could not be

questioned collaterally, and the answer did not negative the fact that they were trustees *de facto*. Redden v. Town of Covington, 29 Ind. 118.

[Acts 1883, p. 29. In force February 26, 1883.]

1170. Voting place.—1. That in town elections there shall be but one place of voting, which shall be centrally located in the town, and designated in the notice of such election given by the town clerk: *Provided*, That the trustee of any town may, if public convenience and public good require, establish by ordinance a precinct in each ward of such town. R. S. 1894, § 4327.

[1 R. S. 1852, p. 482. In force May 6, 1853.]

1171. Polls—Opening and closing.—13. At all elections in said town, the polls shall be open at nine o'clock in the forenoon, and shall not be finally closed until four o'clock in the afternoon of said day. R. S. 1894, § 4328.

[Acts 1881 S., p. 703. In force April 14, 1881.]

1172. Inspector's duties.—14. Such inspectors shall preside at such first election, and be inspectors thereof; and, in the receiving and canvassing of votes, shall be governed by the laws then existing, so far as they are applicable for the election of township officers: *Provided, however*, In case of absence of any of the inspectors from the place of holding such election at nine o'clock in the forenoon, the qualified voters of the town present shall proceed to appoint such inspector, or inspectors, whose duties shall be the same as if they had been presiding at the election held for the purpose of incorporation. R. S. 1894, § 4329.

[Acts 1873, p. 218. In force March 10, 1873.]

1173. Officers to be elected.—15. There shall be elected, at the first and at every subsequent election, one trustee from each district in said town, and also a clerk and treasurer, who shall respectively hold their offices until the first Monday in May next following, or until their successors are elected and qualified: *Provided*, That nothing herein contained shall prevent the respective offices of clerk and treasurer from being held by one and the same person. R. S. 1894, § 4330.

Trustees—How elected—Residence—Inspectors.—A trustee must be elected for each district of an incorporated town, but each must be elected by the voters of the whole town. The preceding board of trustees, or a majority of them, must act as the inspectors at the election and the certificates of election must be signed by the trustees present at the election who have acted as inspectors. Those acting as trustees must each reside in his proper district, and be legally qualified. Millikin v. Town of Bloomington, 49 Ind. 62.

Town trustees not the corporation.—The trustees of a town represent but do not constitute the corporation, and, although they have violated their duty, they may invoke the aid of the courts to protect its rights. Citizens', etc., Co. v. Town of Elwood, 114 Ind. 332; City of Valparaiso v. Gardner, 97 Ind. 1, 6.

Exercise of duties—Collateral attack.—The right of the trustees to exercise their office can not be questioned collaterally. Redden v. Town of Covington, 29 Ind. 118.

Town trustee—Eligible as school trustee.—A town trustee is eligible for election to the office of school trustee. He is not rendered ineligible to the office of school trustee by being a member of the board which elects him. The two offices are not inconsistent offices. State v. Meyer, 60 Ind. 288.

Officer's interest in contract.—The statutory provisions forbidding city officers from purchasing any bond, order, claim or demand against the city, or having any interest in contracts for public improvements, are not found in the law concerning towns. Town of Tipton v. Jones, 77 Ind. 307, 316.

Contracts of officers void.—But contracts between town officers and the town relating to public work are void. Case v. Johnson, 91 Ind. 477; Benton v. Hamilton, 110 Ind. 294; Pratt v. Luther, 45 Ind. 250; see *post*, § 1420 and note.

A trustee can not occupy the double and inconsistent position of vendor and purchaser, and where one trustee of a town, in connection with a partner, contracted with the other trustees to sell to the town a tract of land for a cemetery, and the vendors executed a deed and received orders on the town treasurer for the money, the contract was voidable at the election of the vendee. Pratt v. Luther, 45 Ind. 250.

Officers' salaries—Allowances.—An officer is entitled only to the fees allowed by the statute, and before any allowance is made him he must point out the particular statute authorizing the allowance. Legler v. Paine, 147 Ind. 181; Stiffler v. Board, etc., 1 App. 368; Noble v. Board, etc., 101 Ind. 127; Wood v. Board, etc., 125 Ind. 270.

Mandamus.—Mandamus is the proper remedy to coerce an officer to discharge a public duty, and if it is a matter in which the people in general are interested it is not required that the applicant show any legal or special interest in the result sought to be obtained. It is only necessary that he be a citizen, interested in common with other citizens in the execution of the law. Wampler v. State, 148 Ind. 557; 2 Dillon Munic. Corp., § 823, *et seq.*; 2 Beach Pub. Corp., § 1547, *et seq.*

1174. Who elected—Tie—Certificate.—16. The persons having the greatest number of votes shall be declared elected as such trustees, and the persons who received the greatest number of votes, respectively, for clerk and treasurer, as designated by the ballot for such office, shall be declared so elected; and if two or more shall have an equal and highest number of votes, and there be no choice, the inspectors of such election shall forthwith determine, by lot, which shall be deemed elected. And it shall be the further duty of such inspectors to make a certified statement, over their own signatures, of the persons elected to fill the several offices in said town, and to file the same with the clerk of the circuit court in the county thereof, within ten days from the day of such election. And no act or ordinance of any board of trustees chosen at such election shall be valid until the provisions of this section are substantially complied with. R. S. 1894, § 4331.

Town trustees—Certificate of election—Authority.—Persons elected as trustees of a town have no power to act officially until a certificate of their election has been filed in the office of the clerk of the circuit court. Pratt v. Luther, 45 Ind. 250; Dinwiddie v. President, etc., 37 Ind. 66.

Injunction.—Where no certificate of election has been filed with the clerk, an ordinance passed by the persons elected as trustees gave no authority for an improvement in the town at the expense of the property holders, and an injunction should be granted on their application. Pratt v. Luther, 45 Ind. 250; Dinwiddie v. President, etc., 37 Ind. 66.

Curative act.—The act of March 13, 1875 (S., p. 74), legalizes the acts of boards of trustees and other officers of incorporated towns, where the inspectors of elections had failed to make the return of the election, and is constitutional and valid. Gardner v. Haney, 86 Ind. 17.

Said act is retrospective and curative only, and has no prospective force. Lucas v. State, 86 Ind. 180.

Certificate of election after ten days—Effect.—If the certificate of election of the trustees of the town is filed with the clerk after the time fixed by law, the effect is to legalize and validate, from their inception, ordinances and contracts for street improvements previously made by the board of trustees of such town, and to authorize the recovery of assessments thereunder. For cases distinguished and overruled, see opinion. Jennings v. Fisher, 103 Ind. 112.

Same—Failure to make certificate—Mandate.—Upon the failure and refusal of the inspector to make the necessary return he may be compelled to do so by mandate. Enos v. State, 131 Ind. 560.

Same—Presumption as to public officer.—In an action against an inspector of election to compel him to make out and file with the clerk the certificate of election, it must be presumed, in the absence of a showing to the contrary, that he and the judge of the election did their duty and that such return was made. Public officers are presumed to have done their duty until the contrary is shown. Enos v. State, 131 Ind. 560.

[1 R. S. 1852, p. 482. In force May 6, 1853.]

1175. Clerk's duty.—17. It shall be the duty of the clerk of the proper county to make a record of such certified statement; for which service there shall be paid the same fee as is allowed clerks for similar services in other cases. R. S. 1894, § 4332.

[Acts 1881 S., p. 708. In force March 25, 1881.]

1176. Trustees, how elected—Term.—1. At the next ensuing May election to be held for the election of town officers, as now provided by law, the town trustees shall be chosen in the following manner, to hold their offices for the time herein set forth. In a town where there are three trustees to be elected, the person receiving the greatest number of votes shall hold his office for two years from and after said election, and the two other persons receiving the next greatest number of votes each shall hold their offices for one year from said election. And where there are four trustees to be elected, the two persons receiving the greatest number of votes each shall hold their offices for two years, and the two persons receiving the next greatest number of votes each shall hold their offices for one year. And where there are five trustees to be elected, the two persons receiving the greatest number of votes each shall hold their offices for two years, and the three persons receiving the next greatest number of votes each shall hold their offices for one year. And where there are six trustees to be elected, the three persons receiving the greatest number of votes shall hold their offices for two years, and the three persons receiving the next greatest number of votes shall hold their offices for one year. And where there are seven trustees to be elected, the three persons receiving the greatest number of votes shall hold their offices for two years, and the four persons receiving the next greatest number of

votes shall hold their offices for one year. *And it is further provided,* That at the May elections for the election of town officers, succeeding the May election of one thousand eight hundred and eighty-one, the town trustees of the districts where a vacancy will occur, by reason of the expiration of the term, shall be elected for the term of two years each. In all cases where two or more persons receive an equal number of votes, and there be no choice, the inspector shall determine, as is now provided by law, as to who is elected. R. S. 1894, § 4333.

[1 R. S. 1852, p. 482. In force May 6, 1853.]

1177. Vacancies.—18. A vacancy occurring in the board of trustees, or in any corporation office, shall be filled by appointment, at a special meeting of the trustees called for that purpose; but such appointment shall be made from the district, if a trustee [be appointed], in which the vacancy has occurred, and shall, in no case, extend beyond the annual election provided for in this act. R. S. 1894, § 4334.

1178. President—Oath.—19. The board of trustees, chosen as aforesaid, shall elect a president from their own body; and such president, trustees, and all other officers elect, shall, within five days after such election, take and subscribe, before some person authorized to administer the same, the usual oath or affirmation for the faithful performance of the duties of their respective offices. R. S. 1894, § 4335.

1179. Corporate name.—20. The president and trustees of such town, and their successors in office, shall constitute a body politic and corporate, by the name of the "Town of ———," and shall be capable, in law, to prosecute and defend suits to which they are a party. R. S. 1894, § 4336.

[Acts 1859, p. 206. In force March 4, 1859.]

1180. Order of incorporation, when conclusive.—1. In all cases where the inhabitants of any town in this state have taken steps to incorporate the same under "An act for the incorporation of towns, defining their powers, providing for the election of the officers thereof, and declaring their duties," approved June 11, 1852; and where the board of county commissioners of the county in which such town is situated have, in pursuance of such proceedings, made a final order declaring such town incorporated by the name designated, in pursuance of § 9 of the above recited act, such order shall be conclusive, and such town shall be deemed and taken to be an incorporated town: *Provided,* That nothing in this act shall be so construed as to affect any case where an appeal has been taken from such order, or where an appeal may hereafter be taken from such order within the time prescribed by law. R. S. 1894, § 4337.

[1. R. S. 1852, p. 482. In force May 6, 1853.]

1181. How old town may incorporate.—56. Any town heretofore incorporated may, by a resolution of the board of trustees or other municipal board thereof, entered upon the record book of the corpora-

tion, become incorporated under this act; but the same shall be deemed a surrender of all the rights and franchises acquired under any former act of incorporation or acts amendatory thereto. A copy of such resolution shall be filed with the clerk of the circuit court of the proper county, and entered by him of record. Trustees and other officers of such incorporated town by whatever name designated, performing duties of a like nature to those required by officers created by this act, shall continue to be the officers of such town, by the name as specified in this act, until superseded by the annual election. R. S. 1894, § 4338.

Right to reincorporate—Town of Clarksville.—The right given to towns to reincorporate, by this section, is still effective as to the town of Clarksville, notwithstanding the act of March 3, 1883, repealing certain amendatory acts of the charter of said town, and pertaining to the incorporation of towns on the out-lots of Clarksville. State v. Hertsch, 136 Ind. 293.

1182. Debts not affected.—58. No debt or liability due to or from any incorporated town shall be impaired by reason of such town being brought within the provisions of this act, and becoming incorporated under it. R. S. 1894, § 4339.

1183. Dissolution of town—Proceedings.—53. When an application, signed by one-third of the legal voters of any incorporated town, shall be presented to the board of trustees, in writing, asking for a dissolution of the corporation, setting forth the reasons therefor, it shall be competent for said board, if they deem the reasons good, to call a meeting of the voters of said town, by giving ten days' notice thereof, as provided in this act, to determine whether such corporation shall be dissolved. The board of trustees shall preside at such meeting, and a poll shall be opened, as at other corporation elections, and the voters shall vote by ballot, "Yes" or "No." If a majority of all the votes given shall have thereon the word "Yes," and such votes shall have been given by two-fifths of all the legal voters in such town, a statement of the vote, signed by the president and attested by the clerk, shall be filed in the clerk's office of the county, and such town shall, at the expiration of six months from the time of holding such meeting, cease to be a corporation, and the property belonging to such corporation, after the payment of its debts and liabilities, shall be disposed of in such manner as a majority of the voters of such town, at any special meeting thereof, may direct. R. S. 1894, § 4340.

1184. Rights and contracts not affected.—54. No such dissolution shall affect the rights of any person in any contract or agreement to which such corporation is a party. R. S. 1894, § 4341.

Dissolution of town corporations.—The mode prescribed by statute for the dissolution of town corporations should be followed, and the courts will not dissolve such a corporation by other methods when there is a doubt as to the right. State v. Husband, 26 Ind. 308.

ARTICLE 2.—GOVERNMENT AND POWERS.

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[1 R. S. 1852, p. 482. In force May 6, 1853.]

1185. Official bonds.—28. The clerk, treasurer and marshal shall, within ten days from their election or appointment, each and severally give bonds, payable to the state of Indiana, with freehold sureties, to such an amount as the board of trustees shall direct; but the bonds of the treasurer and marshal shall, respectively, be for double the amount of the estimated tax duplicate for the current year. R. S. 1894, § 4342.

1186. Books, etc., to successor.—29. All books, vouchers, moneys, or other property belonging to the corporation, and in charge or possession of any officer of the same, shall be delivered to his successor when qualified. R. S. 1894, § 4343.

Treasurer—Improvement contract with town.—A contract between a town treasurer and the town for the improvement by the former of a public street is void as against a property owner assessed on account of the improvement. Benton v. Hamilton, 110 Ind. 294; Case v. Johnson, 91 Ind. 477.

Treasurer—Suit on bond.—In a suit upon the bond of a town treasurer for failure to pay the moneys of the town to his successor, an answer in bar that third parties had

recovered a judgment against the town upon bonds issued by the town was bad. Harvey v. State, 94 Ind. 159, 160.

Same—Sureties—New bond.—In a suit upon an official bond an answer by sureties that the sureties on a former bond had, upon proper application, in term, obtained an order from a judge pro tem. discharging them, which, however, was never entered of record, and thereupon the bond sued upon was executed, was bad. Harvey v. State, 94 Ind. 159.

Breach of bond.—The use by a town treasurer of the funds of the town is not a breach of the condition of his bond; there is no breach until he fails to pay or account as the law requires. Harvey v. State, 94 Ind. 159; see Winchester, etc., Co. v. Veal, 145 Ind. 506, and *post*, § 1412. See p. 758, *et seq.*, and notes.

1187. Duties of treasurer.—39. The treasurer of every incorporated town shall so keep his accounts as to show when and from what sources all moneys paid him have been derived, and to whom and when such moneys, or any part thereof, have been paid. The treasurer shall grant all licenses authorized by this act, upon the presentation of the receipt of the marshal that the money therefor has been paid to said marshal. His books, accounts, and vouchers shall at all times be subject to the examination of the board of trustees; and it is hereby made their duty to examine the same at a regular meeting of such board, on some day between the first and last Monday of April in each year, and to have settlement with the said treasurer. R. S. 1894, § 4344.

1188. Publication of treasurer's settlement.—40. It shall be the duty of the board of trustees, immediately after the annual settlement with the treasurer of said corporation, to publish in a newspaper, if one be printed therein, or, if there be no newspaper, then by posting in three or more public places an exhibit of the receipts and expenditures, specifying the sources of such receipts, what appropriations were made, for what objects, and the specific amount of each. R. S. 1894, § 4345.

1189. Duties of clerk.—41. The clerk of such town shall have the custody of the records, books and papers of the board of trustees, and shall attend all meetings and record the proceedings of said board, and shall perform all other duties appertaining to his office and required of him by the by-laws. R. S. 1894, § 4346.

Municipal act—Competent evidence—Record.—The only competent evidence of any act or proceeding of a municipal body upon which members of the corporate body are required to vote, is the record of the proceedings. Byer v. Town of New Castle, 124 Ind. 86; City of Logansport v. Crockett, 64 Ind. 319; City of Delphi v. Evans, 36 Ind. 90.

Mandamus.—Mandamus lies by an officer to compel the delivery, by his predecessor, of the records, books and papers of the office. Frisbie v. Fogg, 78 Ind. 269.

Nunc pro tunc entry.—The board may authorize a *nunc pro tunc* entry to make the records speak the truth. Everett v. Deal, 148 Ind. 90; Logansport v. Crockett, 64 Ind. 319.

[Acts 1879, p. 15. In force March 10, 1879.]

1190. Marshal.—2. The town marshal shall be elected by the qualified voters, as other officers are elected under the present election laws of this state, in all incorporated towns of this state; and he shall

hold his office for one year, or until his successor is elected and qualified. R. S. 1894, § 4347.

1191. Marshal.—4. Whenever any vacancy shall occur in the office of town marshal by death, resignation, or removal, the board of trustees of such incorporated town shall have power to appoint a successor, who shall hold his office until his successor is elected and qualified. R. S. 1894, § 4348.

[1 R. S. 1852, p. 482. In force May 6, 1853.]

1192. Powers of marshal—Fees.—42. The marshal of such town shall possess the powers and be subject to the liabilities possessed and conferred by law upon constables, in executing the orders of the trustees or enforcing the by-laws and ordinances of said town. Such town marshals shall have, in addition to powers they now possess, the jurisdiction and powers of constables in their respective counties, and shall be entitled to the same fees as constables while acting as constables. [As amended, Acts 1889, p. 40. In force February 25, 1889.] R. S. 1894, § 4349.

Marshal's fees, see *ante*, § 95, note.

Arrest—With and without writ.—A peace officer may arrest for a misdemeanor without a warrant only on view. He may arrest for felony without a warrant on view, or upon information when he has reasonable or probable cause to believe that a felony has been committed; but if a private person arrest another for felony on information, and not on view, it devolves on him to justify by showing that the party arrested was guilty of the crime charged. Doering v. State, 49 Ind. 56; Plummer v. State, 135 Ind. 308; Pow v. Beckner, 3 Ind. 475; Nealis v. Hayward, 48 Ind. 19.

Authority of marshal—Ordinances.—The marshal of a town is authorized to arrest, without a warrant, a person who is violating an ordinance of the town in his presence or view, whether the ordinance expressly authorizes him to do so or not. Scircle v. Neeves, 47 Ind. 289; Nealis v. Hayward, 48 Ind. 19.

Authority to detain prisoner.—If a person is arrested late at night for an offense committed in the presence of the officer, such person may be detained until next day before being taken before court for trial. Especially is this the case if the prisoner is so intoxicated as not to be conscious of what is occurring. In such case the prisoner may be detained until the next day, and until in condition to be taken before the court for trial. Scircle v. Neeves, 47 Ind. 289.

Power of town to employ counsel to defend action against marshal.—The board of trustees of a town have incidental power to employ counsel to defend an action for false imprisonment brought against the town marshal by one arrested by him for the violation of a town ordinance, and a claim for service rendered under such employment may be enforced in an action against the town. Cullen v. Town of Carthage, 103 Ind. 196.

Liability of town for acts of marshal in making arrest.—A town is not liable for the acts of an officer in making an arrest for violation of a penal ordinance prohibiting the running of hacks within the limits of the town by an unlicensed person. Vaughtman v. Town of Waterloo, 14 App. 649.

A town is not liable for an illegal arrest by its marshal made without a warrant, and under an invalid ordinance. Town of Laurel v. Blue, 1 App. 128.

Town—Agreement to indemnify marshal.—A municipal corporation can not be held liable on an agreement to indemnify an officer for performing his duty by making

an arrest for violation of a penal ordinance of such corporation. Vaughtman v. Town of Waterloo, 14 App. 649.

Power to collect taxes.—The tax duplicates and warrants attached thereto confer authority upon the marshal to seize and sell the property of a tax-payer the same as an execution issued to the sheriff confers power upon him to seize personal property to satisfy such execution. Town of Andrews v. Sellers, 11 App. 301; Wise v. Eastman, 30 Ind. 133.

[Acts 1893, p. 293. In force March 3, 1893.]

1193. Deputy marshals.—1. That boards of trustees of incorporated towns are hereby authorized and empowered to appoint deputy marshals, not exceeding in number one for each ward of such town, and said deputy marshals shall possess the powers and be subject to the liabilities possessed and conferred by law upon constables in executing the orders of the board of trustees or enforcing the by-laws and ordinances of such town. R. S. 1894, § 4350.

1194. Bond and compensation.—2. The board of trustees shall regulate the amount of bond, the compensation and the term of service of said deputy marshals, and they shall be subject to the order of the marshal of such town, under the general direction and control of the board of trustees. R. S. 1894, §4351.

[1 R. S. 1852, p. 482. In force May 6, 1853.]

1195. Duties of trustees as to streets.—43. The board of trustees shall superintend the grading, paving and improving of streets and the building and repairing of sidewalks. R. S. 1894, § 4352.

See *post*, §§ 1250 and 1258; Cities and Towns, *ante*, § 1107, *et seq.*

By virtue of above section and *post*, §§ 1250, 1251, 1252, 1253 and 1258 (R. S. 1894, §§ 4394, 4395, 4396, 4397, 4404), the board of trustees of an incorporated town is vested with plenary powers and exclusive jurisdiction over the streets and the improvement and repair thereof. Drew v. Town of Geneva, 150 Ind. 662; Keith v. Wilson, 145 Ind. 149.

1196. Fire wardens.—44. The fire wardens shall attend all fires, give their personal superintendence to extinguishing the same, do all other acts required by the by-laws, and obey all orders given by the board of trustees in relation to the fire department. Trustees shall, by virtue of their office, be fire wardens. R. S. 1894, § 4353.

1197. Pay of officers.—45. The trustees, clerk, treasurer and marshal shall, respectively, receive for their services such compensation as the board of trustees, in their by-laws, may direct; and said board shall cause to be paid to all other officers of such town, for their services, a just and reasonable compensation. R. S. 1894, § 4354.

1198. Town suing—Proof.—55. Whenever any suit shall be instituted by an incorporated town, it shall not be required to show its compliance with the provisions of this act as to its organization, or as to publication of by-laws or ordinances, unless the same is controverted by affidavit. R. S. 1894, § 4355.

See *post*, § 1237.

Complaint—Averments—Organization—Ordinance—Publication.—A complaint to

recover for a violation of a town ordinance is sufficient, where it contains averment of the proper enactment of such ordinance, the violation of its provisions by the defendant, and the acts constituting such violation; it is sufficient to aver that the ordinance was duly adopted by the board of trustees of the town, and to set out in or with the complaint, so much of the ordinance as relates to the action; it is not necessary to aver that the members of the board of trustees which passed the ordinance were duly elected, nor that they had authority to pass the ordinance, nor that it has been published. Hardenbrook v. Town of Ligonier, 95 Ind. 70; Town of Brookville v. Gagle, 73 Ind. 117; Wagner v. Town of Garrett, 118 Ind. 114; Town of Martinsville v. Frieze, 33 Ind. 507; Vinson v. Town of Monticello, 118 Ind. 103; Clevenger v. Town of Rushville, 90 Ind. 258; Green v. City of Indianapolis, 25 Ind. 490; Lake Erie, etc., R. Co. v. City of Noblesville, 15 App. 697; Lake Erie, etc., R. Co. v. City of Noblesville, 16 App. 20.

Judicial notice.—While courts take judicial notice of the incorporation of cities and towns, they do not take judicial notice of municipal ordinances and acts. 1 Beach Pub. Corp., § 74; 1 Dillon Munic. Corp. (4th ed.), § 83.

1199. Special meeting of voters.—21. Special meetings of the qualified voters may be called by the clerk, by the order of the trustees of said town, by giving ten days' notice thereof in a newspaper, if any be printed in such town; otherwise, by posting up such notices in five public places therein; and such notice shall state the objects for which such meeting is called. R. S. 1894, § 4356.

[Acts 1879, p. 201. In force March 31, 1879.]

1200. Powers of trustees.—22. The board of trustees shall have the following powers:

Action of the board—When valid.—Individuals composing the board have no power to act so as to bind the corporation, except when they are convened as a board, and any contract made by them when not thus convened, or by an individual thereof, unless it is afterward fully approved and confirmed when in legal session, is not valid. Blue v. Briggs, 12 App. 105; School Town of Milford v. Powner, 126 Ind. 528; Rund v. Town of Fowler, 142 Ind. 214.

Town board—Arbitrary ejection—Assault and battery.—Where a president of a board of trustees of a town orders a marshal to eject a person present at a board meeting who is doing nothing and saying nothing to disturb the meeting, and the marshal acting under such order took such person by the coat and said "come and go outside," the president was guilty of an assault and battery. O'Hara v. State, 21 App. 320.

The board of trustees has the right to maintain order, and to remove any one interfering with the transaction of the business, but it has not the right arbitrarily to eject or attempt to eject one present at a meeting who is not at the time conducting himself improperly. O'Hara v. State, 21 App. 320.

Trustees not the corporation.—It is the inhabitants, and not the officers, who constitute the public corporations of the land, and so the trustees of a town represent, but do not constitute, the corporation, and, although they have violated their duty, they may invoke the aid of the courts to protect its rights. City of Valparaiso v. Gardner, 97 Ind. 1, 6; Strosser v. City of Ft. Wayne, 100 Ind. 443, 449; Baumgartner v. Hasty, 100 Ind. 575, 585; Union S. Tp. v. First Natl. Bank, 102 Ind. 464, 476; Platter v. Board, etc., 103 Ind. 360, 381; Vogel v. Brown Tp., 112 Ind. 299, 300; Citizens', etc., Co. v. Town of Elwood, 114 Ind. 332, 336.

Power to contract—Power to employ counsel.—The board of trustees of a town in this state have incidental power to employ counsel to defend an action for false

imprisonment brought against the town marshal by one arrested by him for the violation of a town ordinance, and a claim for services rendered under such employment may be enforced in an action against the town. Cullen v. Town of Carthage, 103 Ind. 196, 198; City of Logansport v. Dykeman, 116 Ind. 15, 21.

Power to employ factors and brokers.—Town trustees are not required themselves to sell municipal bonds issued pursuant to the provisions of § 5975, R. S. 1894, but may employ a broker to make the sale. The contract of employment need not be in writing. Reed v. Town of Orleans, 1 App. 25, 27.

Broker—Complaint, when sufficient.—The complaint in an action by a broker to recover for his services rendered in selling bonds need not aver that the broker was employed by the trustees while they were in session; an averment that the town by its trustees engaged him to sell the bonds shows the employment was authorized. Reed v. Town of Orleans, 1 App. 25, 27.

Power to purchase fire engines.—A town, incorporated by a special act of the legislature, prior to the constitution of 1851, had power under its charter to purchase fire-engines, but upon amendment of its charter by the legislature in 1873 such power was omitted. Notwithstanding such omission, the town possessed inherent power to purchase such engines for the protection of the property of its citizens from fire. Corporation of Bluffton v. Studabaker, 106 Ind. 129, 133.

Liquor license.—An incorporated town, of 1875, having no power to do so, passed an ordinance requiring a license fee of fifty dollars for retailing liquors, and the trustees, at a regular meeting, agreed orally with A. to enter upon their record an agreement that, in consideration that he would pay the fee, they would repay him the money if the ordinance should be adjudged invalid. He accepted the proposition and made the payment. Afterward the fact of the agreement was entered of record. The ordinance was afterward adjudged invalid. A. sued for breach of the contract. The contract was valid, and A. could recover. Town of Columbia City v. Anthes, 84 Ind. 31, 35.

Evidence.—Evidence that certain work upon a street in a town was done under the supervision of the town marshal, and was accepted and paid for by the town, is sufficient to show that the work was done by the order and under the authority of the town. Town of Thorntown v. Fugate, 21 App. 537.

Officers' contracts with town void.—Contracts between town officers of the town relating to public work, are void. Case v. Johnson, 91 Ind. 477; Benton v. Hamilton, 110 Ind. 294; Pratt v. Luther, 45 Ind. 250; see *post*, § 1420 and note.

First. To have a common seal and alter the same.

Second. To purchase, hold and convey any estate, real or personal, for the use of the corporation, so far as such purchase may be necessary to carry out the objects contemplated in this act.

Trustee—Sale of land by to town.—A sale of land by a trustee of a town to the town is voidable at the election of the vendee. A trustee can not occupy the double and inconsistent position of vendor and purchaser. Pratt v. Luther, 45 Ind. 250.

Third. To organize fire companies, to regulate their government and the times and manner of their exercise, to provide all necessary apparatus for the extinguishment of fires, to make owners of buildings provide ladders and fire buckets, which are hereby declared to be appurtenances to the real estate, and exempt from execution, seizure or sale; and if the owner shall refuse to procure suitable ladders or fire buckets, after reasonable notice, the trustees may procure and deliver the same to him, and in default of payment therefor, may recover of said owner the value of such ladder or fire buckets, by

suit before any justice of the peace in the proper township, and costs accrued thereby; to regulate the storage of gun powder and other dangerous material; to direct the construction of a place of safe deposit of ashes, and may, under any order by them entered upon the proper book of the board, visit, or appoint one or more fire wardens to visit and examine, at all reasonable hours, dwelling houses, lots, yards, inclosures and buildings of every description, discover if any of them are in a dangerous condition, and provide proper remedies for such danger; to regulate the manner of putting up stoves and stove-pipes to prevent out-fires, and the use of fire-works, and the discharge of fire-arms within the limits of such corporation, or such parts thereof as they may think proper; to compel the inhabitants of such towns to aid in the extinguishment of fires and prevent its communication to other buildings, under such penalties as are in this act provided; to construct and preserve reservoirs, wells, pumps, and other water-works, and to regulate the use thereof, and generally to establish other measures of prudence for the prevention and extinguishment of fires, as they shall deem proper.

Fire company—Members—Work on highway.—It is only the members of a fire company organized by the town board, and under its control, that are entitled to exemption from work upon the highways of the town. Leedy v. Town of Bourbon, 12 App. 486.

Fire apparatus—Purchase.—Under the power conferred by this section the board of trustees of a town is authorized to purchase necessary apparatus for the extinguishment of fires for cash. Second National Bank, etc., v. Town of Danville, 60 Ind. 504.

Inherent power.—In the absence of express power conferred by statute a town has inherent power to purchase fire engines, etc., for the protection of the property of its citizens from fire. Corporation of Bluffton v. Studabaker, 106 Ind. 129.

Fourth. To declare what shall constitute a nuisance, and to prevent, abate and remove the same, and take such other measures for the preservation of the public health as they shall deem necessary.

Slaughter-house—Nuisance—Ordinance.—A town ordinance, declaring that slaughter-houses within the corporate limits shall be deemed public nuisances, and making it unlawful to maintain any within such limits, is authorized by this clause, and a slaughter-house erected or conducted in violation of an ordinance prohibiting its maintenance within the corporate limits of the town becomes a nuisance, although it would not be such in the absence of such ordinance. Rund v. Town of Fowler, 142 Ind. 214; Beiling v. City of Evansville, 144 Ind. 644.

Same—Estoppel.—A town is not estopped to claim that a slaughter-house within the corporate limits violates an ordinance, merely because its location was directed and consented to by the town trustees, unless direction or consent was taken by corporate action in some method recognized by law. Rund v. Town of Fowler, 142 Ind. 214.

Nuisance—Power to abate—Courts.—The power conferred by statute upon incorporated towns to declare and abate nuisances does not exclude a resort to the courts for such purpose. American Furniture Co. v. Town of Batesville, 139 Ind. 77.

Same—Concurring remedies.—Where there are concurring effectual remedies, the choice and uninterrupted prosecution of one excludes the other. American Furniture Co. v. Town of Batesville, 139 Ind. 77.

Fifth. To restrain from running at large cattle, sheep, swine and other animals.

Impounding animals.—Under this section, before its amendment, it was held that towns could not provide for the impounding and sale of animals found running at large in the streets. Slessman v. Crozier, 80 Ind. 487.

Dogs—Town ordinance.—A town ordinance requiring the owners of dogs to keep them upon their own premises, or to muzzle them securely in order to guard against hydrophobia and requiring the town marshal to kill all dogs found running at large in violation of the ordinance, is a valid exercise of the police power given by the statute to the trustees of the town. Haller v. Sheridan, 27 Ind. 494; Mitchell v. Williams, 27 Ind. 62.

Sixth. To restrain and prohibit gambling and other disorderly conduct; to suppress and prohibit the keeping of houses of ill-fame, and to authorize the seizure and destruction of gambling apparatus; to punish intoxication, common prostitutes and their associates, immoderate driving and riding; to regulate or prohibit the use of fire-arms, fire-works, or other things tending to endanger persons and property; to prevent interference with the free use of the streets and alleys of the town, and to preserve peace and good order and prevent vice and immorality.

Fast driving—Ordinary trot.—An ordinance inflicting a fine upon any person who shall willfully, etc., ride or drive animals on its streets "faster than an ordinary trot" is authorized by the statute, and is not unreasonable, and the description of the gait is not vague or uncertain. Nealis v. Hayward, 48 Ind. 19.

Railroad crossings—Watchmen—Gates.—An incorporated town can not by ordinance compel a railroad company to keep a watchman and erect and maintain gates at points where the tracks cross a street, and impose penalties for the failure so to do. Express power has not been conferred by the statute to pass and enforce such an ordinance, nor can such power be implied from those expressly granted, nor is such power essential to the declared objects or purpose of the corporation. Pittsburgh, etc., R. Co. v. Town of Crown Point, 146 Ind. 421.

Seventh. To license, regulate or restrain auction establishments, street auctions, and all tables, alleys, machines, devices, and places for sports or games, kept for hire or pay, traveling peddlers, public exhibitions, and the sale of spirituous, vinous, malt and other intoxicating liquors. A sum not exceeding the amount required by the statutes of the state for license to sell or retail intoxicating liquors, may be required to be paid into the treasury of the corporation by the person so licensed before receiving such license.

See *ante*, § 994.

Peddler's license—Sale by sample.—An ordinance of a town of this state requiring all traveling peddlers of goods to take out a license is not void on the assumption that it applies only to non-residents of such town, for it equally applies to citizens thereof; but it is void as to residents of other states who are engaged in selling goods located in such other states, even though the sale is only by sample, on the ground that it is an interference with interstate commerce. Grafty v. City of Rushville, 107 Ind. 502, 511; Martin v. Town of Rosedale, 130 Ind. 109, 110.

License—Ordinance—Intoxicating liquors.—Under this clause an ordinance pro-

viding for a license fee of one hundred dollars for the sale of intoxicating liquors is valid. One who sells beer without a license, contrary to the provisions of the ordinance, may be convicted thereunder. Copeland v. Town of Sheridan, Ind. Sup. Ct., Oct. 25, 1898.

When the statute in force does not require it, the town under the above clause is under no obligation to issue one license for selling spirituous, vinous and malt liquors, and another to sell vinous and malt liquors alone. Copeland v. Town of Sheridan, Ind. Sup. Ct., Oct. 25, 1898.

Liquor selling—License.—Prior to 1879, incorporated towns in this state had no authority to regulate and license the sale of intoxicating liquors. Carr v. Town of Fowler, 74 Ind. 590, 591; Meader v. Town of Fowler, 74 Ind. 601; Town of Martinsville v. Frieze, 33 Ind. 507; McFee v. Town of Greenfield, 62 Ind. 21; Town of Princeton v. Vierling, 40 Ind. 340; Deutschman v. Town of Charleston, 40 Ind. 449; Walter v. Town of Columbia, 61 Ind. 24; Cowley v. Town of Rushville, 60 Ind. 327.

It is not an offense against the laws of the state to sell intoxicating liquors without a town license, and hence § 1709, R. S. 1894, does not prohibit the recovery of a penalty for violation of a town ordinance on that subject. Clevenger v. Town of Rushville, 90 Ind. 258, 260; Vinson v. Town of Monticello, 118 Ind. 103.

To an action to recover the license fee required by a town ordinance, it was answered that the election at which the trustees who passed the ordinance were elected, was not conducted by the then trustees, as inspectors, but by disqualified persons, etc. The answer was bad, as the question of the right of the trustees to exercise their office could not be questioned collaterally, and the answer did not negative the fact that they were trustees *de facto*. Redden v. Town of Covington, 29 Ind. 118.

Same—License.—A license to retail liquors is neither a contract nor a grant, but a mere permit, and the person who receives it does so with the tacit condition and knowledge that it is, at all times, within the control of the legislature. A statute authorizing towns to require license for the sale of intoxicating liquors, is not unconstitutional in so far as it affects the rights of dealers who had obtained a license from the county authorities, under a prior act. McKinney v. Town of Salem, 77 Ind. 213; State v. Bonnell, 119 Ind. 494; Moore v. City of Indianapolis, 120 Ind. 483.

Liquor license—Power to limit.—A town has the right to limit the licenses issued by it for the sale of intoxicating liquors to such persons as have procured and hold a license from the board of county commissioners. Wagner v. Town of Garrett, 118 Ind. 114, 116.

Act of 1889 constitutional.—The act of March 11, 1889, R. S. 1894, § 7282 (*ante*, § 994), empowering cities and incorporated towns to increase the sum theretofore required to be paid for a license to sell intoxicating liquors, is not invalid as violating § 21, article 4, of the state constitution. Bush v. City of Indianapolis, 120 Ind. 476; Moore v. City of Indianapolis, 120 Ind. 483.

Intoxicating liquors—Regulations—Screens.—A municipal corporation has not the power under this clause to make an ordinance requiring the removal from doors and windows of saloons of all screens and other obstructions to the view of the interior of, and business transacted within such saloon; such an ordinance being void, as being prohibitive of a lawful business, and not merely regulative. Steffy v. Town of Monroe City, 135 Ind. 466; Champer v. City of Greencastle, 138 Ind. 339.

Liquor license—Void ordinance—Voluntary payment.—Where in an action to recover moneys, paid by the plaintiff to the defendant, a town, for a license to sell intoxicating liquors, under an invalid penal ordinance adopted under a void statute, the complaint averred that such payment was made "for the purpose of avoiding the penalty and forfeiture," etc., "and to save himself from arrest and imprisonment for violating the provisions of said ordinance as provided for by the statute." Such complaint does not show that such payment was not voluntary, and is therefore bad on

demurrer for want of sufficient facts. The cases of Town of Princeton v. Vierling, 40 Ind. 340, and The Town of Ligonier v. Ackerman, 46 Ind. 552, overruled; Town of Brazil v. Kress, 55 Ind. 14.

Money paid to a town as a license fee, under an invalid ordinance requiring a license for the sale of intoxicating liquors, can not be recovered; but if the town agrees with a person on the payment of a license fee that if the ordinance requiring the same is declared invalid the fee shall be repaid, on such ordinance being declared invalid such town will be liable for such fee. Colglaizer v. Town of Salem, 61 Ind. 445; Town of Columbia City v. Anthes, 84 Ind. 31; Town of Brazil v. Kress, 55 Ind. 14; Town of Edinburg v. Hackney, 54 Ind. 83; Town of Ligonier v. Ackerman, 46 Ind. 552; Town of Sullivan v. McCammon, 51 Ind. 264.

Eighth. To establish and regulate markets, and build market-houses, and direct the location of slaughter houses.

Ninth To lay out, open, grade and otherwise improve the streets, alleys, sewers, side-walks and crossings, and keep them in repair, and to vacate the same.

See *ante*, § 1195, *post*, §§ 1250, *et seq.*, and 1258; Cities and Towns, *ante*, § 1107, *et seq.*

Power over streets—Liability of town.—Boards of trustees in towns are given exclusive power over the streets; and, if the streets and alleys are not kept by the trustees in a safe condition for public travel, the towns will be liable in damages for injuries resulting, in the absence of negligence upon the part of the person injured. Town of Kentland v. Hagen, 17 App. 1; Pittsburg, etc., R. Co. v. Town of Crown Point, 146 Ind. 421; Keith v. Wilson, 145 Ind. 149; Sparling v. Dwenger, 60 Ind. 72; State v. Mainey, 65 Ind. 404; Town of Centerville v. Wood, 57 Ind. 192; Town of Elkhart v. Ritter, 66 Ind. 136; Scudder v. Hinshaw, 134 Ind. 56; Elliott Roads and Streets, p. 319, *et seq.*

Street commissioner—Marshal—Highway.—Under the ninth clause the marshal probably may be, but the street commissioner is, an appropriate officer to execute an order of the board of trustees to remove an obstruction from a street or alley. Under the general law for the incorporation of towns there can be no such body as a board of councilmen. Bidinger v. Bishop, 76 Ind. 244, 248.

Supervisors of highways.—Supervisors of highways have no control over the streets of an incorporated town. State v. Mainey, 65 Ind. 404.

Change of grade.—An incorporated town is not liable for consequential damages to an abutting property owner who has improved his property with reference to an established grade resulting by reason of a change of such established grade. Baker v. Town of Shoals, 6 App. 319; City of Wabash v. Alber, 88 Ind. 428; Snyder v. President, etc., 6 Ind. 237; Elliott Roads and Streets, p. 336.

Same—Certainty of ordinance.—Boards of trustees are authorized to establish the grades of streets, and to require the owners of lots, in constructing sidewalks, to make them conform thereto, without any petition on the part of the property holders. An ordinance establishing the grades of certain streets is not void for uncertainty, if the grade so established can be ascertained without difficulty. Burr v. Town of New Castle, 49 Ind. 322.

Drains and sewers.—A town corporation is not liable to an action for damages accruing by reason of the failure of the corporation to exercise its discretionary powers, of a public or legislative character, as for a failure to provide drains and sewers. The act of directing the construction of a drain or sewer is a legislative act, but the construction of the drain or sewer is the performance of a ministerial duty, and for negligence in the performance of the ministerial duty the town would be liable. Town of Monticello v. Fox, 3 App. 481; Weis v. City of Madison, 75 Ind. 241; Wheeler v. City of Plymouth, 116 Ind. 158.

Vacation of highway.—The corporate limits of a town extended to and along the middle of a county road, thirty feet in width, located before the town was laid out. The board of trustees under this clause had no power to vacate so much of said highway as was within the corporate limits. Debolt v. Carter, 31 Ind. 355.

Tenth. To appoint street commissioners and fire wardens not exceeding three.

Eleventh. To prohibit the incumbrance of the sidewalks of said town, and riding or driving thereon, except to cross the same.

See *post*, § 1384.

This clause did not repeal R. S. 1894, § 4398, making it a misdemeanor to ride or drive upon the brick, stone, plank or gravel sidewalk of any town or village. Town of Whiting v. Doob, Ind. Sup. Ct., Feb. 2, 1899.

Sidewalks—Obstructions.—A sidewalk is a part of the street, and streets include sidewalks. Town of Rosedale v. Ferguson, 3 App. 596, 598; State v. Berdetta, 73 Ind. 185; City of Indianapolis v. Higgins, 141 Ind. 1.

The wrongful obstruction of street a misdemeanor—Ordinance invalid.—The wrongful obstruction of a public street or sidewalk of a city or town is a misdemeanor punishable under the criminal law of the state, and a city or town can not enact an ordinance prescribing a penalty for any one who obstructs the street. City of Indianapolis v. Higgins, 141 Ind. 1; State v. Mainey, 65 Ind. 404.

Same—Driving across a sidewalk.—Any one driving on a sidewalk of a city or town, unless to cross it, is guilty of a misdemeanor under § 2047, R. S. 1894, and may be punished; but the city or town can not make, by ordinance, the same act a penal offense. City of Indianapolis v. Higgins, 141 Ind. 1.

The statute making it a misdemeanor to ride or drive upon a brick, stone, plank or gravel sidewalk, being a penal one, is to be strictly construed, and does not apply to the act of riding or driving upon sidewalks constructed of other material than brick, stone, plank or gravel. Town of Whiting v. Doob, Ind. Sup. Ct., Feb. 2, 1899.

Bicycle—City and town ordinances.—A bicycle is a vehicle, and riding a bicycle upon the brick, stone, plank or gravel sidewalks of a town or city is a public offense against the state, and such offense is not punishable under a city or town ordinance; but under an ordinance prohibiting the riding of a bicycle on the sidewalks upon a proper complaint and proof, a person may be punishable for riding a bicycle upon a sidewalk other than one of brick, stone, plank or gravel. Town of Whiting v. Doob, Ind. Sup. Ct., Feb. 2, 1899; Bybee v. State, 94 Ind. 443; Mercer v. Corbin, 117 Ind. 450.

Twelfth. To insure the public property of such town.

Thirteenth. To purchase, lay out and regulate cemeteries.

Fourteenth. To plant trees upon public grounds, and along the streets of such town, and provide for their culture and preservation, and to inclose any public square or other public grounds within said corporation.

Fifteenth. To levy and collect annual taxes, not exceeding fifty cents on the hundred dollars valuation and twenty-five cents poll-tax, on all property subject by law to taxation, and on each male dog a tax not exceeding one dollar, and on each female dog a tax not exceeding two dollars, to be paid by the owner thereof.

See *post*, § 1238, *et seq.*

Sixteenth. To make and establish such by-laws, ordinances, and

regulations, not repugnant to the laws of this state, as may be necessary to carry into effect the provisions of this act, and to repeal, alter, or amend the same as they shall seem to require, but every by-law, ordinance or regulation, unless in a case of emergency, shall be published in a newspaper in such town, if one be printed therein, or posted in five public places, at least ten days before the same shall take effect.

Invalid ordinances—Certificate of election.—Ordinances passed by the board of trustees before a certificate of their election has been filed in the office of the clerk are invalid; but if such certificate is filed with the clerk after the time fixed by law the effect is to legalize and validate, from their inception, ordinances and contracts for street improvements previously made by the board of trustees. Dinwiddie v. President, etc., 37 Ind. 66; Jennings v. Fisher, 103 Ind. 112.

Town ordinance—Reasonableness of.—The courts will not enquire into the wisdom or reasonableness of an ordinance which a town has power to pass and enforce, unless it violates some constitutional provision. Rund v. Town of Fowler, 142 Ind. 214; Steffey v. Town of Monroe City, 135 Ind. 466; Champer v. City of Greencastle, 138 Ind. 339; Pittsburgh, etc., R. Co. v. Town of Crown Point, 146 Ind. 421.

Same—General power—Mode of exercise—Ordinance.—Where the power granted by the statute is in general terms, and the mode and manner of its exercise are not prescribed, but are left to the discretion of the municipal corporation, the courts may inquire whether in the enactment of the ordinance there has been a reasonable exercise of the power granted, or whether in fact power was given the municipality to do what it attempted to do by the ordinance; but where the power to enact the ordinance is specifically conferred on the city or town, and the statute with precision defines the details of the same, and prescribes the penalties that may be imposed, if the power thus granted be not in conflict with the constitution, the reasonableness of an ordinance enacted within the power granted can not be inquired into by the courts, nor set aside because they deem it unreasonable, or against public policy. City of Shelbyville v. Cleveland, etc., R. Co., 146 Ind. 66; Champer v. City of Greencastle, 138 Ind. 339; Pittsburg, etc., R. Co. v. Town of Crown Point, 146 Ind. 421; Shea v. City of Muncie, 148 Ind. 14; 1 Beach Pub. Corp., §§ 91, 92.

Misdemeanor—Invalidity of ordinance.—Where an act is made a misdemeanor punishable under the criminal laws of the state, a city or town can not enact an ordinance prescribing a penalty for the same offense. City of Indianapolis v. Higgins, 141 Ind. 1; City of Indianapolis v. Huegele, 115 Ind. 581; City of Frankfort v. Aughe, 114 Ind. 77; see *post*, § 1383.

Impounding animals—Ordinance invalid.—Towns in this state have no power to provide by ordinance for the impounding and selling of animals found at large in their streets or other public places. Slessman v. Crozier, 80 Ind. 487.

Regulation and license of hackneymen—Railroad crossings—Street cars—Fast driving.—An ordinance of an incorporated town regulating the running of hacks, by requiring a license, is a proper and reasonable exercise of municipal power, and is fully implied and authorized by the statutes, and this is true particularly under this clause. And this power over streets also extends to all reasonable regulations, as to railroad crossings, movement of street cars, fast driving and to any other use of the streets which may make travel upon them dangerous to the public. Scudder v. Hinshaw, 134 Ind. 56.

Streets—Fast driving.—An incorporated town is authorized to prohibit, by ordinance, riding or driving in its streets faster than an ordinary trot, and to inflict a fine therefor. Such an ordinance is not unreasonable. Nealis v. Hayward, 48 Ind. 19; see *post*, § 1427.

Emergency—Invalid order fixing grade.—Where an order establishing the grade

of a street in a town is passed by the board of trustees without an emergency clause, and no notice of its adoption is given, the order is invalid. A lot-owner whose property is injured by the improvement of the street in such case may maintain an action against the contractor for damages. Meyer v. Fromm, 108 Ind. 208.

Seventeenth. Such board of trustees shall have power to complete school-houses, now in progress of erection, and provide for the payment of the same, to erect or provide such school-houses as may be necessary for the use of the schools of the town, to keep them in repair, and to provide fuel and other necessaries therefor.

Eighteenth. To construct all necessary wharves and landings for steamboats and other vessels, where such town is situated on the bank of any navigable stream or water-course.

Nineteenth. The said board of trustees shall have power to levy and collect annual taxes not exceeding thirty cents on the hundred dollars valuation on all property subject by law to taxation for the support of town schools within their said corporation. [As amended, Acts 1879, p. 201. In force March 31, 1879.] R. S. 1894, § 4357.

Said § 22 of the general act for the incorporation of towns, as passed in 1852, did not authorize towns to require licenses for the sale of intoxicating liquors. Several attempts have been made to amend this section: Acts 1855, p. 128; Acts 1867, p. 220; Acts 1877, p. 144; Acts 1879, p. 201; Acts 1885, p. 171. For reasons appearing in the cases cited, the amendment now in force, and, indeed, the only valid amendment ever enacted, is that of 1879, which is, therefore, set out, though it has heretofore been omitted by the compilers of the several revisions of the statutes. Copeland v. Town of Sheridan, Ind. Sup. Ct., Oct. 25, 1898.

This clause is not repugnant to § 1, art. 8 of the constitution, which provides that the general assembly shall provide for a general and uniform system of common schools which shall be open to all and where tuition shall be free. Shepardson v. Gillett, 133 Ind. 125.

[Acts 1897, p. 176. In force April 14, 1897.]

1201. Licensing and regulating business.—1. That the board of trustees of incorporated towns shall have the following powers, in addition to the powers now granted by law: To license, regulate or restrain auction establishments, street auctions, transient salesmen, itinerant venders of all goods, wares and merchandise of whatsoever nature, denominated "bankrupt stocks," "fire sales," "assignee's sales," or any other terms used for the purpose of attracting trade by persons, both principals and agents; also hacks and all vehicles carrying passengers for hire, and all tables, alleys, machines, devices and places for sports, or games kept for hire or pay, traveling peddlers, public exhibitions, and the sale of spirituous, vinous, malt and other intoxicating liquors within the corporation: *Provided*, That this section shall not apply to any traveling salesman or person selling food, feed, grain or vegetables, or other articles for food consumption. Burns' Supp. 1897, § 4357*a*.

The above section applies only to ordinances enacted after its passage. Copeland v. Town of Sheridan, Ind. Sup. Ct., Oct 25, 1898.

[Acts 1865 S., p. 78. In force September 2, 1865.]

1202. Shade trees.—1. The board of trustees of any incorporated town shall have power, with the consent of persons owning more than one-half of the lots along any street (counting by lineal feet of street front), to authorize all persons owning or occupying such lots to inclose portions of the street in front of their lots, and to occupy the same for shade and ornamental purposes, but not for buildings or permanent structures, and not so as to reduce the streets and sidewalks below the width of sixty feet. R. S. 1894, § 4358.

[Acts 1867, p. 219. In force March 1, 1867.]

1203. Fire limits.—1. Whenever two-thirds of the owners of real estate within the proposed fire limits, residents within the corporate limits of such town, on any street or streets, or designated parts of any street or streets, of any incorporated town in this state, shall petition the board of trustees of such town for the passage of an ordinance establishing fire limits and preventing the erection of wooden buildings on such street or streets (which petition shall accurately describe the proposed boundaries thereof), and such board shall be satisfied that said petition contains the names of two-thirds of the owners of real estate within such limits, and that such proposed ordinance would be just and expedient, they shall pass an ordinance prohibiting the erection of any wooden buildings within the limits described in such petition: *Provided, however*, That such fire limits shall be confined as near as practicable to the business part of such town. R. S. 1894, § 4359.

[Acts 1879 S., p. 204. In force May 31, 1879.]

1204. Lighting streets.—1. The board of trustees of any incorporated town is hereby empowered, in addition to the powers they now have, to contract for lighting the streets of such town with gas, in all cases where gas-works have been erected and mains laid on the streets to be so lighted. Such contract shall not, however, be made for a longer period than one year at a time. R. S. 1894, § 4360.

See *ante*, § 1136, *et seq.*

Action—Debt for light—Complaint.—Where in an action against a town for a sum alleged to be due under the terms of a written contract for electric lights, the complaint containing the averments, that under the terms of the contract the plaintiff furnished the defendant with lights, for which the defendant owed the plaintiff a certain sum which was due and unpaid, the complaint was good against demurrer, the plaintiff not being bound to anticipate and avoid any defense which defendant might have. Town of Petersburg v. Petersburg, etc., Co., 16 App. 151.

1205. Tax for lighting.—2. In all cases contemplated by the preceding section, and where such contract has been made under said section, such board of trustees is hereby authorized to levy and collect a special tax, for such purpose, of not exceeding three dollars on the one thousand dollars of the taxable property within such incorporated

town, to be levied and collected as other corporation taxes are now levied and collected. R. S. 1894, § 4361.

[Acts 1893, p. 191. In force March 2, 1893.]

1206. Tax to pay for electric lights.—1. That in all cases when the board of trustees of any incorporated town in this state shall contract with any individual or corporation for the lighting of any of the streets or public places of said town with electric lights, such board of trustees is hereby authorized to levy and collect a special tax for such purpose of not exceeding fifteen cents on the one hundred dollars of the taxable property within such incorporated town, to be levied and collected as other corporation taxes are now levied and collected. R. S. 1894, § 4362.

[Acts 1893, p. 185. In force March 1, 1893.]

1207. Electric light plant—Construction.—1. That whenever a majority of the voters of an incorporated town, as shown by the number of votes cast at the latest preceding corporation election for officers of said town, shall petition the board of town trustees of said town to cause to be constructed at the expense of the town, an electric light plant for the purpose of furnishing public, commercial and domestic electric lights for said town, the board of town trustees shall proceed to construct said plant under the regulations hereinafter stated. R. S. 1894, § 4363.

1208. Committee to ascertain number of lights.—2. The board of town trustees, upon the presentation of said petition, after satisfying themselves that it has been signed by a majority of the number of votes cast at the latest preceding corporation election, shall appoint a committee to ascertain how many street lights will be required for the proper lighting of said town, and also approximate the number of commercial and domestic lights likely to be disposed of by said town, should said electric light plant be established, which committee shall present a written report at a subsequent meeting of said town trustees. R. S. 1894, § 4364.

1209. Report—Action of board.—3. When said committee's report is presented, it shall be examined by the board of town trustees, and its conclusions may be accepted and adhered to or amended, at the pleasure of the board of town trustees; but upon the day of its presentation the board of town trustees shall act upon it and determine the probable number of each description of lights which will be demanded. R. S. 1894, § 4365.

1210. Advertising for proposals—Bids.—4. Upon said capacity being determined as in section 3 provided for, the trustees shall proceed to advertise in such newspapers as they shall deem best for the town, for proposals for building, completing and thoroughly equipping an electric light plant of the capacity and character determined upon; bids to be made by sealed proposals containing a detailed description of the plant bid upon, but in no case of lower capacity than that fixed

upon by the board of town trustees, and said bids to be received at a meeting of the board of town trustees, to be held for that purpose, not sooner than thirty days, nor more than forty days after the first appearance of the advertisement for said bids. R. S. 1894, § 4366.

1211. Letting of contract.—5. Upon the examination of said bids, if it shall be found that the price asked for said plant shall exceed more than two per cent. of the taxable value of said town as embraced in the tax duplicate of said town for that current year, after subtracting from the amount of said bid any moneys in the treasury of said town which could be applied to said contract; then, and in that event, the contract shall not be let, and said petition for the erection of such plant shall be rejected; but if it is under two per cent. the contract shall then be let: *Provided*, That if any citizen or citizens shall in that time proffer to said town and secure the payment thereof of a donation to said town of a sufficient sum of money to reduce the sum to be paid from the town treasury of said town below the two per cent. of said tax duplicate, then said petition shall not be rejected, but the board of town trustees shall proceed to contract with the lowest and best bidder for the construction of said electric light plant. R. S. 1894, § 4367.

1212. Bonds—Issue and sale.—6. For the purpose of paying the contract price of said plant said board of town trustees are authorized to issue and sell the bonds of said town to such an amount not exceeding the contract price, as shall be necessary; said bonds to sell for not less than par value, to bear not more than 6 per cent. interest per annum from the date of issue: *Provided, however*, That the contractors for said plant shall not be paid to exceed 75 per cent. of the contract price thereof until said plant has been successfully operated and shown to be fully equal to specifications embraced in said contract, for a period of at least ninety days after the completion of said plant. R. S. 1894, § 4368.

1213. Superintendent.—7. When such electric light plant is in operation said board of town trustees are authorized to employ on such terms as they may deem best, to be embraced in an ordinance for that purpose, a superintendent and such other necessary help as may be required to operate said plant. R. S. 1894, § 4369.

1214. Tax to pay bonds.—8. When the bonds are issued to raise money to pay for said plant said bonds shall be redeemed in not less than one nor more than ten years from the date thereof; and it shall be the duty of the trustees to levy a sufficient tax to promptly meet the interest thereon, and to redeem at least one-tenth of the principal each year until paid. R. S. 1894, § 4370.

1215. Sale of lights.—9. Said board of town trustees shall have authority to provide by proper ordinance for selling to citizens of the town, upon such terms and prices as may be fixed by such ordinance, such electric lights as may be desired by citizens, but shall not in any case sell such lights below the cost thereof to said town, but may charge a fair profit thereon. R. S. 1894, § 4371.

1216. Increase of capacity of plant.—10. If said town shall in-

crease so as to demand a larger number of lights than the capacity of the plant will furnish properly, the board of town trustees are authorized to increase the capacity thereof so as to supply the demand, and are also authorized to pass all necessary ordinances to protect and operate said plant. R. S. 1894, § 4372.

[Acts 1899, p. 216. In force March 2, 1899.]

1217. Water-works, lighting plant, street railroad, telephone and telegraph companies—Franchises and contracts—Ordinances for—When take effect—Referendum.—1. That no ordinance for the purchase or establishment of any waterworks or lighting plant, or the granting of any franchise for the establishment or operation of any waterworks, lighting plant, street railroad, telephone or telegraph company in any incorporated town in this state, shall go into effect until thirty (30) days after its passage, nor until voted upon at the polls, if within the said thirty (30) days a referendum is demanded by forty (40) per cent. of the legal voters of such incorporated town, as shown by the last preceding election.

1218. Petition to submit to voters.—2. The voters of such incorporated town may, within the said thirty (30) days, file a petition with the clerk thereof, requiring the board of trustees of such town to submit such ordinance to a vote of the voters of such town, for their rejection or approval as hereinafter provided.

1219. Contents of petition.—3. Such petition shall be written or printed, and to be mandatory, shall be signed by at least forty (40) per cent. of the voters of such town. It shall contain the title of such ordinance or some sufficient description of the same. At least ten (10) of the persons signing the same shall make oath before a competent officer that they are themselves duly qualified voters of said town, and that they believe all the other persons who signed such petition are duly qualified voters of said town, and that they believe all the signatures thereto attached to be genuine, such petition to be filed with the clerk of said town, and such clerk shall forthwith notify each member of such board of trustees of the filing of said petition.

1220. Special election—When required.—4. If fifty (50) per cent. of the voters of such town shall request in such petition that such ordinance shall be submitted to the voters of such town to be voted on at a special election, the board of trustees aforesaid shall cause the same to be submitted at a special election to be called by them not less than fifteen (15) nor more than twenty (20) days from the filing of such petition.

1221. When submitted at regular election.—5. When such petition does not request that such ordinance be submitted to the voters at a special election, the board of trustees of such town shall cause the same to be submitted to the voters of such town at the first regular town election held after the expiration of fifteen (15) days from the filing of such petition, and shall cause the same to be placed upon the official ballots to be used at such election.

1222. Majority of votes cast necessary for approval—Re-enactment.—6. Such ordinances submitted to the voters under the preceding sections, shall not go into effect unless approved by a majority of the votes cast for and against the same, and if rejected by the voters of said town, no ordinance, substantially the same, shall be enacted by the said board of trustees for a period of three years from the date of said rejection, and if re-enacted any time after the expiration of one year from said date of rejection, the voters of said town shall have the right to be heard on the same, as hereinbefore provided.

1223. Notice of election.—7. The board of trustees shall cause notice of elections held under this act to be given by publication in a newspaper published in said town (if there be one) for two successive weekly issues, before such election, and if there be no newspaper published in said town, then by written or printed notices posted in three or more public places in said town, at least fifteen (15) days before said election, and they shall cause copies of said ordinance to be printed in convenient form and shall furnish the same to the voters of such town, upon their application or order, and such notice of election provided in this section, shall designate where such copies may be obtained.

1224. Ballots.—8. All ballots for use in special elections under this act, shall be prepared and furnished by the clerk of such town and shall be in such form that the voters may express their approval or disapproval by yes or no. Where ordinances under this act are submitted to the voters at a regular election, they shall be placed upon the official ballots as hereinbefore provided.

1225. Penalty for making false affidavits.—9. Whoever knowingly or willfully makes a false affidavit, or takes a false oath, or signs a false certificate regarding the qualification of any person, to sign petitions under this act, shall be punished by a fine not exceeding one hundred dollars ($100), or by imprisonment in jail not exceeding one year, or by both fine and imprisonment.

1226. Penalty for town officer failing to comply.—10. Any member of any board of trustees of any incorporated town in the state of Indiana, or any clerk of the same, or any other person, appointed or authorized under this act, to carry out any of the provisions of this act, who fails, neglects or refuses to comply with the provisions of this act, shall be punished by fine not less than five hundred dollars ($500) nor more than one thousand dollars ($1,000).

1227. Election laws apply.—11. The provisions of the statutes of this state relating to election officers, voting places, apparatus and blanks, preparation and form of ballots, information to voters, conduct of elections, manner of voting, counting votes, records and certificates, illegal voting, bribery, perjury and influencing votes, so far as applicable, shall apply to voting on ordinances under the provisions of this act.

[1 R. S. 1852, p. 482. In force May 6, 1853.]

1228. Public grounds and wharves.—49. The trustees shall have jurisdiction over any commons or public ground belonging to said town, and shall have power to regulate, with the consent of a majority of the owners thereof, the banks, shores and wharves of that portion of any navigable stream within its corporate limits; but no ferries heretofore, or which may hereafter, be established by law, shall be prejudiced or in any manner affected by the provisions of this act. R. S. 1894, § 4373.

1229. Money, how appropriated.—24. All moneys, however derived, belonging to such corporation, shall only be appropriated for such objects and defraying such expenses as accrue, or necessarily arise, in the exercise of powers granted by this act. No appropriation shall be made without an order to that effect entered upon a proper book, to be kept for that purpose by such board. R. S. 1894, § 4374.

1230. Claims.—25. No account or claim against said town shall be audited or allowed by the board of trustees unless it be made out fully and itemized; and every such account audited shall be numbered from one upward, in the order they were presented, and a memorandum of the same entered upon a book to be kept exclusively for that purpose. R. S. 1894, § 4375.

1231. Money, how drawn.—26. No account or claim shall be paid unless audited and allowed by the board as aforesaid; and no moneys shall be drawn from the treasury, except by a warrant upon the treasurer, signed by the president of said town and attested by the clerk thereof. R. S. 1894, § 4376.

1232. Loans.—27. No incorporated town under this act shall have power to borrow money or incur any debt or liability unless a majority of the resident owners of the taxable real estate of said town shall petition the board of trustees to contract such debt or loan. Such petition shall have attached thereto an affidavit verifying the genuineness of the signatures to the same. And for any debt created thereby the trustees shall add to the tax duplicate of each year successively a levy sufficient to pay the annual interest on such debt or loan, with an addition of not less than five cents on the hundred dollars, to create a sinking fund for the liquidation of the principal thereof. [As amended, Acts 1891, p. 389. In force March 9, 1891.] R. S. 1894, § 4377.

Repeal.—Prior to the amendment of this section the same was repealed by implication by the act of March 11, 1867, so far as it relates to the issuing of bonds by incorporated towns for the purposes specified in said act, but said section remained in full force except so far as it may be repealed by said act. Clark v. Town of Noblesville, 44 Ind. 83.

Liability for necessary articles.—A municipal corporation has full control over its streets and alleys, and is in duty bound to keep them in safe condition for the traveling public, and is liable on a promissory note given for the purchase of a "reversible road scraper" to be operated on its streets. This section, forbidding an incorporated town to borrow money or incur any debt or liability, save on petition, etc., does not apply to the purchase of articles of indispensable necessity. Town of Fowler v. Austin, etc., Co., 5 App. 489, 490.

Power to contract debt—Petition of tax-payers.—Under this section, prior to its

amendment, the board of trustees might, on the presentation of the petition required by such section, purchase fire apparatus on credit. Such purchase might be made by parol contract, or, where the manner in which such debt was to be contracted was not described by the petition, the board might direct a promissory note to be executed. Second National Bank, etc., v. Town of Danville, 60 Ind. 504.

Same—Cemetery.—The trustees of towns are prohibited by this section from borrowing money or contracting a debt except pursuant to petition of property owners as provided in the statute. A purchase of cemetery grounds on credit, in the absence of such petition, is unauthorized and void. Pratt v. Luther, 45 Ind. 250.

Prior to the amendment of the section, petitions from property owners were not necessary to authorize the board of trustees to issue bonds to procure money with which to build school-houses. Clark v. Town of Noblesville, 44 Ind. 83.

Ordinance to issue bonds.—The fact that, upon presentation of the petition, and pending the negotiations for the purchase of property, an ordinance is passed for the issue and sale of bonds to realize means for the purchase of such property, does not, where in fact no such bonds are issued, exhaust the power of the board, under such petition, to make such purchase in some other manner, though such ordinance remains unrepealed. Second National Bank, etc., v. Town of Danville, 60 Ind. 505.

Remonstrance to petition—Withdrawal of signatures.—Where after the board of trustees had granted the prayer of the petition and entered into negotiations to make the purchase prayed for, the fact that a remonstrance was presented to the board, purporting to be, but unaccompanied by any evidence that it was, signed by a sufficient number of the signers of the petition to reduce the qualified signers thereon below the number required, will not avoid a contract subsequently entered into by the board pursuant to such petition. Second National Bank, etc., v. Town of Danville, 60 Ind. 504.

Bonds—Commercial paper.—Bonds of a municipal corporation duly issued under authority of law, payable to borrower, for definite sums of money at specified times, are regarded as commercial paper and are governed by the law merchant. Myers v. City of Jeffersonville, 145 Ind. 431; City of Bloomington v. Smith, 123 Ind. 41; Board, etc., v. Bright, 18 Ind. 93; Gardner v. Haney, 86 Ind. 17; City of Mt. Vernon v. Hovey, 52 Ind. 563; Hainer Munic. Securities, §§ 251–258.

Municipal bonds—Towns can not issue negotiable securities.—Under the laws in force in May, 1878 (R. S. 1894, §§ 4357, 4377, 5975, 5976), upon the subject of the power of towns to borrow money, contract loans, incur debts and issue bonds, towns had no power of issuing, for sale in open market, negotiable securities in the form of bonds and coupons, which, in the hands of bona fide purchasers before maturity, will be subject to no legal or equitable defenses in favor of the maker. Merrill v. Monticello, 138 U. S. 673; Hopper v. Covington, 118 U. S. 148. See Hainer Munic. Securities, §§ 251–258.

Lighting contract—Debt—Statute construed.—A contract for lighting a town, the lights to be paid for annually as furnished, does not create a debt within the meaning of this section. The contract does not create an indebtedness for the aggregate sum of all the yearly installments, since the debt for each year does not come into existence until the compensation for each year has been earned. Foland v. Town of Frankton, 142 Ind. 546; Seward v. Town of Liberty, 142 Ind. 551; Crowder v. Town of Sullivan, 128 Ind. 486; Hainer Munic. Securities, § 43.

Current expenses—Light—Water, etc.—The expense of light, water, labor and the like is essential to the maintenance of corporate existence, and constitutes current expenses, payable out of the current revenues, which may be applied to such purpose even though the effect is to postpone judgment or other creditors. Foland v. Town of Frankton, 142 Ind. 546; City of Valparaiso v. Gardner, 97 Ind. 1; Town of Fowler v. Austin, etc., Co., 5 App. 489.

Injunction—Contract for lighting.—An allegation in the complaint in an action to

restrain a town from entering into a contract for lighting its streets, "that the town will not have money to meet its indebtedness when same matures above the amounts necessary for necessary expenses of said town, and will not receive from the present levy sufficient funds to pay said indebtedness, and can not make a levy in time to pay the same as it matures," is insufficient as a mere conclusion. Foland v. Town of Frankton, 142 Ind. 546.

Erection and completion of school buildings—Bonds.—For decisions arising upon questions under act of March 8, 1873, authorizing cities and towns to issue bonds for the erection and completion of school buildings, R. S. 1894, § 5975, *et seq.*, see Williams v. Town of Albion, 58 Ind. 329; Gardner v. Haney, 86 Ind. 17; Wilcoxon v. City of Bluffton, Ind. Sup. Ct., June 14, 1899.

If a town contract for the erection of a school-house and agree to pay a sum therefor which will raise the indebtedness of the town above the constitutional limit, the portion of the contract within the constitutional limit will be a valid indebtedness and a sufficient consideration for the contract, and, in such case, the contractors and their sureties can not escape liability for failure to complete the building on the ground that the contract was void. School Town of Winamac v. Hess, 151 Ind. 229.

Power to issue bonds.—A town can not, under the constitution of this state, issue bonds to obtain funds with which to rebuild a school-house, when the issuance of the bonds will create a debt in excess of two per centum of the taxable value of the property within the corporate limits of the town. Town of Winamac v. Huddleston, 132 Ind. 217, 218.

Injunction—Unauthorized issue of bonds.—A tax-payer may maintain an injunction to prevent the issuance of corporate bonds without authority. Town of Winamac v. Huddleston, 132 Ind. 217; Denny v. Denny, 113 Ind. 22; Hainer Munic. Securities, §§ 471, 480.

Bonds not authorized—Agent for sale—Liability of sureties.—If the bonds issued by a municipal corporation are not authorized by law, and the proceeds thereof come into the hands of an agent for the sale of the same, neither the agent nor his sureties upon his bond can be heard say that the municipality has transcended its power in issuing the bonds and placing them in the hands of the agent for sale. Wilson v. Town of Monticello, 85 Ind. 10.

[Acts 1875, p. 149. In force February 25, 1875.]

1233. Bonds.—1. Any incorporated town in this state which shall have, heretofore, by the action of its board of trustees, commenced the erection of any public building, to be used as a market-house, engine-house, or for other public purposes, and shall not have the necessary means with which to complete such building, on the passage of an ordinance, authorizing the same, by the board of trustees of said incorporated town, may issue the bonds of such town, to an amount not exceeding in the aggregate ten thousand dollars, in denominations not less than fifty dollars nor more than five hundred dollars, and payable at any place that may be designated in the bonds, the principal in not less than one year nor more than ten years after the date of such bonds, and the interest annually or semi-annually, as may be therein provided, to provide the means with which to complete such building: *Provided*, That such bonds shall not be sold at a price less than ninety-four cents on the dollar, nor bear a greater rate of interest than eight per cent. per annum. R. S. 1894, § 4378.

Bonds—Coupons.—Where a municipal corporation has power to negotiate bonds for a certain purpose, with interest payable at stated intervals, the payment of the interest

may be provided for by coupons attached to the bonds, executed at the same time and referred to in the bonds, and themselves referring to the bonds to which they are attached, of which they in substance constitute part. Such coupon, detached from its bond, is negotiable. Town of Cicero v. Clifford, 53 Ind. 191.

1234. Proceeds paid treasurer.—2. The proceeds of the sales of such bonds shall be paid to the treasurer of said incorporated town to enable said board of trustees to complete such building; but before payment to said treasurer he shall file with the board of trustees a bond, payable to the state of Indiana, in a sum not less than the full amount of the said money to be paid to him, and with security to be approved by said board of trustees, conditioned for the faithful and honest application of said money to the purpose for which the same was provided. R. S. 1894, § 4379.

1235. Tax to pay interest.—3. In addition to the levy of the tax by incorporated towns for general purposes, now authorized by law, the board of trustees of any incorporated town which shall avail themselves of the provisions of this act are hereby authorized and required to levy, annually, a special additional tax, at the same time and in the same manner as other taxes of such town are levied, sufficient to pay the interest of said bonds falling due, which additional special tax shall be assessed and collected as the taxes for state and county revenue are assessed and collected. And the treasurer of said town shall keep accurate accounts of the revenue arising from such special tax, and shall, in his reports, when required by the board of trustees, show the amount thereof, if any, remaining delinquent. He shall pay out the same only by the authority of the board of trustees of such town, and shall permit the same to be applied to no other purpose than the payment of the principal and interest of such bonds: *Provided, always,* That the additional special tax hereby authorized shall not, in any one year, exceed fifty cents on each one hundred dollars of taxable property and one dollar on each poll. R. S. 1894, § 4380.

[1 R. S. 1852, p. 482. In force May 6, 1853.]

1236. Fines.—23. Such board of trustees shall have power to enact fines, penalties and forfeitures for violations of this act, or of any by-law or ordinance by them established, not exceeding ten dollars for any one offense, which may be recovered by an action in the name of the corporation. But such board may remit the whole or any part of the fine, penalty or forfeiture: *Provided,* That the fine assessed for the violation of any ordinance requiring a license shall not be less than the amount required to be paid for such license, although it may exceed the sum of ten dollars. R. S. 1894, § 4381.

Misdemeanor—Invalidity of ordinance.—Where an act is made a misdemeanor, punishable under the criminal law of the state, a city or town can not enact an ordinance prescribing a penalty for the same offense. City of Indianapolis v. Huegele, 115 Ind. 581; City of Indianapolis v. Higgins, 141 Ind. 1; Jett v. City of Richmond, 78 Ind. 316.

The statute prohibiting towns and cities from making acts punishable by ordinance

which are made public offenses punishable by the state does not apply to an ordinance providing a punishment for selling intoxicating liquors without first procuring a license from the town or city, that not being an offense under the statutes of the state. City of Frankfort v. Aughe, 114 Ind. 77; Clevenger v. Town of Rushville, 90 Ind. 258; Zeller v. City of Crawfordsville, 90 Ind. 262.

Prior to the enactment of the statute prohibiting towns and cities from making acts punishable by ordinance which are made public offenses punishable by the state, a town may be authorized to provide by ordinance for the punishment of an act already punishable by the criminal law of the state. Williams v. City of Warsaw, 60 Ind. 457; Ambrose v. State, 6 Ind. 351; Sloan v. State, 8 Blackf. 361.

Impounding animals.—Towns have no power to provide for impounding and selling animals found at large in the corporate limits. Slessman v. Crozier, 80 Ind. 487.

Validity of ordinance, when not in question—Action.—An action to recover the penalty prescribed for the violation of an ordinance does not necessarily call in question the validity of the ordinance. Griffee v. Town of Summitville, 10 App. 332.

[Acts 1877 S., p. 75. In force March 12, 1877.]

1237. Suits—Imprisonment.—57. Any person violating the provisions of any ordinance of a town organized under this act, to which there may be a penalty affixed, may be prosecuted before a justice of the peace of such town, and in case there be no acting justice therein, then before the justice of the peace residing nearest to said town, in the county in which such town is situated, upon a warrant issued by such justice, as in cases of misdemeanors, and such person, upon conviction, shall stand committed until the judgment and costs are paid or replevied, and in default of payment or replevy of such judgment and costs, the defendant, unless a female, may be adjudged and required to pay the same by manual labor upon the streets or other public works of said town, under the control of the marshal of said town, for which labor such defendant shall be allowed on such judgment and costs seventy-five cents per day. It shall be the duty of such marshal, or such other officer as the board of trustees of such town may direct, to work such defendant not less than six nor more than ten hours per day, according to the season, and each evening to return him to the custody of the keeper of the prison in whose custody such defendant was committed, and upon the full payment, as aforesaid, of such judgment, costs and accrued costs, such defendant shall be fully discharged. And such marshal is hereby authorized and required to perform all the duties herein prescribed, and to use all proper means thereto. And the board of trustees are hereby vested with full authority to pass by-laws and ordinances for compelling the enforcement of such manual labor by such defendant, by the use of sufficient force and means as they may deem right and proper. Such defendant may be committed to the town prison, or if such town has no prison, then to the county prison of the county in which such town is situated, and in the latter case it shall be the duty of such person having charge of such prison to receive such defendant and obey the judgment of the court in reference to him, and for the keeping, custody and boarding of said defendant, the keeper of such prison shall receive fifty cents per day, to be paid by such town on the presentation of an itemized

account therefor, and he shall receive only one commitment and one discharging fee, and such defendant may, at any time, replevy and pay such judgment and costs. And in case he has performed labor under such judgment, he shall be entitled to a credit for the same, to the amount of labor performed, and the balance may be paid or replevied as aforesaid. [As amended, Acts 1883, p. 132. In force June 5, 1883.] R. S. 1894, § 4382.

See *ante*, § 1198.

Actions for violation of ordinance—Civil action.—Actions to recover penalties for the violation of ordinances of municipal corporations are civil actions. Town of Brookville v. Gagle, 73 Ind. 117; City of Greensburg v. Corwin, 58 Ind. 518; City of Goshen v. Croxton, 34 Ind. 239; City of Hammond v. New York, etc., R. Co., 126 Ind. 597; Shea v. City of Muncie, 148 Ind. 14; Clevenger v. Town of Rushville, 90 Ind. 258; Town of Indianapolis v. Fairchild, 1 Ind. 315; 1 Beach Pub. Corp., § 553; 1 Dillon Munic. Corp., § 409, *et seq.*

Penalty, not debt—Imprisonment.—A penalty for the violation of a town ordinance is not a debt, in the sense of the constitution, which forbids imprisonment for debt. Hardenbrook v. Town of Ligonier, 95 Ind. 70; McCool v. State, 23 Ind. 127; McIlvain v. State, 87 Ind. 602; 1 Beach Pub. Corp., § 525.

Complaint—Averments.—In an action for the violation of a town ordinance, it is not necessary to aver that the members of the board of trustees which passed it were duly elected, nor that they had authority to pass the ordinance, nor that it has been published. Hardenbrook v. Town of Ligonier, 95 Ind. 70.

Same.—A complaint to recover the penalty for a violation of a town ordinance is sufficient, where it contains averments of the proper enactment of such ordinance, the violation of its provisions by the defendant, and the acts constituting such violation. Town of Brookville v. Gagle, 73 Ind. 117; Wagner v. Town of Garrett, 118 Ind. 114; Town of Martinsville v. Frieze, 33 Ind. 507; Hardenbrook v. Town of Ligonier, 95 Ind. 70.

Same—Ordinance.—In a complaint predicated on a town ordinance, it is sufficient to aver that the ordinance was duly adopted by the board of trustees of the town, and to set out, in or with the complaint, so much of the ordinance as relates to the action. Hardenbrook v. Town of Ligonier, 95 Ind. 70; Wagner v. Town of Garrett, 118 Ind. 114; Vinson v. Town of Monticello, 118 Ind. 103; Clevenger v. Town of Rushville, 90 Ind. 258.

Same—Sufficiency of complaint—Exhibited ordinance.—The ordinance violated gives the right of action, and is so far the foundation of the suit that a copy filed with the complaint will be looked to in considering whether a demurrer was correctly overruled, without other averment than that the ordinance "is attached to and made a part of the complaint." Wagner v. Town of Garrett, 118 Ind. 114.

Same—Copy of ordinance.—In an action for the violation of an ordinance, so much of the ordinance as is claimed to have been violated must be set forth. Where two or more sections are relied upon as defining the offense and prescribing the penalty, both sections should be set out. Clevenger v. Town of Rushville, 90 Ind. 258; Wagner v. Town of Garrett, 118 Ind. 114; Lake Erie, etc., R. Co. v. City of Noblesville, 15 App. 697; Lake Erie, etc., R. Co. v. City of Noblesville, 16 App. 20.

Same—Ordinance—Proof.—Unless the publication of an ordinance is denied under oath proof of such publication is not required. Hardenbrook v. Town of Ligonier, 95 Ind. 70; Lake Erie, etc., R. Co. v. City of Noblesville, 15 App. 697; Green v. City of Indianapolis, 25 Ind. 490; Lake Erie, etc., R. Co. v. City of Noblesville, 16 App. 20.

Same—Court—Jurisdiction.—Circuit courts have jurisdiction of actions for the recovery of penalties for the violation of town ordinances. Town of Brookville v. Gagle, 73 Ind. 117; Redden v. Town of Covington, 29 Ind. 118.

Justices of the peace.—An action for the violation of a town ordinance may be instituted before any justice of the peace residing within the corporate limits. Town of Spencer v. Cline, 28 Ind. 51.

Jurisdiction of justices.—The jurisdiction of a justice for the violation of town ordinances, as to amount, is the same as in other civil actions. Clevenger v. Town of Rushville, 90 Ind. 258.

Appeal.—An appeal can not be prosecuted from a cause originating before a justice of the peace, on a penalty prescribed by a city or town ordinance, where the amount in controversy, exclusive of interest and costs, is less than fifty dollars, when the validity of the ordinance is not in question. Griffee v. Town of Summitville, 10 App. 332; City of Greensburg v. Corwin, 58 Ind. 518; Hardenbrook v. Town of Ligonier, 95 Ind. 70.

Action on ordinance—Collateral attack.—In an action upon a town ordinance to recover a license fee required by ordinance of retail liquor dealers, an answer that the election at which the trustees who passed the ordinance were elected was not conducted by the then trustees, as inspectors, but by disqualified persons, etc., was bad, as the question of the right of the trustees to exercise their office could not be questioned collaterally, and the answer did not negative the fact that they were trustees *de facto*. Redden v. Town of Covington, 29 Ind. 118.

Repeal—Effect on pending prosecution.—If, during the progress of a prosecution, the ordinance on which it is based is repealed, the prosecution must fail, unless the repealing ordinance contains some express provisions whereby all pending prosecutions are saved from its operations. Horr and Bemis Munic. Ords., § 63; Terre Haute, etc., R. Co. v. City of South Bend, 146 Ind. 239; 1 Dillon Munic. Corp. (4th ed.), § 314 n.; 1 Beach Pub. Corp., § 519.

But if an ordinance under which a prosecution is pending is re-enacted in substantially the same form, its effect is to continue in force the provisions of the original ordinance and does not abate or affect the prosecution. Cheezem v. State, 2 Ind. 149; Martindale v. Martindale, 10 Ind. 566; Cordell v. State, 22 Ind. 1; 1 Beach Pub. Corp., § 521.

Repeal of ordinance by implication.—Ordinances as statutes may be repealed by implication. Where a statute or ordinance covers the whole subject-matter of an older one, adds new provisions, prescribes different penalties, and is evidently intended to supersede and take the place of the prior statute or ordinance, the latter is repealed by implication. Terre Haute, etc., R. Co. v. City of South Bend, 146 Ind. 239; 1 Beach Pub. Corp., § 521.

ARTICLE 3.—TAXATION.

SEC.		SEC.	
1238.	Annual tax, when fixed.	1244.	Redemption of real estate.
1239.	Tax levy.	1245.	Duplicate to auditor.
1240.	Warrant for collection.	1246.	County treasurer to collect.
1241.	Appraisement of real estate in certain cases.	1247.	Road tax.
1242.	Duty of county auditor.	1248.	Levy of road tax.
1243.	Tax, how collected.	1249.	Tax to pay for water-works.

[Acts 1855, p. 130. In force August 17, 1855.]

1238. Annual tax, when fixed.—30. The board of trustees shall, before the third Tuesday in May of each year after the town shall have been incorporated, determine the amount of general tax for the current year; but the tax for the year in which the town is incorporated

may be determined, at any time, by the board of trustees. R. S. 1894, § 4383.

General laws.—Some of the provisions of the statutes compiled under this title, and decisions cited thereunder, may not now be applicable. The general laws of the state upon the subject of taxation control municipal taxation so far as applicable. See *ante*, § 1057. See general law, Taxation, R. S. 1894, ch. 108 (R. S. 1894, § 8408, *et seq.*), Burns' Supp. 1897, ch. 108 (§ 8411, *et seq.*); and Acts 1899, pp. 422, 430, 431, 491, 516.

Time of levy.—The above section was amended by implication by the act of March 10, 1879, and under the latter act the boards of trustees of towns need not levy the tax for each year until after the county board of equalization has adjourned. Worley v. Harris, 82 Ind. 493; Kretli v. Larrew, 104 Ind. 363.

Same.—Prior to the act of 1879, taxes could not be levied after the third Tuesday of May of each year. Town of Williamsport v. Kent, 14 Ind. 306; Clark v. Town of Noblesville, 44 Ind. 83.

Statute construed.—The words, "determine the amount of general tax for the current year," as used in this section, mean the final determination of the board as to the amount, assessment and levy. Kretli v. Larrew, 104 Ind. 363; Worley v. Harris, 82 Ind. 493.

Tax levy—When void.—A tax levy by the trustees of a town, to be valid, must be levied by a legally constituted board of trustees, upon property liable to be taxed; and the necessary forms in assessing the property, levying the tax and placing it upon the duplicate must be complied with. Millikin v. Town of Bloomington, 49 Ind. 62.

When the action of the board determining the amount of tax to be levied is reduced to writing and signed by the president and clerk, the failure to make a formal record thereof will invalidate a tax sale. Scarry v. Lewis, 133 Ind. 96.

[1 R. S. 1852, p. 482. In force May 6, 1853.]

1239. Tax levy.—33. When the assessment-roll shall have been corrected and completed, the trustees shall levy a tax upon the taxable property of said town to such an amount as they may deem necessary, and shall set opposite the name of each person taxed a description and valuation of the property charged therewith, and the amount of tax assessed against such person. And when such tax-list shall have been made, they shall cause a copy thereof, with a warrant annexed, to be delivered to the marshal of such town. The original assessment-roll and tax-list shall be deposited with the treasurer of such town, who is hereby charged with the safe custody of the same. R. S. 1894, § 4384.

Residents—Personal property.—Where a person resides in a town and his personal property belongs elsewhere, such town has no authority to assess taxes upon such property, and the collection of the same will be enjoined. The situs of personal property for the purpose of taxation does not follow the domicile of the owner. Eversole v. Cook, 92 Ind. 222; Cook v. Town of Port Fulton, 106 Ind. 170.

Non-residents.—If personal property is used in business in this state it should be assessed for taxes, even though the owner claims to be a citizen of, and domiciled in another state; and this is true of moneys and credits as well as of other forms of personal property. Buck v. Miller, 147 Ind. 586.

Same.—The personal property of non-residents should be assessed to the owner or person having the control thereof in the township, town or city where the same may be. Buck v. Miller, 147 Ind. 586.

Water craft.—Water craft must be listed for taxation at the place of the owner's

residence, without regard to its actual situation; and where two members of a firm owning the craft lived in one town, and the other partner in another town in same county, the craft was subject to taxation in the town where the two partners resided. Cook v. Town of Port Fulton, 106 Ind. 170.

Personal property defined.—For the purposes of taxation, the term "personal property" includes bonds, notes, choses in action, and other evidences of credit. The situs of such property for taxation must be the place where it is used in business. Buck v. Miller, 147 Ind. 586.

Lands and personal property situated within the corporate limits of a town but used for farm purposes are subject to taxation for town purposes. Such taxation is not a taking of private property for public use without compensation contrary to the provisions of the constitution. Town of Cicero v. Sanders, 62 Ind. 208; City of Logansport v. Seybold, 59 Ind. 225; City of Aurora v. West, 9 Ind. 74.

1240. Warrant for collection.—34. Such warrant shall be under the seal of the corporation, signed by the president and trustees, or a majority of them, and attested by the clerk, and shall command the marshal to collect the taxes specified in the duplicate within ninety days, and pay over the same, and make return of said warrant to the treasurer of said town. Such trustees may renew such warrant for any period not exceeding thirty days. R. S. 1894, § 4385.

Wrongful assessment—Voluntary payment.—In order to recover back money from a municipal corporation, under the common law, upon the ground of the illegality of a tax, the payment must have been made upon compulsion, and not voluntarily. Ignorance of the illegality of the assessment at the time of the payment of the tax is insufficient. Simonson v. Town of West Harrison, 5 App. 459.

There is no statute in this state requiring an incorporated town to refund taxes which were wrongfully assessed and paid. Simonson v. Town of West Harrison, 5 App. 459.

Tax sales—Caveat emptor.—The doctrine of *caveat emptor* applies in its fullest extent to tax sales. Worley v. Town of Cicero, 110 Ind. 208; City of Logansport v. Humphrey, 84 Ind. 467; Churchman v. City of Indianapolis, 110 Ind. 259.

Private sale.—Real estate can not be sold at private sale by towns for delinquent taxes. Stevens v. Williams, 70 Ind. 536; Worley v. Town of Cicero, 110 Ind. 208.

Void sale—Recovery of purchase-money.—If the sale is void, the purchase-money can not be recovered. Stevens v. Williams, 70 Ind. 536; Worley v. Town of Cicero, 110 Ind. 208; Simonson v. Town of West Harrison, 5 App. 459.

Construction of statute.—A statute authorizing the sale of lands for delinquent taxes must be strictly construed. Stevens v. Williams, 70 Ind. 536.

Power of marshal—Warrant.—When the town marshal has received the tax duplicate of his town, and the warrant attached thereto, they confer upon him the same powers as an execution issued to him by a justice of peace, and he may seize the property of any tax-payer on such duplicate any place within the county wherein such marshal's town is situated. Town of Andrews v. Sellers, 11 App. 301; Wise v. Eastham, 30 Ind. 133.

[Acts 1893, p. 190. In force March 2, 1893.]

1241. Appraisement of real estate in certain cases.—1. That where a town has been or may be hereafter incorporated more than one year prior to the time fixed by law for the assessment and appraisement of real estate for the purposes of taxation, it shall be the duty of the as-

sessor of the township in which said incorporated town is situated to assess and appraise all of the real estate in said town in the manner provided by law for the appraisement and assessment of real estate in towns at the regular periods for the appraisement and assessment of real estate now or hereafter determined by law. And said appraisement and assessment herein provided for shall be made at the time the said assessor makes the appraisement and assessment of personal property in his township, and returned to the auditor of the county or counties in which said town is situate at the time said assessor returns the assessment and appraisement of personal property in the township or townships at the next succeeding assessment after the incorporation of said town. R. S. 1894, § 4386.

1242. Duty of county auditor.—2. To enable the assessor to make the appraisement and assessment required of him by section one (1) of this act, the auditor of the county or counties wherein said town is situate, shall on or before the first Monday in April succeeding the incorporation of said town, upon written request of the board of trustees of said town, make out and deliver to the assessor of the township or townships wherein said incorporated town is situate, a list of all the lands and lots within the corporate limits of said town, together with the names of the owners of each separate tract, parcel or lot as shown by the records in the office of said auditor, in tabular form. R. S. 1894, § 4387.

[1 R. S. 1852, p. 482. In force May 6, 1853.]

1243. Tax, how collected.—35. The marshal shall collect the taxes on said duplicate when so required, and shall have the same power to enforce collections and shall be governed by the same rules and regulations as county treasurers and county auditors; and shall have authority, in like manner, to collect by distress and sale, and to make conveyances and certificates of real estate sold by virtue of such sale. Such sale, if at a county-seat, shall be at the door of the court-house or place of holding court; and, if not at the county-seat, it shall be held at the door of the town hall or place of meeting of the board of trustees; and the clerk of said board shall perform the like duties, at said sale, as are required of the county auditor at a sale for state and county taxes; and all deeds or conveyances for lands so sold for taxes shall be prima facie evidence of the validity of such purchase. R. S. 1894, § 4388.

Property seized for taxes—Replevin—Trover.—Replevin, under the statute, is a possessory action, and if it appears upon a trial that the property was taken for a tax, the plaintiff will not be entitled to it. In such case, if the seizure was wrongful, the injured party is remitted to his action for trespass or trover, or other proper action. The illegality of the tax in such case can not be considered. Town of Andrews v. Sellers, 11 App. 301.

Stranger's property seized for tax.—But if the property of a person is seized who does not owe the tax, he may maintain replevin for the property against the tax collector receiving such property. Town of Andrews v. Sellers, 11 App. 301.

Demand before levy.—A seizure of property for taxes is not illegal because of the fail-

ure of the tax collector to first make a demand of payment of the person owing such taxes. Town of Andrews v. Sellers, 11 App. 301.

Tax sale—Caveat emptor.—The doctrine of *caveat emptor* applies in its fullest extent to tax sales. Worley v. Town of Cicero, 110 Ind. 208.

Statutory construction.—A statute authorizing the sale of lands for delinquent taxes must be strictly construed. Stevens v. Williams, 70 Ind. 536.

Private sale—Void—Lien.—A sale of lands, by the marshal of a town, at private sale, for delinquent taxes, is unauthorized and void; nor can the purchaser enforce a lien for, or recover back, the purchase-money. Stevens v. Williams, 70 Ind. 536.

Invalid sale—Lien of state.—A sale of land for taxes made in violation of a mandatory statute vests in the purchaser the lien of the state; and if, therefore, the land sold was subject to taxation, and the taxes had not been paid, and the description was sufficient to identify the property, and the sale was made by authority of law, the sale would be valid to transfer the lien, notwithstanding there were omissions and irregularities which would render the sale invalid to convey title. Scarry v. Lewis, 133 Ind. 96.

Tax deed prima facie evidence of lien.—The introduction of a tax deed in evidence makes a prima facie case of the existence of a lien, notwithstanding an admission that the proceedings upon which the sale was based were irregular and insufficient to convey title. Scarry v. Lewis, 133 Ind. 96.

Estoppel—Additions to town—Collateral attack.—Where additions have been made to a town, and the town has exercised control over such additions for ten or fifteen years, expending large sums of money in improving the streets of those additions, and in the erection of school buildings, etc., and where a person had lived in one of the additions for a number of years, had voted in the town, had been elected to offices of the town, under such circumstances he can not be allowed to question the validity of the annexation proceedings for the purpose of defeating a tax lien on his land in such additions, simply because in making said additions the strict letter of the law had not been complied with; nor are such objections available in a collateral attack. Scarry v. Lewis, 133 Ind. 96.

Invalid sale—Refunding taxes.—If a sale is invalid the town is not liable to the purchaser for the purchase-money; there is no statute requiring towns to refund the taxes illegally assessed and paid. Worley v. Town of Cicero, 110 Ind. 208; Simonson v. Town of West Harrison, 5 App. 459.

Common law action—Voluntary payment.—In order to recover back money from a municipal corporation, under the common law, upon the ground of the illegality of the tax, the payment must have been made upon compulsion and not voluntarily. Ignorance of the illegality of the assessment at the time of the payment of the tax is insufficient. Simonson v. Town of West Harrison, 5 App. 459.

Illegal taxes—Injunction.—If illegal taxes are assessed and threatened to be collected, the appropriate remedy to restrain their collection is by injunction. Toledo, etc., R. Co. v. City of Lafayette, 22 Ind. 262; City of Peru v. Bearss, 55 Ind. 576; City of Delphi v. Startzman, 104 Ind. 343; City of Delphi v. Bowen, 61 Ind. 29.

Irregularities—Injunction.—Irregularities, or the neglect of mere forms in the assessment of taxes, where there is authority to levy the tax, will not be sufficient cause to enjoin the collection thereof. Jones v. Summer, 27 Ind. 510; Ricketts v. Spraker, 77 Ind. 371; Reynolds v. Bowen, 138 Ind. 434; Florer, etc. v. McAffee, 135 Ind. 540.

1244. Redemption of real estate.—36. Any real estate sold by virtue of this act shall be redeemable under the same regulations and restrictions as real estate sold for county and state taxes is made redeemable. All moneys for the redemption of such real estate shall be paid to the treasurer of the corporation. R. S. 1894, § 4389.

1245. Duplicate to auditor.—37. The trustees of such town may,

at their option, deliver the tax duplicate to the auditor of the proper county, on or before the first day of August in each year, instead of to the marshal of such town; and said auditor shall enter said tax, and, if delinquent, the interest and penalty thereon, upon his duplicate. R. S. 1894, § 4390.

1246. County treasurer to collect.—38. The treasurer of such county shall collect the corporation taxes upon such duplicate as other taxes are collected, and pay the same over to the treasurer of such corporation. The auditor and treasurer shall be allowed and paid by the corporation the same compensation as is paid by the county for like services. R. S. 1894, § 4391.

1247. Road tax.—47. Nothing contained in this act shall exempt the inhabitants of any town from the payment of highway taxes legally assessed, nor from the formation of one or more road districts irrespective of the corporate limits of such town. R. S. 1894, § 4392.

[Acts 1881 S., p. 708. In force September 19, 1881.]

1248. Levy of road tax.—5. The town trustees shall have power to levy a road tax not to exceed twenty-five cents on the one hundred dollars' taxable property within such corporation, in addition to the powers now conferred upon them by law for the levy and collection of taxes: *Provided*, That the board of commissioners or township trustees shall have no power or authority to levy a road tax on any property within the corporate limits of such town. R. S. 1894, § 4393.

[Acts 1897, p. 263. In force March 8, 1897.]

1249. Tax to pay for water works.—1. That in all cases where the board of trustees of any incorporated town in this state shall, or have heretofore contracted with any corporation, person or firm for supplying said town with water for fire protection and other purposes, or where any incorporated town shall, or has heretofore purchased any water works system located within said incorporated town, then and in either of said cases: *Provided*, Said town has not incurred and shall not hereby be authorized to incur an indebtedness of more than two (2) per cent. of the amount of taxable property of said town, as provided in the constitution of the state of Indiana; the board of trustees of said incorporated town are hereby authorized to levy and collect an annual special tax for paying said contract price for said water so furnished or for paying the purchase price of said water works system of not to exceed forty cents on the one hundred dollars of the taxable property within such incorporated town, to be levied and collected as other corporation taxes are levied and collected. Burns' Supp. 1897, § 4393*a*.

ARTICLE 4.—IMPROVEMENT OF STREETS.

SEC.
1250. Sidewalks.
1251. Requisites of sidewalk ordinance.
1252. Owner failing, town makes.
1253. Cost, how recovered.
1254. Street improvement.
1255. Street improvement.
1256. Cost, how apportioned.
1257. Cost, how collected.

[Acts 1859, p. 184. In force February 14, 1859.]

1250. Sidewalks.—1. Whenever, in the opinion of the board of trustees of any incorporated town in this state, public convenience requires that the sidewalks of any street in such town should be graded or paved or planked, such board of trustees may, by an ordinance, compel the owners of lots adjoining such street to grade, pave, or plank the same. R. S. 1894, § 4394.

See *ante*, § 1195, and *post*, § 1258, and Cities and Towns, *ante*, § 1107, *et seq.*

This section was not repealed by the act of 1869, R. S. 1894, § 4401; nor by the act of March 8, 1889, R. S. 1894, § 4288. Wiles v. Hoss, 114 Ind. 371; Allen v. Town of Salem, 10 App. 650; Shrum v. Town of Salem, 13 App. 115.

Sidewalks—Improvement.—Under this statute sidewalks only can be improved; but under R. S. 1894, § 4401, streets and sidewalks may both be improved. Keith v. Wilson, 145 Ind. 149; Wiles v. Hoss, 114 Ind. 371.

Ordinance—Sidewalk improvement—Notice.—Under this act the ordinance for the improvement is sufficient notice to the lot-owner where further notice is not provided for by the ordinance. Shrum v. Town of Salem, 13 App. 115; City of Elkhart v. Wickwire, 121 Ind. 331.

Same.—Where, after the passage of the ordinance requiring the improvement, the lot-owners were ordered to grade the sidewalk in front of their lots, that was all the notice they were entitled to, and it was immaterial whether such order was oral or written. Shrum v. Town of Salem, 13 App. 115.

Same—Improvement lien—Notice.—In such case the property owner having had ample opportunity to be heard before the assessment was made, and before the work was done by the municipality, an improvement lien attached and was enforceable. Shrum v. Town of Salem, 13 App. 115.

Sidewalks.—Under the statutes in force in 1875, the board of trustees of an incorporated town had the power to compel the grading and building of sidewalks whenever, in their opinion, the public convenience required it, and if lot-owners refused to do the work, to let a contract for the improvement, pay the cost out of the treasury and collect the same from such lot-owners by suit. Powers v. Town of New Haven, 120 Ind. 185, 190.

Sidewalk, power to determine width.—Town trustees have the power to determine what the width of a sidewalk shall be; and they are not required to make it of uniform width throughout the entire length of the street, nor to make the improvement of such sidewalk for the entire length of a uniform width. Town of Marion v. Skillman, 127 Ind. 130, 140.

Lot-owner—Improvement by—Town taking charge of.—The fact that the lot-owner had undertaken to do the work himself will not prevent the municipality from taking charge of and completing it, unless it be shown that he had substantially complied with the requirements of the ordinance. Shrum v. Town of Salem, 13 App. 115.

Liability of town for acts of property owner.—The acts of a property owner, who improves a sidewalk under an ordinance adopted in pursuance of this section, are not the acts of the town in such sense as to charge the latter for his negligence; but, in order to charge the corporation, evidence of his negligence must be supplemented by evidence that the town authorities were negligent, or that the work directed to be done was intrinsically dangerous. Dooley v. Town of Sullivan, 112 Ind. 451.

Same—Power of trustees—Grade—Sidewalk.—The board of trustees are authorized to establish the grades of streets, and to require the owners of lots, in constructing sidewalks, to make them conform thereto, without any petition on the part of property holders; and an ordinance establishing the grades of certain streets is not void for uncertainty, if the grade so established can be ascertained without difficulty. Burr v.

Town of New Castle, 49 Ind. 322; Martindale v. Palmer, 52 Ind. 411; Taber v. Ferguson, 109 Ind. 227.

1251. Requisites of sidewalk ordinance.—2. Such ordinance shall specify the height of the grade, if the grade of any such sidewalk is to be altered, the width of such pavement, and the time when the same shall be done. R. S. 1894, § 4395.

1252. Owner failing, town makes.—3. If the owner of such lots shall fail or refuse to grade, pave, or plank such sidewalk, as required in such ordinance, it shall be the duty of the marshal of such town forthwith to let out the grading, paving, or planking of such sidewalk to the lowest bidder, first giving ten days' notice, by posting up written notices thereof in three public places in such town for that length of time. And when such grading, paving, or planking is completed, said marshal shall report the same to said board of trustees, and the cost of such work shall be audited and paid out of the treasury of such town as other claims against said corporation are audited and paid. R. S. 1894, § 4396.

Writ of prohibition—Discretion.—A writ of prohibition will not lie, at the suit of a property holder of an incorporated town, to prevent the execution of a contract let by such town to a contractor, to construct a sidewalk along and upon the real property of the plaintiff. The town authorities are the sole judges of the necessity of such walk. Corp. of Bluffton v. Silver, 63 Ind. 262; Keith v. Wilson, 145 Ind. 149; Town of Marion v. Skillman, 127 Ind. 130.

Injunction—Jurisdiction.—Such proceedings would only be proper, if at all, in such matter, to prevent the making of such contract for want of jurisdiction. The remedy in such case is by injunction. Corp. of Bluffton v. Silver, 63 Ind. 262.

Improvement—Farm land.—The fact that more than twenty acres of the real property is used for farming purposes only is no ground for prohibiting the execution of such contract. Corp. of Bluffton v. Silver, 63 Ind. 262.

Intention of owner—Notice.—The fact that the property holder was, at the time of the passage of the ordinance requiring the construction of a sidewalk, about to construct a sidewalk of a different kind from that required by the ordinance, but of which the town is not alleged to have had notice, is not ground for prohibiting the execution of a contract entered into between the town and a contractor. Corp. of Bluffton v. Silver, 63 Ind. 262.

The execution of an improvement contract will not be enjoined on the ground that the town "has not established grade lines or set grade stakes," etc., nor upon the ground that there was no necessity for the improvement. Corp. of Bluffton v. Silver, 63 Ind. 262.

Construction by town—Collection of cost.—Where the property owners fail to construct walks when so ordered, the town may construct the same and collect the expense of such owners. Powers v. Town of New Haven, 120 Ind. 185; Town of Auburn v. Eldridge, 77 Ind. 126; Allen v. Town of Salem, 10 App. 650; Shrum v. Town of Salem, 13 App. 115.

Property owner—Estoppel.—If the owner of property in a town stands by, and, without objecting, permits improvements to be made which benefit his property, he is estopped to afterwards deny the authority of the town to make the improvements. Powers v. Town of New Haven, 120 Ind. 185; Taber v. Ferguson, 109 Ind. 227; Jenkins v. Stetler, 118 Ind. 275.

First and subsequent improvements—Discretion.—This and the preceding sections

not only apply to the first improvement, but authorize the board of trustees to make subsequent improvements. Courts will not interfere with the discretion of the trustees, but if their discretion is abused the court may restrain such abuse. Keith v. Wilson, 145 Ind. 149.

1253. Cost, how recovered.—4. Such board of trustees may immediately, by a suit in any court of competent jurisdiction, in the name of such corporation, recover against the owner of such lot the amount of the cost of paving or planking and grading such sidewalk; and upon execution against the property of said defendant upon such judgment, the same shall be sold for cash without regard to the valuation and appraisement laws of this state. And from the date of the completion of such pavement or planking or grading under contract by the marshal, the costs of such grading and paving or planking, and the damages aforesaid, shall be a lien on such lot, and may be enforced in any court of competent jurisdiction by an action in the name of such corporation. R. S. 1894, § 4397.

Discretion—Injunction.—The discretion of the town trustees in proceedings under this act for the construction of sidewalks, in the absence of abuse, will not be controlled by the courts. Keith v. Wilson, 145 Ind. 149.

Cost—Collection—Pleading.—In an action by a town against a property owner, to recover for constructing a sidewalk along his lot, under the provisions of the act of 1859 (R. S. 1894, § 4394, *et seq.*), a complaint showing a general and substantial compliance with the provisions of said act is sufficient on demurrer; and the allegation that the work was "duly completed" is a sufficient averment that the walk was completed in accordance with the specifications of the ordinance. Town of Auburn v. Eldridge, 77 Ind. 126, 128.

Complaint—Exhibit—Ordinance.—In such case, the ordinance to compel owners of lots to construct sidewalks is not such an instrument as becomes a part of the complaint by the filing of a copy therewith. Town of Auburn v. Eldridge, 77 Ind. 126, 128.

[Acts 1857, p. 73. In force March 5, 1857.]

1254. Street improvement.—46. Whenever two-thirds of all the resident owners, in number or in value, of real estate, bounding both sides of any street, not less than one square, shall petition to have such street or sidewalks connected therewith graded, paved or otherwise improved, or the sidewalks thereof built or repaired; or when two-thirds of the owners of real estate, in number or in value, on one side of such street, shall desire a sidewalk on that side, it shall be the duty of such board to levy and cause to be collected by tax upon all the owners of all real estate or lots on such street or part of a street, or such side of a street, according to the last appraised valuation of said real estate, exclusive of any improvement that may be made thereon, such sum of money as is necessary for the improvement of said street or sidewalk as in said petition requested. At the time of making such levy, said board shall fix the nature, extent and specifications of the proposed improvement. And any person upon whose real estate any such tax is levied may satisfy the same, or any part thereof, by labor done and materials furnished for the proposed im-

provement, under the direction and to the acceptance of said board. If any person against whose real estate a tax shall be levied for the purpose of building or repairing a sidewalk shall have previously built a sidewalk adjoining to the whole of the real estate so taxed, to the acceptance of the board, or shall afterward build or repair the same within the time prescribed by said board and to their acceptance, it shall be a full discharge of such tax for the improvement of such sidewalk. R. S. 1894, § 4400.

Grades—Sidewalk improvements, etc.—The board of trustees of a town are authorized to establish the grades of streets, and to require the owners of lots, in constructing sidewalks, to make them conform thereto, without any petition on the part of property owners. The case of Town of Covington v. Nelson, 35 Ind. 532, distinguished and commented upon. Burr v. Town of Newcastle, 49 Ind. 322.

[Acts 1869 S., p. 33. In force April 27, 1869.]

1255. Street improvement.—8. Whenever a majority of all the resident owners of any lots or parcels of land on any street or alley, not less than one square (to be estimated by numbers or by measuring the front lines of such lots or parcels of land bordering thereon) shall petition the board of trustees of such town to grade, pave, gravel or macadamize, or for either kind of said improvement, the board of trustees may cause the same to be done according to the specifications by them to be adopted, by contract given to the best bidder, after advertising to receive proposals therefor: *Provided*, That the said board of trustees may order the improvement as aforesaid of any street around the public square in such town without the filing of such petition; and when the county in which such town is situate owns or controls real estate bordering on such public square, it shall be subject to the same rules and regulations as to payment for said improvement as the citizens of said town are subjected. R. S. 1894, § 4401.

See *ante*, § 1107.

Repealed by implication.—This and the two succeeding sections were repealed by implication by the Barret law, act of 1889, R. S. 1894, § 4288. (See *ante*, § 1107, *et seq.*) Koons v. Cluggish, 8 App. 232; Cluggish v. Koons, 15 App. 599; Allen v. Town of Salem, 10 App. 650. See Keith v. Wilson, 145 Ind. 149, in which the supreme court seems to recognize this statute as being still in force, although it is not so expressly held.

Same—Repeal.—This act did not repeal the act of 1859, R. S. 1894, § 4394. Allen v. Town of Salem, 10 App. 650; Wiles v. Hoss, 114 Ind. 371; Shrum v. Town of Salem, 13 App. 115.

Effect of repeal—Improvement lien—Sufficiency of complaint.—Where the theory of a complaint for the foreclosure of a lien alleged to have accrued by reason of certain improvements was, that the contract was made and work performed under the act of 1869, R. S. 1894, § 4401, *et seq.*, relating thereto, the complaint was insufficient on demurrer, the contract having been made and work performed under the act of 1889, relating to the same subject and repealing the former. Koons v. Cluggish, 8 App. 232.

Improvement under repealed statute—Estoppel.—Where a street improvement is ordered by a town board under a statute at the time repealed by implication, and the contract for said improvement let to a contractor, who, prior to the commencement of the work, consulted an attorney and was informed and believed that all of the proceedings were regular, and he in good faith entered upon and completed the work accord-

ing to the plans and specifications of the board, and the abutting property owner stood by and agreed to the work and encouraged it, such property owner will be estopped from denying the authority of the town board to make such contract. Cluggish v. Koons, 15 App. 599; Taber v. Ferguson, 109 Ind. 227; Ross v. Stackhouse, 114 Ind. 200.

Street and alley improvements.—Under this statute, streets and sidewalks may both be improved; under § 4394, *et seq.*, R. S. 1894 (*ante*, § 1250, *et seq.*), sidewalks only can be improved. Keith v. Wilson, 145 Ind. 149; Wiles v. Hoss, 114 Ind. 371.

The method provided under this act for the improvement of streets and alleys upon petition of lot owners, is not in conflict with the more summary method of direct action of the trustees under § 4394, *et seq.*, R. S. 1894 (*ante*, § 1250, *et seq.*), but is simply another mode of doing the same work. Keith v. Wilson, 145 Ind. 149; Wiles v. Hoss, 114 Ind. 371.

Petition—Street improvement—Jurisdiction.—Under this section the board of trustees of an incorporated town acquire jurisdiction of the improvement of a street within the town, only when a majority of all the owners of any lots or parcels of land abutting on the street, residing within the town, shall petition the board of trustees for such improvement. Case v. Johnson, 91 Ind. 477, 486; Town of Covington v. Nelson, 35 Ind. 532; Anthony v. Williams, 47 Ind. 565.

Compliance with statute.—In proceedings of a board of trustees of an incorporated town for the improvement of a street, the rule is uniform that there must be a strict compliance with the provisions of the statute; otherwise the proceedings are illegal and void. Case v. Johnson, 91 Ind. 477, 492.

Void proceedings—Injunction.—Where the work in progress under void proceedings will be of no benefit, but a damage to the citizens of the town, a resident tax-payer of the town may, for himself and others of like interest, enjoin the prosecution of the work. Town of Covington v. Nelson, 35 Ind. 532.

Petition for improvement—Ordinance.—A petition of property owners in an incorporated town for the improvement of "Hope street, between Willow and Schofield streets," authorizes an ordinance for the improvement of "that portion of Hope street, and sidewalks thereof, lying between Schofield and Willow streets." Wiles v. Hoss, 114 Ind. 371, 379.

Public square.—To render a county liable for the improvement of a street around a public square, made by order of the board of trustees, it is not necessary that a petition for such improvement be filed. Board, etc., v. Shrader, 36 Ind. 87.

Petitioners—How counted.—Two methods of counting the petitioners are provided by this section; one by ascertaining the number of petitioners simply, the other by measuring the front lines of the land or parcels of land bordering upon the part of the street to be improved, and thus ascertaining whether or not the petitioners represent a majority of the front feet. Indianapolis, etc., R. Co. v. Ross, 47 Ind. 25.

Notice of letting of contract—Time—Sunday.—Where an advertisement under this section by the board of trustees, for bids for certain proposed street improvements, stated that bids would be received up to a certain hour on the following "Saturday, September 19," but, the 19th being Sunday, the bids were opened and the contract let on the 18th, the notice was reasonable and sufficient. Case v. Johnson, 70 Ind. 31; Case v. Fowler, 65 Ind. 29.

Same.—The question as to whether or not there was a proper advertisement for bids is a question of fact which arises "prior to the making of the contract," and this question can not be tried in an action to enforce an assessment. Wiles v. Hoss, 114 Ind. 371, 380.

Contract, when sufficient.—A written proposal by the town authorities of the work to be done, a written bid to do the proposed work and a written acceptance of the bid by the proper authorities, together constitute a sufficient and binding contract. Wiles v. Hoss, 114 Ind. 371, 379.

Contract—Writing.—The contract between the contractor and the town for an improvement should be in writing. Overshiner v. Jones, 66 Ind. 452; City of Indianapolis v. Imberry, 17 Ind. 175; Moberry v. City of Jeffersonville, 38 Ind. 198; Budd v. Kraus, 79 Ind. 137.

Parol acceptance of bid.—The parol acceptance, by the board of trustees of the town, of the written bid of the contractor, is not such a contract as the statute requires. An acceptance of a bid which contains no agreement by the contractor to perform the work, is not a valid contract. Overshiner v. Jones, 66 Ind. 452.

Contract with town officers—Void.—A contract between the board of trustees and any officer of the town, for the construction of any public work for the use of the town, is absolutely void. Case v. Johnson, 91 Ind. 477; Benton v. Hamilton, 110 Ind. 294; Pratt v. Luther, 45 Ind. 250. See Town of Tipton v. Jones, 77 Ind. 307; 1 Dillon Munic. Corps. (4th ed.), § 444.

1256. Cost, how apportioned.—9. In all contracts specified in the last preceding section, the cost of any such improvement shall be estimated according to the whole length of such street or alley, or the part thereof to be improved, per running foot; and the town shall be liable for so much thereof only as is occupied by public grounds of said town bordering thereon, and the crossings of the streets and alleys; and the owners of lots or parcels of land bordering on such street or alley, or the part thereof to be improved, shall be liable to the contractor for their proportion of the cost of such improvement in the ratio of the first [front] line of lots or parcels of land owned by them to the whole improved line: *Provided*, That when the owner of any lot or parcel of land shall have made any improvement in front of his lot or parcel of land in accordance with the general plan for the improvement of such street or alley, and under the direction of the board of trustees, he shall be entitled to a reasonable allowance therefor upon his proportion of the cost of such improvement; which reasonable allowance shall be determined by said board of trustees: *Provided*, That every such owner of lot or parcel of land, improved as aforesaid, shall be entitled to a credit for his road tax and road-labor tax that may accrue for the year in which the improvement is made. R. S. 1894, § 4402.

This section held repealed by implication. See preceding section and cases.

Railroad—Assessment.—Under this section, where a railroad company occupied and used one side of a street of a town as for a right of way, and owned real estate contiguous to said side, said real estate was liable to assessment for the improvement of said street. Indianapolis, etc., R. Co. v. Ross, 47 Ind. 25. See 2 Elliott Railroads, § 785-790; Elliott Roads and Streets, p. 403.

Rules of construction—Power to assess and to pay from general fund.—A city or town can not compel abutting land-owners to pay for street improvements unless empowered so to do by statute, and when so empowered, the statute will be strictly construed. The power to make street improvements to be paid for out of the city or town treasury is liberally construed. Town of Marion v. Skillman, 127 Ind. 131.

Repairing—Assessment.—Power to assess abutting property owners with the cost of grading and paving a street does not of itself authorize a city or town to assess such owners with the cost of repairing such street. Town of Marion v. Skillman, 127 Ind. 131.

1257. Cost, how collected.—10. When any such contract shall be made, or shall have been heretofore made, and shall have been fulfilled or in progress of fulfillment, the board of trustees shall have power to cause estimates to be made, from time to time, of the amount of work done by the contractor, and to require such amount to be paid to him, deducting a reasonable percentage to secure the completion of the contract, until the whole shall be finished, and to prescribe the time in which the whole shall be completed; and such estimate shall be a lien upon the ground upon which they are assessed, in favor of said contractor. In case any of the owners of lots or parcels of land on which such assessments have been made, shall fail or refuse, for the space of ten days after the date of the estimate, to pay the amount thereof due by such person to such contractor, such contractor may immediately, by a suit in any court of competent jurisdiction, recover against such owners of lots or parcels of land the amount of such estimate; and upon execution against the property of said defendant upon such judgment, the same shall be sold for cash without regard to valuation or appraisement laws of this state: *Provided*, That in such suits on estimates, no question of fact shall be tried which may arise prior to the making of the contract for said improvement under the order of the board of trustees. When any contract for the improvement of any street or alley has been heretofore made, and wholly or partially completed, and the said improvements wholly or partially unpaid for, such contractor may collect the same under the provisions of this act, provided the requirements of this act have been followed by the board of trustees in letting such contract. R. S. 1894, § 4403.

This and the two preceding sections held repealed by implication. See cases under preceding sections.

Complaint—Sufficiency.—A complaint by the contractor against a property owner to recover an assessment must show, except where the street improvement is around a public square, that the improvement was asked for by a petition signed by a majority of the property owners; that the specifications were prepared and showed the kind, quantity, and location of the work to be done; that proposals to do the work were advertised for; that a contract to do the work according to specifications was entered into; that the work was done according to the contract; that the amount of the contract price was estimated to the different tracts of ground bordering on the street improved; that the board of trustees required the owners to pay the amount so estimated; and that the owner complained of failed or refused to pay the same within ten days after the date of such estimate. Anthony v. Williams, 47 Ind. 565; Overshiner v. Jones, 66 Ind. 452; Case v. Johnson, 91 Ind. 477.

Complaint—Necessary averments.—In an action under this statute to recover the expense of improving a street in a town, the complaint must show that every step required by the statute regulating such improvements has been taken. Anthony v. Williams, 47 Ind. 565; Moore v. Cline, 61 Ind. 113; Overshiner v. Jones, 66 Ind. 452; Ross v. Stackhouse, 114 Ind. 200, 202.

The complaint to be sufficient must allege facts showing that the town had power to bind the defendant, and had legally exercised it. Anthony v. Cooley, 61 Ind. 323.

The complaint should aver that the contract is in writing, and when it does not do so, and no copy of the contract is exhibited with the complaint, the same is bad. Overshiner v. Jones, 66 Ind. 452.

Assessment, complaint to enforce.—In an action by a contractor against the owner of a town lot to enforce an assessment thereon for street improvement, the complaint must aver the cost of the improvement, the length of the improved line upon the street, and the length of the front line of the lot; otherwise the complaint is insufficient on demurrer; and exhibits attached to such complaint, other than the copy of the assessment, can not be considered in determining its sufficiency. Mendenhall v. Clugish, 84 Ind. 94, 95.

Assessment, collection of—Estoppel.—A question as to whether or not there was a proper advertisement for bids is a question of fact which arose "prior to the making of the contract" for the improvement of the street, and, under § 4403, R. S. 1894, is not triable in an action to enforce an assessment. Wiles v. Hoss, 114 Ind. 371, 380.

Complaint—Exhibit—Contract.—A complaint by a contractor against a property owner, to recover an assessment made against the latter by the trustees of a town for grading the street whereon his property abuts, must be founded upon a written contract and must set forth the original contract or a copy thereof. A copy of the contractor's bond is not a sufficient substitute. Budd v. Kraus, 79 Ind. 137, 139.

Same—Exhibits.—Exhibits attached to such complaint, consisting of copies of the petition for such improvement, the record of the action of such board thereon, and of other documents connected therewith, can not be looked to in determining the sufficiency of the complaint. Moore v. Cline, 61 Ind. 113.

Complaint—Demurrer.—The sufficiency of a complaint by a contractor to recover for grading and graveling a street in an incorporated town, in reference to matters occurring prior to the making of the contract, may be tested by demurrer. Anthony v. Williams, 47 Ind. 565.

Contract—Mandamus.—Complaint against a town in two paragraphs, each showing a contract between the defendant by its trustees and the plaintiff for the improvement of a certain street at the expense of the adjacent property owners, the town to pay for street crossings, but the plaintiff to receive nothing until laborers were paid. The gravamen of the first paragraph was, that the town had failed to make necessary orders for the sale of property, and so had deprived the plaintiff of a remedy against the owners; and the gravamen of the second paragraph was, that the town, without cause, ordered the plaintiff, and with threats of violence compelled him, to stop the work, depriving him of the benefit of the contract. The first paragraph was insufficient, and the second, if sufficient, was good for nominal damages only. If the town were compelled to make compensation for the work done, it could not re-imburse itself by assessment, and it, therefore, was not liable on account of the delinquencies alleged in the first paragraph. The plaintiff's remedy was by mandamus. The complaint was insufficient for work done on crossings, for want of an averment that the laborers had been paid. The second paragraph did not show that the contract was valuable or valid; if not valid, the estimates could not have been enforced; and the plaintiff was not shown to have been injured by the interruption. Town of Tipton v. Jones, 77 Ind. 307, 312.

Assignment of contract—Trustee.—An answer, in such case, that the plaintiff had in writing assigned his contract, and all assessments and estimates made and to be made, to another person, who still held it, was good as against an action on the contract, but not as against the tort alleged in the second paragraph of complaint, if actual damage were shown. It was no objection to such assignment, as between the parties thereto, that the assignee was a trustee of the town, though he could not make a profit of it. Town of Tipton v. Jones, 77 Ind. 307, 316.

Public square—Liability of county—Appeal.—The contractor for the improvement of a street bordering on a public square in a town, upon receiving an estimate for work done, may present his claim therefor in the form of an account against the county, to the board of commissioners who have the power to allow it; and if payment is refused, he may either appeal from the action of the board to the circuit court, or bring an action against the county. Board, etc., v. Shrader, 36 Ind. 87.

Same—Pleading—Evidence.—It is not necessary that the account so presented should state that all the steps required by law to make a valid assessment were taken, but evidence thereof can be introduced on the trial on appeal. Board, etc., v. Shrader, 36 Ind. 87.

ARTICLE 5.—OPENINGS AND VACATIONS.

SEC.

1258. Power over streets, bridges, etc.
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1262. Assessment—Collection.
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1279. Action by county board.

[Acts 1869 S., p. 33. In force April 27, 1869.]

1258. Power over streets, bridges, etc.—1. The board of trustees of incorporated towns in this state shall have exclusive power over the streets, alleys, highways and bridges within the corporate limits of such town, and may prescribe the height and manner of construction of all such bridges, and lay out, survey, and open new streets and alleys, and straighten, narrow, widen, grade and gravel, and otherwise alter and improve those already laid out, or that may be hereafter laid out; and make repairs thereto as hereinafter provided. They may cause buildings, structures, and other things in the way of any streets or other public improvement to be taken down, removed and appropriated, upon the payment of damages as hereinafter provided. And no person residing in said town shall be compelled to work on any road or highway without the corporate limits of said town. And the board of trustees may exercise all the powers given to township trustees in regard to highways in their respective towns; and the marshal, under the direction of the board of trustees, may perform all the duties and exercise all the powers of road supervisors in reference to a road labor tax, not to exceed two days in each year, by each person liable to work on roads in townships, and shall be governed by the same rules and regulations in reference to the collections and enforcement of the same, and any person so liable to work may be discharged therefrom on the payment of one dollar and fifty cents per diem: *Provided*, That the board of trustees may, by general ordinance, prescribe the time within which and the manner in which such labor shall be performed. R. S. 1894, § 4404.

See Cities and Towns, *ante*, § 1107, *et seq.*, and *ante*, §§ 1195, 1250; also Cities, § 218 and notes.

Power over streets—Repairs—Liability.—An incorporated town has exclusive power over its streets, and is under the duty to use ordinary care to keep them in a reasonably safe condition for travelers thereon, exercising ordinary care, and failure to exer-

cise such care will subject the town to a liability for damages for injuries caused by such failure. Town of Worthington v. Morgan, 17 App. 603; Keith v. Wilson, 145 Ind. 149; Dooley v. Town of Sullivan, 112 Ind. 451; Town of Gosport v. Evans, 112 Ind. 133; Town of Spiceland v. Alier, 98 Ind. 467; Town of Rushville v. Poe, 85 Ind. 83; Town of Salem v. Goller, 76 Ind. 291; Town of Knightstown v. Musgrove, 116 Ind. 121; Town of Marion v. Skillman, 127 Ind. 130; Alexander v. Town of New Castle, 115 Ind. 51; Town of Albion v. Hetrick, 90 Ind. 545; Town of Centerville v. Woods, 57 Ind. 192; Town of Elkhart v. Ritter, 66 Ind. 136; Pittsburgh, etc., R. Co. v. Town of Crown Point, 146 Ind. 421; Town of Kentland v. Hagen, 17 App. 1; Scudder v. Hinshaw, 134 Ind. 56; Town of Rosedale v. Ferguson, 3 App. 596; Wickwire v. Town of Angola, 4 App. 253; Town of Fowler v. F. C. Austin Mfg. Co., 5 App. 489; Town of Monticello v. Kennard, 7 App. 135; Sparling v. Dwenger, 60 Ind. 72; State v. Mainey, 65 Ind. 404; Snyder v. Town of Rockport, 6 Ind. 237; Town of Nappanee v. Ruckman, 7 App. 361; Town of Salem v. Walker, 16 App. 687; Drew v. Town of Geneva, 150 Ind. 662; Town of Williamsport v. Lisk, Ind. App. Ct., Jan. 11, 1899; Elliott Roads and Streets, p. 327, *et seq.*

Streets and turnpikes—When reasonably safe for travel—How determined.—Whether a street or turnpike is reasonably safe for travel is a question to be determined by the surrounding circumstances, the nature and surface of the soil over which the road is made, the natural obstructions and obstacles to be overcome, its situation and locality, and the kind and amount of public travel which pass over it. Sale v. Aurora, etc., Co., 147 Ind. 327; 2 Dillon Munic. Corp., §§ 1006, 1008, 1016, 1019.

Use of streets—Easement—Expansive.—The easement in a street is not limited to the particular methods of use in vogue when the easement was acquired, but included all new and improved methods, the utility and general convenience of which may afterward be discovered and developed in aid of the general purpose for which highways are designed. It is not material that these new and improved methods of use were not contemplated by the owners of the land when the easement was acquired, and are more onerous to him than those then in use. Magee v. Overshiner, 150 Ind. 127; Elliott Roads and Streets, p. 529.

By virtue of the above section and *ante*, §§ 1195, 1250, 1251, 1252 and 1253 (R. S. 1894, §§ 4352, 4394, 4395, 4396, 4397), the board of trustees of an incorporated town is vested with plenary powers and exclusive jurisdiction over the streets and the improvement and repair thereof. Drew v. Town of Geneva, 150 Ind. 662; Keith v. Wilson, 145 Ind. 149.

A town having passed an ordinance for the improvement of a street, may maintain an action for injunction in the name of the corporation against an abutting owner who insists upon making permanent improvements in respect to the streets, in defiance of the ordinance of the board of trustees. Drew v. Town of Geneva, 150 Ind. 662.

The exclusive power conferred by this section is inconsistent with the exercise of any power over the streets by the county board of commissioners. The act of 1891 (R. S. 1894, § 5175), does not take away from the town board and confer upon the county board the control over the streets in a town to any degree, and an order of the county board requiring a railroad company to keep a flagman at a street crossing in a town is of no effect. State v. Chicago, etc., R. Co., 151 Ind. 474.

The legislature in granting to cities and towns exclusive authority over the streets did not abridge its power to define and punish misdemeanors, nor did the legislature thereby repeal or modify the statutes then in force, making acts relating to streets in towns or cities, crimes. The wrongful obstruction of a public street or sidewalk in a city or town is a misdemeanor under the criminal laws of the state, and a city or town can not enact an ordinance prescribing a penalty for any one who obstructs such street. City of Indianapolis v. Higgins, 141 Ind. 1.

Under a prior incorporating act, the president and trustees of an incorporated town did not have such possession of the streets of the town as to enable them to maintain

an action of trespass *quare clausum fregit* for an injury thereto. Conner v. President, etc., 1 Blackf. 88.

Eminent domain—Lot-owner's right.—The owner of a lot abutting upon the street of a town has a property-right in the street as it exists, which can not be appropriated and taken from him against his consent without compensation, but in the exercise of the power of eminent domain it may be taken for a public use by due process of law. State v. Berdetta, 73 Ind. 185, 189; Ross v. Thompson, 78 Ind. 90, 94; Cummins v. City of Seymour, 79 Ind. 491, 498; City of Logansport v. Shirk, 88 Ind. 563, 571; City of Indianapolis v. Kingsbury, 101 Ind. 200, 211; Town of Rensselaer v. Leopold, 106 Ind. 29, 31; Terre Haute, etc., R. Co. v. Bissell, 108 Ind. 113, 116; Indiana, etc., R. Co. v. Eberle, 110 Ind. 542, 546; City of Lafayette v. Nagle, 113 Ind. 425, 427; Burkam v. Ohio, etc., R. Co., 122 Ind. 344, 345; Kincaid v. Indianapolis, etc., Co., 124 Ind. 577, 579; Adams v. Ohio, etc., Co., 131 Ind. 375, 378; Dantzer v. Indianapolis, etc., Co., 141 Ind. 604; Lostutter v. City of Aurora, 126 Ind. 436; Egbert v. Lake Shore, etc., R. Co., 6 App. 350; Haslett v. New Albany, etc., R. Co., 7 App. 603; Elliott Roads and Streets, pp. 142, 154.

Discretion of municipal body.—Unless it is apparent at first blush that the proposed use is not public, courts can not interfere with the discretion confided in a municipal body in doing what the statute expressly authorizes. Town of Rensselaer v. Leopold, 106 Ind. 29.

Exclusive privileges.—A municipal corporation can not grant to a private corporation the exclusive privilege of using its streets for the purpose of supplying the corporation or its citizens with light, water, fuel or the like. Citizens', etc., Co. v. Town of Elwood, 114 Ind. 332; City of Rushville v. Rushville, etc., Co., 132 Ind. 575; Indianapolis, etc., Co. v. Citizens', etc., R. Co., 127 Ind. 369; Crowder v. Town of Sullivan, 128 Ind. 486; Elliott Roads and Streets, pp. 332, 566–569; 1 Beach Pub. Corp., § 622.

Defects and obstructions—Liability for.—A municipal corporation is required to exercise vigilance in keeping its streets and sidewalks in a reasonably safe condition for travel by night as well as by day; but, that a pavement has become uneven, or that bricks therein may be displaced by the action of the elements, does not necessarily involve such municipality in liability if the defect can be readily discovered and easily avoided by persons exercising due care, or if the defect be of such a nature as not of itself to be dangerous to persons so using the walk. Town of Gosport v. Evans, 112 Ind. 133.

Same—Injunction.—In an action to enjoin the obstruction of a public highway within the limits of an incorporated town and under the jurisdiction and control of such corporation, brought by a plaintiff who predicates his right to such relief on the ground that he is the owner of certain lots fronting upon the highway obstructed by a third person, such corporation is not a necessary party plaintiff. Debolt v. Carter, 31 Ind. 355.

Power to assess—Improvement at public expense—Rules of construction.—The city or town can not compel abutting land owners to pay for street improvements unless empowered so to do by statute; and when so empowered, the statute will be strictly construed. The power to make street improvements, to be paid for out of the city or town treasury, is liberally construed. Town of Marion v. Skillman, 127 Ind. 130; Elliott Roads and Streets, pp. 369, 370, 374.

Repairing.—Power to assess abutting lot-owners with the cost of grading and paving a street does not, of itself, authorize a city or town to assess such owners with the cost of repairing such street. Town of Marion v. Skillman, 127 Ind. 130.

Street improvement—Injunction.—Before the courts will, at the suit of an abutting land-owner, enjoin municipal authorities from making street improvements, at the public expense at least, it must be shown that there has been a clear invasion of the rights of such complaining land-owner, and that unless the injunction be granted, the

abutting land-owner will suffer irreparable injury. Town of Marion v. Skillman, 127 Ind. 130.

Mode of improvement—Mandamus—Discretion.—The board of trustees have exclusive power over the streets and alleys of the town, with power to improve the same, and the manner of improvement being discretionary with the board, their discretion as to the mode of improvement can not be controlled by mandamus. State v. Miles, 138 Ind. 692.

Improvement of streets—Negligence or unskillfulness—Damages—Abutting proprietors.—Where the improvement of the street is carefully and skillfully made, the town can not be held liable to any lot-owner for merely consequential damages to him or his lot; but where the work is negligently or unskillfully done, the town will be liable in damages to the abutting lot-owner for such injuries to his lot and premises as result directly from negligence or unskillfulness in the improvement of the street. Town of Princeton v. Gieske, 93 Ind. 102; Platter v. City of Seymour, 86 Ind. 323; City of Evansville v. Decker, 84 Ind. 325; Elliott Roads and Streets, pp. 204–206, 336.

Where an incorporated town itself undertakes the improvement of its streets, and is sued by an abutting proprietor to recover damages resulting from its negligence in doing the work, it is no defense to the action that the improvement of the streets enhanced the market value of the plaintiff's property; and, therefore, evidence offered of such enhanced market value was incompetent and properly excluded. Town of Martinsville v. Shirley, 84 Ind. 546.

Assessment of damages—Opinion of witnesses.—In the assessment of the plaintiff's damages to the property of an abutting owner in the improvement of a street the jury is not bound or concluded by the opinion or estimates of witnesses as to the amount of damages. Town of Princeton v. Gieske, 93 Ind. 102.

Estoppel of property owner.—If the owner of property in a town stands by, and, without objecting, permits improvements to be made which benefit his property, he is estopped to afterward deny the authority of the town to make the improvements. Powers v. Town of New Haven, 120 Ind. 185; Taber v. Ferguson, 109 Ind. 227; Ross v. Stackhouse, 114 Ind. 200; City of Evansville v. Pfisterer, 34 Ind. 36; Jenkins v. Stettler, 118 Ind. 275; Johnson v. Allen, 62 Ind. 57; Elliott Roads and Streets, pp. 419, 423.

Estoppel—Standing by—Silence.—Mere silence of the property owner having knowledge that the work in grading a street is being done, and his failure to object and to prevent it by injunction, will not estop him to contest an assessment against his property made without any contract. Budd v. Kraus, 79 Ind. 137, 140.

Acceptance of work.—In such case, the contractor can not be heard to allege that the property owner received and accepted the grade, which can be done only by the trustees of the town. Budd v. Kraus, 79 Ind. 137, 141.

Power to narrow street.—The board of trustees of an incorporated town in this state have, upon the conditions imposed by the statutes, power to narrow a street, and property appropriated in making such improvement is for a public use. Town of Rensselaer v. Leopold, 106 Ind. 29, 34.

Narrowing sidewalk.—Town trustees have power to determine the width of a sidewalk; and they are not required to make it of uniform width throughout the entire length of the street, nor to make the improvement of such sidewalk for the entire length of uniform width. Town of Marion v. Skillman, 127 Ind. 130.

Power to widen street.—Under the act of April 27, 1869 (§§ 4401, 4405, R. S. 1894), an incorporated town has no authority to order, in the same proceeding, a street to be widened, graded and graveled, as the proceeding to widen is distinct from a proceeding to grade and gravel, and these proceedings can not be blended; and an assessment made by virtue of such order is void. Mendenhall v. Clugish, 84 Ind. 94, 98.

Street—Consent of members to change.—Consent of members of a town board to a change in a street, unless given while assembled as a board, can not be regarded as an act of the corporation. Blue v. Briggs, 12 App. 105.

Grade and change of grade of street.—An incorporated town is not liable for consequential damages arising by reason of the changing of the grade of its streets. After the grade has been established and improvements made with reference thereto, the town has power to change the grade without payment of damages. Baker v. Town of Shoals, 6 App. 319; Snyder v. President, etc., 6 Ind. 237; City of Wabash v. Alber, 88 Ind. 428; Burr v. Town of New Castle, 49 Ind. 322; Elliott Roads and Streets, p. 336.

The board of trustees may change the grade of a sidewalk at any time before the work on an improvement is completed, in such manner as in their judgment would make the walk beneficial to the public. State v. Miles, 138 Ind. 692.

Invalid order fixing grade—Improvement—Liability of contractor.—Where an order establishing the grade of a street in a town is passed by the board of trustees without an emergency clause, and no notice of its adoption is given, a lot owner whose property is injured by the improvement of the street may maintain an action against the contract or for the damages. Meyer v. Fromm, 108 Ind. 208.

An ordinance establishing the grades of certain streets in a town is not void for uncertainty, if the grades so established can be ascertained without difficulty. Burr v. Town of New Castle, 49 Ind. 322.

Town grade—Change by city.—An incorporated town having established a grade of a street and improved it accordingly, afterwards became a city and changed the grade, much to the injury of an abutting lot. The proviso to R. S. 1894, § 3508, did not require the city to pay damages. City of Wabash v. Alber, 88 Ind. 428; City of Huntington v. Griffith, 142 Ind. 280.

Negligence—Specific act of negligence—Complaint.—A complaint against the town for a personal injury suffered by reason of a fall in the street must show that the injury was caused by some specific act of negligence or omission of duty on the part of the town; and a charge that the town, while grading a street, caused the digging of a hole ten inches deep and twelve inches in diameter which it negligently permitted to remain in the street for ten days uncovered and unguarded, and that, while walking along the street the plaintiff, without negligence on her part, stepped into the hole and was thrown down and injured, is insufficient. Town of Rushville v. Poe, 85 Ind. 83.

Notice—Active and constructive—Safety of streets.—A municipal corporation is not an insurer of the safety of its streets, but it is bound to exercise reasonable care and diligence to keep them in a reasonably safe condition. The corporation is entitled to notice of the defect, and to a reasonable time in which to remove it, where it has been caused by some third person. The notice may be either actual or constructive. Whenever the defect has existed such length of time as that, when its character and location and the other attendant circumstances are considered, the corporation, by the exercise of reasonable diligence, ought to have discovered and removed the defect, then it will be held liable for damages occasioned thereby to one himself without fault. Town of Monticello v. Kennard, 7 App. 135; Higert v. City of Greencastle, 43 Ind. 574; City of Richmond v. Mulholland, 116 Ind. 173; City of Franklin v. Harter, 127 Ind. 446; Turner v. City of Indianapolis, 96 Ind. 51; City of Huntington v. Breen, 77 Ind. 29; Town of Spiceland v. Alier, 98 Ind. 467; City of Evansville v. Wilter, 86 Ind. 414; Town of Rosedale v. Ferguson, 3 App. 596; City of Aurora v. Bitner, 100 Ind. 396; City of Ft. Wayne v. Patterson, 3 App. 35; City of Huntingburg v. First, Ind. App. Ct., March 10, 1899.

Same—When notice need not be shown.—Where the defect in the street which caused the injury is attributable to the act of the corporation itself, it is not necessary to prove notice. In making improvements in the street, a municipal corporation is bound to take notice of such defects as ordinary skill and prudence will discover. City of Ft. Wayne v. Patterson, 3 App. 34; Board, etc., v. Bacon, 96 Ind. 31; City of Ft. Wayne v. Coombs, 107 Ind. 75; City of Warsaw v. Dunlap, 112 Ind. 576; Board, etc., v. Pearson, 120 Ind. 426.

Constructive notice—Length of time—Question of fact.—What length of time will be sufficient to charge the city or town with constructive notice is in most cases a question of fact for the jury. City of Aurora v. Bitner, 100 Ind. 396; City of Ft. Wayne v. Patterson, 3 App. 34.

Excavation in street—Complaint—Notice.—In an action against a town, to recover damages for an injury received by the plaintiff by a fall into an excavation in a sidewalk in a public street of said town, the complaint alleged that the defendant had "negligently permitted such excavation to be made;" that it was "so situated as to prevent pedestrians from passing along the said sidewalk * * without turning into" the street; that said excavation was upon a street "most used by the public, * * and was by the defendant so negligently and carelessly allowed to remain several days prior to said accident, without any proper or sufficient guards, lights, notices or railings * * ; that, at the date of said accident, the plaintiff resided in said town, and was engaged in daily labor, by which she gained her support; * * " that in the evening, about dark, she attempted to pass along said street, when, "without fault or negligence on her part she fell into said excavation and was thereby greatly injured, both externally and internally, disabled to labor, put to great expense," etc. On demurrer the complaint is sufficient; also, the clear inference from the facts alleged is that the defendant had notice of the excavation, and of its condition, but that no such notice to the plaintiff can be inferred. Town of Elkhart v. Ritter, 66 Ind. 136.

Notice of defect—Complaint.—When in a complaint it is averred "that the defendant knew of, and had notice of, the identical hole and defective place and sidewalk where plaintiff was injured, as aforesaid, a sufficient length of time before the injury occurred to have repaired the defective place before the 2d day of April, 1891," the time of the occurrence, is a sufficient averment of notice to the town of the alleged defect. Town of Nappanee v. Ruckman, 7 App. 361.

Notice—Complaint.—A complaint against an incorporated town for an injury resulting from a defective sidewalk, which fails to aver notice by the corporation of the defect, or facts by reason of which the law will impute notice, or from which it may be reasonably inferred, is bad on demurrer. Town of Spiceland v. Alier, 98 Ind. 467; Turner v. City of Indianapolis, 96 Ind. 51.

Notice to trustee—Notice to town.—Notice to a member of the board of trustees of a town of the defective condition of a street is notice to the town. Jewell v. Town of Sullivan, 5 App. 188; City of Logansport v. Justice, 74 Ind. 378; City of Columbus v. Strassner, 124 Ind. 482.

Obstruction of street—Notice.—Where a pile of brush two feet high, projecting eight feet into one of the principal streets of a town, near the business portion thereof, remained in such position for three days, the corporation was chargeable with notice of such obstruction, and with liability for any damages resulting from such negligence, where the injured person is free from contributory negligence. Town of Monticello v. Kennard, 7 App. 135, 140.

Negligence—Damages—Proximate cause.—Where one, while passing along the street of a town in charge of a prisoner, is seized by the latter in an attempt to escape and thrown into a pit negligently permitted by the town authorities to remain in the street, whereby he suffers injury, the town is not liable, its negligence not being the proximate cause of the injury. Alexander v. Town of New Castle, 115 Ind. 51, 53.

Obstruction of highway—Damages to abutting owner.—The owner of real estate abutting on a public highway can not maintain an action for the obstruction of such highway, unless some special injury, one not common to all who use the highway, has been sustained, where such abutting owner is not the owner in fee-simple of any part of the highway. Pittsburg, etc., R. Co. v. Noftsger, 148 Ind. 101.

Excavations under sidewalk—Liability of abutting owner.—An excavation made

in a street or under the sidewalk for private purposes is a nuisance *per se*, if made without the consent of the municipality; but if made with such consent, it does not become a nuisance until it renders the street actually dangerous. The author is bound only to exercise ordinary care and diligence to maintain the same in a safe condition, and is answerable only for his negligence. Wickwire v. Town of Angola, 4 App. 253; City of Elkhart v. Wickwire, 87 Ind. 77; McNaughton v. City of Elkhart, 85 Ind. 384; Elliott Roads and Streets, p. 482.

Although the excavation was made by a prior owner and a remote grantor of the defendants, by and with the consent of the town, the excavation is presumptively a beneficial appurtenance to the realty, and the defendants were liable for a failure to keep it in a safe condition, if they maintained and used it. Wickwire v. Town of Angola, 4 App. 253.

Improvement of sidewalk by lot-owner—Excavation.—To a complaint against a town to recover for an injury sustained by falling, in the night time, into an excavation in a sidewalk, an answer that the excavation was made by the owner of the abutting lot in pursuance of an ordinance requiring him to improve the sidewalk, and that he had, when the work was left on the night in question, placed proper danger signals at the excavation, which the plaintiff, without any fault on the part of the lot-owner, had disregarded, is good. Dooley v. Town of Sullivan, 112 Ind. 451.

Liability of town for acts of property owner.—The acts of the property owner, who improves a sidewalk under an ordinance, are not the acts of the town in such sense as to charge the latter for his negligence; but, in order to charge the corporation, evidence of his negligence must be supplemented by evidence that the town authorities were negligent, or that the work directed to be done was intrinsically dangerous. Dooley v. Town of Sullivan, 112 Ind. 451.

Danger signals—Watch.—Only ordinary care is required of a municipal corporation, its agents and contractors, and it is sufficient to show that proper signals or guards were placed about an excavation on quitting work, unless there are circumstances peculiar to the particular case making it necessary that a watch be kept, and if such signals or guards are removed during the night by a wrong-doer there is no liability against the town. Dooley v. Town of Sullivan, 112 Ind. 451.

Defective covering of coal hole in sidewalk—Negligence—Damages.—In order to charge the owner of the fee in a street in front of his premises with negligence, because of the defective fastening of the cover of a coal hole in the sidewalk, it must appear that he placed the cover in the sidewalk, or, if made and placed there by others without his authority or acquiescence, that he assumed control thereover. Gaston v. Bailey, 14 App. 581.

Neither the city nor the owner of the fee in a street guarantees the absolute safety of the sidewalk, and negligence is essential to the liability of the owner for an injury received upon such walk. Gaston v. Bailey, 14 App. 581.

Permitting objects in street calculated to frighten horses—Damages.—Towns and cities, in the absence of contributory negligence, are liable for injuries resulting from the fright of horses, of ordinary gentleness, at objects naturally calculated to frighten them, and which the corporation has negligently placed, or permitted to be placed, and to remain upon the street. Town of Rushville v. Adams, 107 Ind. 475. See Cleveland, etc., R. Co. v. Wynant, 114 Ind. 525, 531; Town of Fowler v. Linquist, 138 Ind. 566.

Contributory negligence—Knowledge of obstruction—Assumption of risk.—If a person knows there is an obstruction in a street, and he attempts to pass the place, where, in consequence of the darkness of the night, or other hindering cause, he can not see the obstruction and runs upon it, he takes the risk upon himself, and if he sustains injury can not recover. President, etc., v. Dusouchett, 2 Ind. 586; Bruker v. Town of Covington, 69 Ind. 33; Riest v. City of Goshen, 42 Ind. 339; Louisville, etc., R. Co. v. Schmidt, 81 Ind. 264; City of Indianapolis v. Cook, 99 Ind. 10; Evansville, etc.,

R. Co. v. Griffin, 100 Ind. 221; Town of Gosport v. Evans, 112 Ind. 133; Morrison v. Board, etc., 116 Ind. 431; Evansville, etc., R. Co. v. Crist, 116 Ind. 446; Town of Boswell v. Wakley, 149 Ind. 64; Rogers v. City of Bloomington, Ind. App. Ct., Dec. 16, 1898.

If the danger is so near and so great that a prudent man, knowing of its existence, would not assume the hazard of encountering it, then it will constitute contributory negligence for the traveler to voluntarily encounter the same. Evansville, etc., R. Co. v. Crist, 116 Ind. 446; Town of Gosport v. Evans, 112 Ind. 133; City of Richmond v. Mulholland, 116 Ind. 173; Lake Shore, etc., R. Co. v. Pinchin, 112 Ind. 592.

Contributory negligence—Knowledge of obstruction.—Where a party knows of the existence of an open cellarway in a sidewalk, and attempts to pass the place in the night, he will be considered as taking the risk on himself, even if at the time he had forgotten the existence of the obstruction, and if he receives injuries from falling into such cellarway he is guilty of contributory negligence and can not recover damages. Bruker v. Town of Covington, 69 Ind. 33.

Where plaintiff passed over a sidewalk that was out of repair three or four times a week for several weeks prior to his injury, and had actual knowledge that the sidewalk was old and boards loose and walk dangerous, and was walking over it in the dark with his hands in his pockets, and could have gone home by some other route, and there was no evidence that he was actually trying to avoid anticipated danger, he is not free from contributory negligence, and can not recover damages because of being tripped up by a loose board in the sidewalk. Where a traveler knows of the general condition of a sidewalk and that some boards are loose and dangerous, but does not know that the particular board over which he afterwards trips was loose, he is held to know of the defect. Town of Boswell v. Wakley, 149 Ind. 64.

Same.—One who sees an obstruction in a street or sidewalk, and, knowing its dangerous character, deliberately goes into or upon it when he is under no compulsion to do so, or might avoid it by going around, takes the risk upon himself, and if injured on account of such obstruction can not, because of contributory negligence, maintain an action therefor. Town of Gosport v. Evans, 112 Ind. 133.

Same.—It is contributory negligence upon the part of a horseman, who, riding upon a street in a city or town, encounters an obstruction which frightens his horse, to thereafter, voluntarily and without necessity to do so, again ride his horse in proximity to such obstruction. Town of Salem v. Walker, 16 App. 687.

Same—Action—Burden.—In an action against a municipal corporation for injuries caused by the failure of the corporation to keep the streets in safe condition, the plaintiff must allege in his complaint and prove that the injury was incurred without his own negligence having contributed thereto. The burden is on him to show, not only the negligence of the corporation, but his own freedom from negligence contributing to the injury. Town of Salem v. Walker, 16 App. 687. But this rule has been changed so that absence of contributory negligence need not be alleged and proved by the plaintiff, negligence of the plaintiff being made matter of defense provable under the general denial. See Acts 1899, p. 58.

Knowledge of defect—Traveler not bound to forego travel—Degree of care.—Knowledge that there is a defect in a highway, making it dangerous to attempt to travel upon it, does not of itself make it negligence to use the highway carefully and cautiously. Knowledge of this existence of a dangerous place does, however, make it incumbent upon the traveler to use care and caution proportionate to the danger which he knows lies in his way. Town of Salem v. Walker, 16 App. 687; City of Indianapolis v. Cook, 99 Ind. 10; Town of Albion v. Hetrick, 90 Ind. 545; Toledo, etc., R. Co. v. Brannagan, etc., 75 Ind. 490; City of Huntington v. Breen, 77 Ind. 29; Wilson v. Trafalgar, etc., Co., 93 Ind. 287; Turner v. Buchanan, 82 Ind. 147; Murphy v. City of Indianapolis, 83 Ind. 326; Town of Gosport v. Evans, 112 Ind. 133; Lake Shore, etc., R. Co. v. Pinchin, 112 Ind. 592; Vance v. City of Franklin, 4 App. 515; Evansville, etc., R. Co. v. Carvener, 113 Ind. 51; City of Richmond v. Mulholland,

116 Ind. 173; Evansville, etc., R. Co. v. Crist, 116 Ind. 446; Pennsylvania Co. v. Marion, 123 Ind. 415; City of Ft. Wayne v. Breese, 123 Ind. 581; City of Columbus v. Strassner, 124 Ind. 483; Town of Williamsport v. Lisk, 21 App. 414; City of Huntingburg v. First, Ind. App. Ct., March 10, 1899.

Instruction to jury—Harmless error.—An instruction that if the street was in ordinarily safe condition for ordinary public travel, the plaintiff could not recover, the town not being bound to provide against extraordinary conditions or circumstances, is correct as an abstract proposition, and, even if not applicable to the case made, is not harmful to the plaintiff. Alexander v. Town of New Castle, 115 Ind. 51, 54.

Negligence—Question for jury.—Where the evidence is conflicting it is for the jury to find from the evidence whether the defendant was negligent and the plaintiff free from fault and not for the court to find as matter of law. Town of Williamsport v. Lisk, 21 App. 414.

Defect in street—Act of third person—Damages.—In an action against a town, to recover damages for injuries received by a person while traveling on one of her public streets, by reason of a defect therein, it is no defense that such defect was caused by the act of a third person, without the consent of the town. Where, in such case, damages are recovered from the town for such injury, the latter, in an action against such third person, may compel him to repay such damages. Town of Centerville v. Woods, 57 Ind. 192; Town of Elkhart v. Ritter, 66 Ind. 136; Elliott Roads and Streets, pp. 546, 547.

Same—Cost of repairs—Recovery from third person.—Where a third person has unlawfully injured a public street of a town, which he has refused, on demand, to repair, and the same has been repaired by the town, he is liable to the latter for the cost of such repairs. Town of Centerville v. Woods, 57 Ind. 192.

Contributory negligence of third person.—Persons who are injured by reason of defects or obstructions in streets, and who are free from fault, may recover for such injuries, although the negligence of some third person may have contributed to the injury. Town of Knightstown v. Musgrove, 116 Ind. 121; Louisville, etc., R. Co. v. Creek, 130 Ind. 139; City of Michigan City v. Boeckling, 122 Ind. 39; Town of Nappanee v. Ruckman, 7 App. 361; Elliott Roads and Streets, pp. 451, 452.

The concurring fault of the driver of the vehicle in which the plaintiff is riding will not defeat his action, when he is himself free from fault; in such case a husband's negligence is not imputed to the wife. Town of Knightstown v. Musgrove, 116 Ind. 121; City of Michigan City v. Boeckling, 122 Ind. 39; Louisville, etc., R. Co. v. Creek, 130 Ind. 139; Miller v. Louisville, etc., R. Co., 128 Ind. 97; Elliott Roads and Streets, pp. 631, 632.

The contributory negligence of the driver and manager of a carriage will not defeat an action by one who was passively riding with him upon invitation, for personal injuries caused by the negligence of town authorities in leaving a dangerous obstruction in the streets without proper safeguard, if the person injured be himself without fault. Town of Knightstown v. Musgrove, 116 Ind. 121.

When negligence of third persons is a defense.—Before the concurring negligence of a third person can be interposed to shield another, whose negligence has caused an injury to one who was without fault, it must appear that the injured person and the one whose negligence contributed to the injury sustained such a relation to each other in respect to the matter then in progress, that in contemplation of law the negligent act of the third person was, upon the principles of agency, or co-operation in a common or joint enterprise, the act of the person injured. Town of Knightstown v. Musgrove, 116 Ind. 121; Town of Nappanee v. Ruckman, 7 App. 361.

Contributory negligence—Master and servant—Complaint.—In an action against a town for a personal injury received while attempting to cross a gully in a street, over which the plaintiff was driven by a servant in a wagon loaded with hay, an allegation in the complaint that the plaintiff was without fault is equivalent to an allegation that

neither the plaintiff nor his servant was in fault; and allegations that, though seeing the gully, the plaintiff believed it reasonably safe to make the attempt, and used due and ordinary care, and that there was no other safe road, do not show contributory negligence on the part of plaintiff. Town of Albion v. Hetrick, 90 Ind. 545.

Same—Question of fact for jury—Witness—Opinion.—In the case stated in previous note, whether the plaintiff, in attempting to cross the gully, was guilty of negligence, is a question of fact for the jury. Upon the trial of such action the opinions of witnesses who are acquainted with the street are not admissible to prove that the place was so dangerous that a prudent man would not attempt to cross it. Town of Albion v. Hetrick, 90 Ind. 545.

Liability of property owner or third person—Damages paid by town.—If a town is compelled to pay damages on account of a defect in a street, and such defect was caused by the wrongful act of a third party, such town may recover the amount of such damages from such third person. McNaughton v. City of Elkhart, 85 Ind. 384; Town of Centerville v. Woods, 57 Ind. 192; City of Elkhart v. Wickwire, 87 Ind. 77; Wickwire v. Town of Angola, 4 App. 253.

Notice to defend—Effect.—Where the person who has wrongfully or negligently caused the injury is notified of an action against the town, instituted by one who has suffered injury because of such wrongful and negligent act, the judgment will be conclusive against him as to the questions adjudicated in the action. City of Elkhart v. Wickwire, 87 Ind. 77; McNaughton v. City of Elkhart, 85 Ind. 384.

Judgment—Res adjudicata.—In such case, where the town, upon being sued, notified the wrong-doer thereof, and that it will look to him for indemnity, the judgment concludes him as to the facts thereby adjudicated. McNaughton v. City of Elkhart, 85 Ind. 384.

Railroad crossings—Watchmen—Gates.—An incorporated town can not by ordinance compel a railroad company to keep a watchman and erect and maintain gates at points where the tracks cross a street, and impose penalties for the failure so to do. Express power has not been conferred by the statute to pass and enforce such an ordinance, nor can such power be implied from those expressly granted, nor is such power essential to the declared objects or purpose of the corporation. Pittsburgh, etc., R. Co. v. Town of Crown Point, 146 Ind. 421.

Railroad—Construction of in highway—Injury to person near track.—Where a railroad company constructs its road-bed along and over a public highway, extending through a town, rendering the use of such highway for vehicles impossible, but the public continued to use it for a footway, and on each side of the track a space three feet wide is kept smooth by the company for the use of foot passengers, the company will be liable to a person who is injured while walking along the footway by being struck, when at a distance of forty feet from the track, by a cross-tie falling from a derailed car of a passing train, such car being derailed by the negligence of the company. In such case the person is on the public highway, where he has a right to be, and he may recover from the company for the injuries sustained. Louisville, etc., R. Co. v. Downey, 18 App. 140.

[Acts 1885, p. 74. In force July 18, 1885.]

Bridges in cities and towns.—All bridges, the estimated cost of which shall exceed $500, to be built within the corporate limits of any city or town within this state, shall be built by the board of county commissioners in the same manner and paid for out of the same funds that other bridges without such corporate limits of such town or city are by law built and paid for. R. S. 1894, § 3283.

See Cities, *ante*, § 218 and note, Bridges, Duties, Liabilities.

Board of commissioners—Bridges.—While the act of 1885 imposes the duty of constructing bridges in towns and cities in certain cases upon the board of commissioners, still this act does not withdraw all power from towns and cities to build bridges, in

such cases, when they deem it proper to do so. City of New Albany v. Iron Substructure Co., 141 Ind. 500.

Same—Statute construed—Discretion—Mandate.—Said act of 1885 does not confer power on cities, by mandate or otherwise, to force the county board to build a bridge at any point deemed desirable or convenient by the city government. That must be left to the sound discretion of the commissioners except in cases of extraordinary public necessity. It is the judgment of the board and not that of the city authorities, which is to determine what kind of a bridge should be built. Board, etc., v. City of Washington, 141 Ind. 187.

Same—Control of by towns—Repairs.—Said act of 1885, making it the duty of the board of county commissioners to build all bridges within the corporate limits of any city or town within the state, the estimated cost of which exceeds $500, does not purport to in any other manner interfere with the absolute control of the city or town over the bridges, nor does it relieve the cities and towns from the duty of keeping them in repair. City of Wabash v. Carver, 129 Ind. 552; Town of Boswell v. Wakley, 149 Ind. 64.

Municipalities are liable for negligence of officers in the construction and repair of bridges, culverts, etc., even if counties are not. Town of Boswell v. Wakley, 149 Ind. 64.

Negligence—Bridge—Complaint.—In an action against a municipal corporation for an injury to plaintiff's horses, caused by the defective condition of the approach of a bridge, a complaint which fails to designate any act or omission of the corporation as the cause of the injury, is insufficient. Town of Williamsport v. Smith, 2 App. 360.

Highways—Streets—Opening—County commissioners.—The board of trustees of an incorporated town are clothed with exclusive power, in laying out, surveying and opening new streets, alleys and highways, within the corporate limits. The board of commissioners of a county have no power whatever to open a highway within the limits of an incorporated town of such county, without the consent, express or implied, of the board of trustees thereof. Sparling, etc., v. Dwenger, 60 Ind. 72; Tucker v. Conrad, 103 Ind. 349; Chicago, etc., R. Co. v. Sutton, 130 Ind. 405.

Road supervisors.—Road supervisors have no authority over the streets of a town, and may be convicted for obstruction of the same in making repairs. State v. Mainey, 65 Ind. 404.

The act of 1852, for the incorporation of towns, did not empower the corporate authorities to construct wharves, but they will not be restrained from grading a street merely because a wharf will accidentally result. Snyder v. Town of Rockport, 6 Ind. 237.

Under said act of 1852, the town authorities can not apply money raised for improving a street to the construction of a wharf, except so far as such wharf may be a mere incident to the legitimate improvement of the street. Snyder v. Town of Rockport, 6 Ind. 237.

1259. Opening streets.—2. When, upon petition signed by twelve freeholders, residents of any town, the board of trustees of such town may be of the opinion that public convenience requires the opening of a new street or alley, or widening or narrowing of a street or alley already opened, the board of trustees shall appoint three commissioners, residents of said town, who shall be disinterested freeholders, to appraise and assess the damages and benefits accruing to the owner of any land or lot through which any street or alley is proposed to be constructed or altered, or any building or structure thereon appropriated, as provided in the preceding section. Such commissioners shall, before they proceed to perform their duties as said appraisers,

take and subscribe an oath or affirmation faithfully to perform their duties as such appraisers; which shall be indorsed upon or attached to their appointment, and filed with the clerk of the board. Twenty days' notice shall be given such commissioners by the board of trustees, through the town clerk, of the appraisement to be made, giving a complete description of the premises to be viewed. A like notice shall be given by personal service, or by leaving the same with some person of suitable age at their reputed place of abode, to each of the owners or agents of lots or lands upon or through which the public improvement or street or alley is proposed to be made. If the owners are unknown or non-residents, publication of the same in one or more newspapers of the town, or by posting up written notices in six public places in the town (if there be no newspaper published therein), for three weeks, shall be deemed equivalent to such personal service. R. S. 1894, § 4405.

Widening and improvement of street—Assessment void.—An incorporated town has no authority to order, in the same proceedings, a street to be widened, graded and graveled, as the proceeding to widen is distinct from a proceeding to grade and gravel, and these proceedings can not be blended, and an assessment made by virtue of such order is void. Mendenhall v. Clugish, 84 Ind. 94.

Notice—Jurisdictional fact.—The finding of the board of trustees that due notice of the proceeding for the improvement has been given to a property owner is conclusive against others who have been properly served. Town of Rensselaer v. Leopold, 106 Ind. 29, 37; Porter v. Stout, 73 Ind. 3; Grimes v. Coe, 102 Ind. 406.

Consent of lot-owners.—The statute requiring the written consent of a lot-owner to the vacation of a street in front of his lot, has no application to an improvement by narrowing or altering it. Town of Rensselaer v. Leopold, 106 Ind. 29, 31.

Condemnation proceedings, validity of.—Condemnation proceedings will not be held void, where there has been a substantial compliance with the requirements of the statute, and they have been made in good faith. Graves v. Town of Middletown, 137 Ind. 400, 403.

Notice, waiver of.—By appearing before the treasurer and demanding damages assessed, after condemnation proceedings by a town for the opening of an alley, an owner waives any defect in the service of notice on him. Graves v. Town of Middletown, 137 Ind. 400, 402.

Notice—Injunction.—Where all the proceedings in an action to open an alley are confessedly in compliance with the requirements of the statute, except that notice was given by publication to parties who were residents of the state, some notice being given, the proceedings were not void, and can not be attacked collaterally by way of injunction. Graves v. Town of Middletown, 137 Ind. 400.

1260. Duty of commissioners.—3. Such commissioners, or a majority of them, shall, at the place and time indicated in such notice, proceed to an examination of the real estate proposed to be appropriated as aforesaid, and shall then and there estimate, first, the value of the land or other property to be appropriated for such improvement; second, what real estate, if any, would be benefited by the improvement, specifying the same in parcels, with the name of the owner, if known, and the proportion of benefits each owner receives, and the proportion of damages each would sustain. They shall view the premi-

ses, and receive any evidence touching the question before them; and may, for that purpose, administer oaths to witnesses examined in relation thereto. They shall report on each of the specifications above indicated, and, within ten days thereafter, file the same with the clerk of the board of trustees. R. S. 1894, § 4406.

Benefits and damages.—Where the report of the commissioners appointed by the board of trustees to assess benefits and damages is silent as to the value of the right in question and resulting damages, it will be presumed that the commissioners considered them as nothing. Town of Rensselaer v. Leopold, 106 Ind. 29, 35.

1261. Tender of damages.—4. When such report is filed, as in the preceding section required, the board of trustees, if it accept the terms of the same, shall direct the treasurer of the town to tender the owner or owners of such real estate, or their heirs or representatives, the damages awarded by such commissioners, deducting the amount of benefits assessed to such owner or owners; or if not found within the town, or the award is not accepted, then the sum shall be kept by the treasurer as a special deposit, subject to the order of such owner or his heirs or representatives. R. S. 1894, § 4407.

Benefits—Acceptance—Effect.—The reception and retention of an award of damages in condemnation proceedings estop the landholder to deny the validity of the proceedings. Holland v. Spell, 144 Ind. 561; Test v. Larsh, 76 Ind. 453; Byer v. Town of New Castle, 124 Ind. 86.

Report—Nunc pro tunc entry.—The town may order the entry *nunc pro tunc* of the report of assessors of benefits and damages caused the property of a designated person by the opening of a street, which has been inadvertently omitted from the records. Holland v. Spell, 144 Ind. 561; Chamberlain v. City of Evansville, 77 Ind. 542.

Wrongful appropriation of land for street—Injunction.—Injunction is the proper remedy where a town is proposing to appropriate an owner's land for a street wrongfully under color of right, without assessment and tender of compensation. Town of Hardinsburg v. Cravens, 148 Ind. 1; City of New Albany v. White, 100 Ind. 206; Sidener v. Turnpike Co., 23 Ind. 623.

1262. Assessment—Collection.—5. If the board of trustees, within twenty days after the filing of said report, by a vote of a majority of the members, determine to make the appropriation of real estate for such improvement, it shall cause an assessment list to be made, by transcribing so much of the report, as aforesaid, as describes the parcels of real estate to be benefited by the opening or improvement, with the name of the owner, if known, and the amount of benefits which each would receive, thereby directing such amount to be assessed upon such parcels of real estate respectively; which assessment shall be a lien on such real estate. The board of trustees may, immediately after making such assessment, by suit in any court of competent jurisdiction, in the name of such corporation, recover against the owners of such parcels of real estate the amount of such assessment; and upon execution against the property of said defendant upon such judgment, the same shall be sold for cash without regard to valuation or appraisement laws of this state. R. S. 1894, § 4408.

1263. Action on report—Appeal.—6. The board of trustees shall, within twenty days from the filing of said report, either accept or reject the terms of the same. And any owner of land or representative thereof, aggrieved by such report, may appeal therefrom at any time, within thirty days after the filing thereof, to any court having jurisdiction of the same, upon filing the usual bond with the clerk of said town for the payment of costs. But no such appeal shall prevent any such town from proceeding with said appropriation and improvement as if no appeal had been taken. No other question shall be determined than the regularity of the proceeding in the suit and the amount of damages sustained. R. S. 1894, § 4409.

Commissioners' report—Parol evidence.—Where the record of the board of trustees shows that a proper petition praying for the opening of a street was filed; that commissioners were duly appointed to assess benefits and damages, and that the commissioners made and filed their report with the town clerk, but fails to show that the board accepted the report within twenty days, or that any further action was taken by that body in opening the street, it is incompetent to prove by parol that the board of trustees accepted the report within the time prescribed, and that it determined to make the appropriation of the land therein described. Byer v. Town of New Castle, 124 Ind. 86, 87.

Rejecting commissioners' report—Termination of cause—Appeal.—Where a board of trustees of a town, on a petition to widen a certain street, appointed three commissioners to assess the benefits and damages, and make report of the same, and, upon hearing the report, rejected it, the board of trustees, in rejecting the report, determined the proceedings, and such board had no authority to revise the proceedings, or put on foot new proceedings to widen the street, without a new petition being filed for that purpose. From the final action of the commissioners an appeal will lie. Millisor v. Wagner, 133 Ind. 400.

1264. Infants and insane.—7. When the owner of any such land or building, appropriated as aforesaid, shall be an infant or of unsound mind, no proceeding shall be had affecting the rights of such persons until a guardian therefor shall be appointed by the court having probate jurisdiction, and such guardian shall have given security to the satisfaction of such court for the faithful performance of the trust; but any proceeding affecting such rights shall only be void to that extent. R. S. 1894, § 4410.

[Acts 1897, p. 272. In force March 8, 1897.]

1265. Opening and improving streets.—1. That the boards of trustees for incorporated towns within said state shall have the same powers and rights for the purpose of opening or improving streets and alleys within such towns and to condemn and appropriate lands owned by any person, company or corporation which lands are then in use for public purposes the same as they now have the right to condemn lands where the same are used or held for private purposes: *Provided*, That upon the condemnation of such lands the owners thereof shall be awarded damages therefor the same as an individual or corporation

would be if such lands were used or held for private purposes. Burns' Supp. 1897, § 4410*a*.

Appropriation of land taken for one public use to another.—Lands once taken for a public use can not under general laws, without an express act of the legislature for that purpose, be appropriated by proceedings *in invitum* to a different public use. When the statute expressly authorizes municipal corporations to extend streets and alleys across property devoted to public use, such appropriation to the second use may be made. City of Terre Haute v. Evansville, etc., R. Co., 149 Ind. 174; Baltimore, etc., R. Co. v. North, 103 Ind. 486; City of Ft. Wayne v. Lake Shore, etc., R. Co., 132 Ind. 558; 3 Elliott Railroads, § 966. For additional authorities, see *ante*, § 218, note, Eminent Domain—Streets.

[1 R. S. 1852, p. 493. In force May 6, 1853.]

1266. Record of plats.—1. Any person who may hereafter lay off any town, or addition thereto, in this state, shall, previous to the sale of any lots in such town, cause to be recorded in the recorder's office of the county wherein the same may lie, a correct copy of the plat of said town, with the public grounds, streets, lanes, and alleys, with their respective widths properly marked, the lots regularly numbered, and the size of the lots marked by reference to the plat. R. S. 1894, § 4411.

See Cities, *ante*, § 380, *et seq.*, and Cities and Towns, *ante*, § 1040; also, § 218, note, Dedication.

A statute authorizing the survey and platting of land for a town, etc., is a public act, and is not necessary to be pleaded in order that the plat of the town may be admitted as evidence, such plat being declared by the statute a public record. Such statute, declaring the map of such town a public record, constitutes, of itself, the streets and alleys in the town public highways. West v. Blake, 4 Blackf. 234.

Plat—When not entitled to record.—A plat not signed and acknowledged is not entitled to record. Taylor v. City of Ft. Wayne, 47 Ind. 274; Allen v. City of Vincennes, 25 Ind. 531.

Same.—A plat of lands not being a plat of a town or city, nor of an addition thereto, is not such a plat as may be recorded. Taylor v. City of Ft. Wayne, 47 Ind. 274; Town of Woodruff Place v. Raschig, 147 Ind. 517; Forsythe v. City of Hammond, 142 Ind. 505.

Record of plat without authority—Sale of lots—Effect.—If a plat is recorded without authority of law, and lots are sold by the owner by reference to the plat, a dedication of the streets and alleys arises by such sale of lots with reference to the plat. Town of Woodruff Place v. Raschig, 147 Ind. 517; Rhodes v. Town of Brightwood, 145 Ind. 21.

Town plat—Explanatory note—Evidence.—An explanatory note upon a town plat, which is inconsistent with all other things which appear by the plat, including courses and distances marked thereon, will not control the other facts thus appearing where the location of a lot is in dispute. Hunter v. Eichel, 100 Ind. 463.

Same—Parol evidence.—When the recorded plat of a town shows the width of a certain street, parol evidence to show that the proprietor of the town intended the street to be of a different width than shown by the plat is inadmissible. Wood v. Mansell, 3 Blackf. 124; Elliott Roads and Streets, p. 123, notes and cases.

Same—Construction.—A plat must be construed like a written instrument, and no part of it can be regarded as superfluous or meaningless if such a result can be reasonably avoided. City of Noblesville v. Lake Erie, etc., R. Co., 130 Ind. 1; Elliott Roads and Streets, pp. 111, 112.

Practical construction.—If the meaning of the person who executed the plat is

doubtful, the practical construction put upon it by the acts of the parties concerned will be accepted by the courts. City of Noblesville v. Lake Erie, etc., R. Co., 130 Ind. 1.

Reservations—Intention.—Where a plat into lots of an addition to an incorporated town or city is made, and reservations for any purpose are marked on such plat, the intention of the proprietor of the plat in regard to the meaning of the marks on such reservations is in general a question of fact, and not of law. Pidgeon v. McCarthy, 82 Ind. 321, 328.

"General Harrison's Reserve."—General William Henry Harrison, in 1816, made a plat of an addition to the borough of Vincennes, and marked thereon one of the lots with the words, "General Harrison's Reserve." The lot so marked was assessed thereafter for municipal purposes by the borough, town and city of Vincennes, in their successive corporate capacities, and for nearly sixty years such taxes so assessed were paid to the proper officer of the corporation by the successive owners of the lot. It was a proper conclusion of law upon such facts and others of like import, that said lot was within the corporate limits of the city of Vincennes, and was subject to taxation by the city authorities for municipal purposes, as other real estate within the city limits. Pidgeon v. McCarthy, 82 Ind. 321, 328.

1267. Donation by plat.—2. Every donation or grant to the public, or to any individual, religious society, corporation or body politic, noted as such on the plat of the town wherein such donation or grant may have been made, shall be considered a general warranty to the said donee or grantee for the purposes intended by the donor or grantor. R. S. 1894, § 4412.

Dedication of street—Sale of lots with reference to street.—The making of plats of towns upon which streets and alleys are designated, and the recording of such plats and sale of lots with reference thereto, operate as a dedication to the public of all streets and alleys marked on such plat. Miller v. City of Indianapolis, 123 Ind. 196; Rhodes v. Town of Brightwood, 145 Ind. 21; City of Indianapolis v. Kingsbury, 101 Ind. 200; Faust v. City of Huntington, 91 Ind. 493; City of Logansport v. Dunn, 8 Ind. 378; City of Evansville v. Page, 23 Ind. 525; Cox v. Louisville, etc., R. Co., 48 Ind. 178; Wolfe v. Town of Sullivan, 133 Ind. 331; Fossion v. Landry, 123 Ind. 136; Town of Woodruff v. Raschig, 147 Ind. 517; Doe v. Town of Attica, 7 Ind. 641; Elliott Roads and Streets, pp. 14, 15, note 20.

Under a prior incorporating act, the designation of a street on the recorded plat of a town operated, by virtue of the statute, as a general warranty conveyance to the town, to individuals, or to the public, according to the intention of the grantor. The designation on the plat of a street operates as a grant of a highway to the public, but were it an exclusive grant to the corporation, and the street on a river, it would not vest such right to the soil, as would authorize the establishment of a ferry under the statute. Conner v. President, etc., 1 Blackf. 43.

Irrevocable—Estoppel in pais.—A dedication once made is irrevocable; it is considered as in the nature of an estoppel *in pais*. Town of Marion v. Skillman, 127 Ind. 130, 136; City of Noblesville v. Lake Erie, etc., R. Co., 130 Ind. 1, 3; Shanklin v. City of Evansville, 55 Ind. 240; Haynes v. Thomas, 7 Ind. 38; Common Council, etc., v. Croas, 7 Ind. 9.

Revocation before acceptance.—Prior to the acceptance by the public the owner may revoke such dedication. Steinhauer v. City of Tell City, 146 Ind. 490.

The dedication becomes irrevocable after private rights have accrued by reason of the dedication, as by sale of lots by reference to the plat showing the dedication. Rhodes v. Town of Brightwood, 145 Ind. 21.

Corrected plat—Revocation.—Where a triangular tract at the intersection of two

streets, as shown upon a town plat, was not separated from the streets by lines, and two years afterwards a corrected plat was filed which expressly reserved said triangular tract, there being no evidence that said tract had been intended to be dedicated to the public, and no evidence of acceptance thereof by the public, the making and recording of said first plat did not constitute a dedication of said triangular tract. Steinhauer v. City of Tell City, 146 Ind. 490.

Use of unenclosed lot in town for street purposes—Passive acquiescence, effect.—Mere passive acquiescence, with knowledge by the owner, of an unenclosed and unimproved lot in a town or city, in its use by the public for street or highway purposes, until such time as he may be able and willing to improve the same, does not constitute a dedication. Tucker v. Conrad, 103 Ind. 349.

User—General highway law.—The provisions of § 6762, R. S. 1894, in relation to highways by user, are not applicable to the public streets of a town or city. Tucker v. Conrad, 103 Ind. 349; Brown v. Hines, 16 App. 1.

But where there has been twenty years' use of the way, prior to its annexation to the city, such use constitutes a public one prior to the annexation. Upon annexation of the territory through which it extends to the city, such public highway becomes one of the streets of the city. Such street may be improved as any other street and the cost thereof collected as in other cases. Brown v. Hines, 16 App. 1.

Dedication of land to public use—Intention of party.—Where the declarations, acts, and conduct of a land-owner are such as fairly and naturally lead to the conclusion that he intended to dedicate land to public use, and others have in good faith acted upon such acts and declarations, the fact that the land-owner may have entertained a different intention from that manifested by his acts and declarations can not prevail against the force of his conduct and acts upon which the public or those dealing with him have relied. Pittsburgh, etc., R. Co. v. Noftsger, 148 Ind. 101.

Dedication of street by plat—Evidence.—The filing and recording of a plat of an addition to a town shows, prima facie, that the dedicator was the owner of the land and intended to dedicate the streets marked on the plat. Town of Fowler v. Linquist, 138 Ind. 566. See City of Lawrenceburg v. Wesler, 10 App. 153.

Conditions annexed to dedication.—A donor can not attach to a dedication any condition that will destroy its chief characteristic or take it from the control of the public authorities; if such a condition be attached, it is void and the dedication valid. City of Noblesville v. Lake Erie, etc., R. Co., 130 Ind. 1.

Same—Condition that railroad may be laid in street.—The use of a street for a railroad is a public use, and is not necessarily destructive of the character of the public way; and a condition annexed to a dedication that a railroad company should have the right to lay a track or tracks in the street dedicated is not void. City of Noblesville v. Lake Erie, etc., R. Co., 130 Ind. 1.

Width of street dedicated—Example.—North of a small unplatted tract of land in a town was a platted tract, and south of it a tract similarly platted, both plats within the town limits. A platted street in the north plat extended south to the north line of the unplatted tract; and a similar platted street, of the same width and name, began at the south line of such unplatted tract, in a direct line with the north street, and extended south through the south plat. That portion of the unplatted tract lying between where the street ended on the north and the other commenced on the south was unfenced and unoccupied to the full width of the streets, except a narrow strip on the west side covered by a hotel. Such had been the condition of the three tracts of land for more than twenty years, and the public had used the two streets, and the space across the unplatted tract as a street, for that length of time. There was a dedication of a strip across the unplatted tract to the full width of the two streets, except that portion occupied by the hotel, and the three parts constituted one street. Town of Marion v. Skillman, 127 Ind. 130, 137.

Where a street has been dedicated to public use by recording the plat, if there is uncertainty as to its boundaries, in the first instance, the subsequent user by the public for a long period of years would of itself mature into a right. City of Evansville v. Page, 23 Ind. 525.

Invalid statutory dedication—Dedication by user.—Streets and alleys of a town, as fixed by continuous user for more than twenty years, will prevail as against a prior invalid statutory dedication. Waltman v. Rund, 109 Ind. 366; Town of Marion v. Skillman, 127 Ind. 131.

Acceptance of dedication.—Where it appears that a street was used by the public both before and ever since the dedication, and that the town authorities worked the street where such work was needed, an acceptance of the dedication is sufficiently established. Town of Fowler v. Linquist, 138 Ind. 566.

Husband and wife—Donation by husband bars wife's interest.—A donation or grant of land by a husband to a municipal corporation for use as a street bars the inchoate interest of his wife in such land. Duncan v. City of Terre Haute, 85 Ind. 104; City of Indianapolis v. Kingsbury, 101 Ind. 200, 220; Robinson v. Thrailkill, 110 Ind. 117; Indiana, etc., R. Co. v. Allen, 113 Ind. 581, 585.

Dedication—Park—Parol evidence.—An irrevocable dedication of land is effected by designating certain land on a map filed in the county recorder's office as a "park," and by selling lots with reference to the map; and where a dedication of a tract of land is expressed, evidenced by a recorded plat, the intent, as expressed by such plat, can not be contradicted by parol evidence. Rhodes v. Town of Brightwood, 145 Ind. 21; Doe v. Town of Attica, 7 Ind. 641; Miller v. City of Indianapolis, 123 Ind. 196.

Same—Corporation trustee for public—Change of trustee.—Where there has been laid out and filed a plat of land as an addition to a city, upon which plat a portion of the land is designated as a "park," and there has been a sale of lots with reference to the plat, the dedication of the "park" thus effected is to the public, and may be asserted by a town subsequently incorporated, which annexes such addition to its corporate limits, for a change of trustee does not defeat the dedication. Rhodes v. Town of Brightwood, 145 Ind. 21.

Same—Unauthorized taxation—Estoppel.—A municipal corporation is not estopped to assert a dedication of land, by the unauthorized taxation thereof to the original owner, after dedication. Rhodes v. Town of Brightwood, 145 Ind. 21.

Same—Public square—Public ground, etc.—Dedication to public use is shown by spaces on plats designated by the words, block, public square, public ground, common, county block, college square, plaza, place, etc. Rhodes v. Town of Brightwood, 145 Ind. 21; Doe v. Town of Attica, 7 Ind. 641; 2 Dillon Munic. Corps. (4th ed.), § 645.

Church—Market—Public square, etc.—The designation upon a plat of a lot or space, as a site for a church, seminary, market or common, operates as a dedication of the same to the public for such purpose; and the words "public square," have, in this state, acquired a definite legal meaning, and when written or printed in a proper place on the plat of a town designed for a county seat, the place so designated is set apart as the site of the court-house, and other county buildings. City of Logansport v. Dunn, 8 Ind. 378.

River landing—Easement—Implied dedication—Alluvial accretions.—The implied dedication by the owner of land platted for a town site of a strip of land fronting on a river, to the public as a common, for the purpose of a landing and for access to the river, does not vest in the town, or in the public, the fee of the land, but the fee remains in the grantor subject to the easement. Such easement attaches to alluvial additions caused by the changes in the course of the river, and the public has the right to pass over such additions for the purpose intended by the dedication. Town of Freedom v. Norris, 128 Ind. 377.

Same—Abandonment of easement—Non-user.—A non-user of the easement, for

the purpose intended, for a period of thirty years, due to an abandonment of commerce upon the stream, will be taken as an abandonment of the easement. Town of Freedom v. Norris, 128 Ind. 377.

Donation for particular use.—If a parcel of land is donated by plat for a particular use, and is not accepted for such use, the title will remain in the donor. Rule applied to land designated on plat "public square." Westfall v. Hunt, 8 Ind. 174; Vaughn v. Stuzaker, 16 Ind. 338; Rhodes v. Town of Brightwood, 145 Ind. 21.

Plat books—Public record—Judicial notice.—Judicial notice will be taken that books known as plat books are kept by the county recorders in the various counties of the state, in which are recorded the plats of the towns and cities and the additions thereto, and that such books are kept as public records. Miller v. City of Indianapolis, 123 Ind. 196.

Same—Commissioners in partition.—A plat book is a public record, and a plat prepared by commissioners in a partition proceeding which is recorded therein by order of the court, is properly recorded. Miller v. City of Indianapolis, 123 Ind. 196.

[Acts 1881, p. 56. In force March 3, 1881.]

1268. Plat, how acknowledged.—3. The person desiring to lay off such lots, before offering such plat for record, shall acknowledge the same before some officer authorized by law to take and certify the acknowledgment of deeds in the proper county; a certificate of which acknowledgment shall be, by the officer taking the same, annexed to such plat or other paper, and recorded therewith. R. S. 1894, § 4413.

Acknowledgment—Record.—Plats not properly acknowledged are not entitled to record. Taylor v. City of Ft. Wayne, 43 Ind. 274; Forsythe v. City of Hammond, 142 Ind. 510; Allen v. City of Vincennes, 25 Ind. 531.

Unauthorized recorded plat—Not evidence.—The record of a plat, not acknowledged, is not admissible as evidence. Allen v. City of Vincennes, 25 Ind. 531.

[1 R. S. 1852, p. 493. In force May 6, 1853.]

1269. Penalty.—4. Every person who may lay off any town, or any addition to any town, in this state, and fail to comply with the requisitions of this act, shall forfeit and pay, for the use of said town, for every month, a sum not exceeding one hundred dollars nor less than five dollars, to be recovered in the name of the treasurer of the county. R. S. 1894, § 4414.

1270. Imperfect plat.—5. Where any town plat, heretofore or hereafter to be recorded, does not clearly describe the size of the lots, streets, alleys, and courses of the lines of said town, and where donations have been given or intended to be given, either to the public or to individuals, or to any religious society, and it has been neglected to insert the same on said plat, any of the proprietors of such town are hereby required to make out such other description as will more clearly explain the true intent; which shall be acknowledged, certified, and recorded as required in this act. R. S. 1894, § 4415.

[Acts 1857, p. 126. In force August 24, 1857.]

1271. Vacation.—6. Whenever any person or corporation interested in any incorporated town, or in any real estate, in this state, laid out in streets and lots as a town, may desire to vacate any lot, street, alley,

common, public square or part thereof, in such town or plat of town, such person or corporation may petition the board of county commissioners of the proper county, giving a distinct description of the property to be vacated and the name of the persons to be affected thereby; which petition shall be filed with the county auditor thirty days previous to the sitting of such board; and notice of the pendency of said petition shall be given, for the same space of time, in a public newspaper printed in said county, if any there be, and by written notices thereof set up in three public places near the lots, streets, alleys, common, or square proposed to be vacated. R. S. 1894, § 4416.

[1 R. S. 1852, p. 493. In force May 6, 1853.]

1272. Proceedings concerning vacation.—7. If no opposition be made to such petition, the board of county commissioners may vacate the same, with such restrictions as they may deem for the public good; but if opposition be made, such application shall be continued until the next term of the board, when, if the objector consent to such vacation, or if two-thirds of all the real estate holders of the town petition therefor, the board may grant the prayer of the petition. R. S. 1894, § 4417.

1273. Title on vacation.—8. The part so vacated, if it be a lot, shall vest in him who may have the title thereof according to law; and if the same be a street or alley, the same shall be attached to the ground bordering on such street or alley, and all title thereto shall vest in the persons owning the property on each side thereof, in equal proportions, according to the length or breadth of such ground, as the same may border on such street or alley. And whenever a public square shall be vacated, the property thereof shall vest in the board of county commissioners, for the use of the county. R. S. 1894, § 4418.

1274. No vacation, unless owners consent.—9. But no such vacation of a street or alley shall take place, unless the consent of the persons owning the property immediately adjoining thereto be obtained therefor in writing; which consent shall be acknowledged before some justice of the peace, and filed with said board. R. S. 1894, § 4419.

1275. Additions, how vacated.—10. If any person shall lay off an addition to any town which does not improve, and shall be the legal owner of all the lots contained in such addition, such person, or any other person who shall become the legal owner thereof, may have such addition, or any part thereof, vacated, by applying to the board of commissioners of the proper county, after notice as hereinbefore provided, and proof of ownership of such lots. R. S. 1894, § 4420.

1276. Change of name.—11. Such board may change the name of any town upon a petition therefor of a majority of the qualified electors of such town; and in case any such change is made, notice thereof shall be given by publication, three weeks successively in a newspaper of the county, if any, and, if not, by written or printed notices posted up in three of the most public places of such town; and a certified copy of the order of such change shall be recorded in the recorder's office of the county. R. S. 1894, § 4421.

[Acts 1879 S., p. 172. In force May 31, 1879.]

1277. Vacation of unused public square.—1. Where, in any township having a population of less than two thousand according to the census of the United States of America, taken in the year of our Lord, eighteen hundred and seventy, any tract of land has been platted with the view of incorporating said tract of land as a town; and where, with the view of locating the county seat of any county upon said tract of land in said township, a public square has been donated and made part of the plat of the said tract of land, with the idea of locating the county court-house upon said public square; and when, for the period of sixty years, said public square has never been used for the purpose of building a court-house therein, and when, for the period of sixty years, the said tract of land so platted has become an incorporated town; and when, for the period of sixty years, no county seat of any county has been located in the said township, nor upon any tract or plat of land therein, then, and in that case, on application of persons owning ground adjacent to the said public square to the judge of the circuit court of the county where the same is located, and upon their showing the state of facts set out in the foregoing portion of this act, the judge of the said court shall order the said public square to be vacated, and the lot or tract of land composing it shall vest in those whose deeds show that they are entitled to said lots or tracts of land according to the present records of the county in which such township is located. R. S. 1894, § 4422.

[Acts 1872, p. 12. In force December 27, 1872.]

1278. Public square—School.—1. Any town in this state laid off, platted and recorded, with streets, lanes, alleys, lots and a public square with no other public use expressed on such plat than "public square" by the donor or grantor; and when the citizens of such town, by common consent of people, and the express consent of the grantor, have taken possession of said public square for educational purposes, and erected thereon lasting and valuable school buildings; and the citizens being desirous of retaining and occupying the same for educational purposes, and that the same shall be dedicated to such use, may, by five or more freehold citizens of such town (or, if an incorporated town, by her corporation) petition the board of county commissioners for the proper county, giving a distinct description of the public square to be granted to the public for educational purposes; which petition shall be filed with the county auditor thirty days previous to the sitting of such board; and notice of the pendency of said petition shall be given for the same space of time in a public newspaper printed in said county, if any there be, and by printed or written notices thereof, set up in three public places near the public square mentioned in the petition. R. S. 1894, § 4423.

1279. Action by county board.—2. If no opposition be made to such petition, the board of county commissioners may grant the prayer of petitioner or petitioners, as the case may be, and declare the same

dedicated for educational purposes, in accordance with the petition, and to have the same effect as if said public square had been so marked and dedicated upon the original plat of such town. But if opposition be made before the board of county commissioners before final action had, such application shall be continued until the next term of the board, when, if the objector consent to such petition, or if two-thirds of all the real estate holders of the town petition therefor, the board shall grant the prayer of the petition. R. S. 1894, § 4424.

ARTICLE 6.—ANNEXATION OF TERRITORY.

SEC.
1280. Of lots and out-lots.
1281. Of lands not platted.
1282. Duty of county board.
1283. Lost plat.

[Acts 1857, p. 73. In force March 5, 1857.]

1280. Of lots and out-lots.—48. When two-thirds of the owners of a tier of out-lots adjoining an incorporated town shall sign a petition asking that the corporate limits of said town be extended so as to include said out-lots, the board of trustees of said town shall cause said petition to be recorded, and make an order that said tier of out-lots shall thereafter be included in and constitute a part of said corporation. Whenever there shall be lots laid off and platted adjoining to or within such town, and a record of the same is made in the recorder's office of the proper county, the board of trustees may, by a resolution, extend the boundary of such town so as to include such lots, whether improved or not; and the lots thus annexed shall thereafter form a part of such town, and be within the jurisdiction of the same. A copy of such resolution, with plat or map of survey defining the metes and boundaries of such addition, shall be immediately filed and recorded in the office of the recorder aforesaid, and said tier of out-lots and said lots annexed, as last specified, shall be included in and constitute a part of said corporation, and the inhabitants residing thereon, and owners thereof, shall be subject to all the laws and regulations, and entitled to all the privileges of said corporation. R. S. 1894, § 4425.

See *ante*, § 1017, *et seq.*

Platted territory.—Territory platted into lots can not be annexed by the board of commissioners, but such annexation must be made by the board of trustees of the town. Mullikin v. City of Bloomington, 72 Ind.

[1 R. S. 1852, p. 482. In force May 6, 1853.]

1281. Of lands not platted.—51. When any town shall desire to annex contiguous territory thereto, not platted or recorded, the trustees shall present to the board of county commissioners a petition setting forth the reasons for such annexation, and shall accompany the same with a map or plat accurately describing, by metes and bounds, the territory proposed to be attached, which shall be verified by affida-

vit. Such trustees shall give thirty days' notice, by publication in a newspaper printed in such town, if any; otherwise in the county, or, if none, then by posting up such notice in five or more public places within the corporation. A copy of such notice shall be served on the owner or owners of such territory, if known and residents of the county. R. S. 1894, § 4426.

Statutes construed—Annexation.—This section is not void for uncertainty, nor inconsistent with the previous section. It confers jurisdiction upon the board of commissioners, upon petition of the trustees of the town, to order annexation to the town, of any adjacent territory not embraced in the provisions of the preceding section. Elston v. Crawfordsville, 20 Ind. 272.

Contiguous territory—Question of fact.—Whether territory is or is not contiguous to corporate limits is a question of fact for the decision of the board of commissioners. Town of Cicero v. Williamson, 91 Ind. 541.

Notice—Jurisdiction.—As to persons not resident in the county, notice by publication is sufficient, and it is not necessary to name in the notice each person owning parts of the territory sought to be annexed, if the territory is so described and identified as to give such persons notice that their interests are to be involved; but service of personal notice upon known residents of the county whose lands it is sought to annex is, as to them, necessary to give jurisdiction, and a failure to do so renders the proceeding void upon collateral attack. Woodfill v. Town of Greensburg, 18 Ind. 203; Elston v. Crawfordsville, 20 Ind. 272; Town of Cicero v. Williamson, 91 Ind. 541.

Jurisdiction—Collateral attack.—The proceedings of the board of county commissioners annexing territory to an incorporated town, if jurisdiction was acquired, can not be questioned collaterally, but, if jurisdiction is not acquired, the proceeding may be collaterally attacked by injunction. If jurisdiction is acquired the remedy is by appeal. Town of Cicero v. Williamson, 91 Ind. 541; City of Delphi v. Startzman, 104 Ind. 343; Grusenmeyer v. City of Logansport, 76 Ind. 549, 556; City of Terre Haute v. Beach, 96 Ind. 143; City of Logansport v. LaRose, 99 Ind. 117; Hiatt v. Town of Darlington, Ind. Sup. Ct., May 19, 1899.

Petition—Collateral attack.—When the petition contains enough to show that the subject-matter is within the jurisdiction its sufficiency in other respects can not be questioned collaterally, nor can the formality of the proceedings of the trustees of the town. Town of Cicero v. Williamson, 91 Ind. 541, 542.

Where an inferior tribunal is required to ascertain and decide upon facts essential to its jurisdiction its determination thereon is conclusive as against collateral attack. Mullikin v. City of Bloomington, 72 Ind. 162; Hiatt v. Town of Darlington, Ind. Sup. Ct., May 19, 1899.

Taxes—Injunction—Parties.—Where several owners of lands unite in a complaint to enjoin an incorporated town from collecting taxes upon their lands, upon the ground that no notice at all was given of proceedings for annexation, there can be no separate decree in favor of one of the plaintiffs. Town of Cicero v. Williamson, 91 Ind. 541, 545.

Where a complaint to enjoin the collection of taxes assessed by an incorporated town upon lands alleged to have been illegally annexed thereto, alleged that such annexation was made by the order of the board of county commissioners, of territory laid out in lots, and plat thereof recorded, but failed to show that the officers of such town did not also adopt a resolution annexing such territory, such complaint is insufficient on demurrer. Mullikin v. City of Bloomington, 72 Ind. 161.

An allegation in such complaint, that the board of trustees of such town had not adopted a resolution annexing such territory prior to the petition to the board of commissioners, is not sufficient to show that none was adopted prior to the assessment of the tax complained of. Mullikin v. City of Bloomington, 72 Ind. 161.

Lands laid out in lots—Jurisdiction.—Where territory sought to be annexed to a

town is laid out in lots, the board of county commissioners have no jurisdiction to authorize such an annexation; it must be made by resolution of the town authorities. Mullikin v. City of Bloomington, 72 Ind. 161.

Petition—Reason for annexation.—The statute does not prescribe what reasons for annexation shall be set forth in the petition, and that question, therefore, is necessarily left to the sound discretion of the authority passing on the same. Windfall, etc., Co. v. Emery, 142 Ind. 456; Catterlin v. City of Frankfort, 87 Ind. 45; Elston v. Crawfordsville, 20 Ind. 272; Chandler v. City of Kokomo, 137 Ind. 295.

The reasons for the proposed annexation of territory should be stated in the application therefor, and the map or plat accompanying the same should be verified, but the application need not be. As to what reasons are sufficient, see opinion. Elston v. Crawfordsville, 20 Ind. 272.

A petition is sufficient which shows that many persons in the territory sought to be annexed have been receiving the benefits and advantages of the town, without bearing their share of its burdens, and that public interests require that said territory be annexed, and that it is just and equitable, and for the public good, that the petition be granted. Paul v. Town of Walkerton, 150 Ind. 565.

Same—Sufficiency of reasons not reviewable on appeal.—The sufficiency of the reasons stated in a petition for the annexation of territory to a town can not be considered upon an appeal, at least in the absence of a plain abuse of the discretion necessarily vested in the county board of commissioners, by the omission of the statute to prescribe what reasons shall be set forth. Windfall Mfg. Co. v. Emery, 142 Ind. 456.

Annexation of territory—Evidence—Remonstrant—Use of streets—School children.—In a proceeding under this statute for the annexation of territory to a town, it may be shown that the office of the remonstrant is within the town, that the streets of the town are used for the distribution of the products manufactured by him within the territory in question, that other factories in the same territory are in prospect, and that children residing in such territory attend schools in the town. Windfall Mfg. Co. v. Emery, 142 Ind. 456.

1282. Duty of county board.—52. The board of county commissioners, upon the reception of such petition, shall consider the same, and shall hear the testimony offered for or against such annexation; and if, after inspection of the map, and the testimony being heard, such board is of the opinion that the prayer of such petition should be granted, it shall cause an entry to be made on the order-book, specifying the territory annexed, with the boundaries thereof according to the survey; which entry, or an attested copy thereof, shall be conclusive evidence, in all courts, of such annexation. R. S. 1894, § 4427.

Appeal.—An appeal lies from an order of the board of county commissioners annexing territory to a town or city. For cases overruled, see Grusenmeyer v. City of Logansport, 76 Ind. 549; City of Logansport v. La Rose, 99 Ind. 117. See *ante*, § 1033 and notes.

The action of the board of county commissioners upon a petition filed for annexation is judicial in its character, and the legislature may provide for an appeal from such proceedings. Forsythe v. City of Hammond, 142 Ind. 505; Forsythe v. City of Hammond, 166 U. S. 506.

[Acts 1869 S., p. 33. In force April 27, 1869.]

1283. Lost plat.—11. When the original survey and plat of any incorporated town of this state have been, or may hereafter be, lost or destroyed, the board of trustees of such town may order a survey and

plat of said town to be made. And when such survey and plat is made, and adopted by a majority of said board of trustees, the same shall be presented to the board of commissioners of said county, with an affidavit that the original survey and plat are lost; whereupon the said board of commissioners shall order the same to be recorded by the recorder of said county as the survey and plat of such town. R. S. 1894, § 4428.

ARTICLE 7.—SEWERS.

SEC.		SEC.	
1284.	Power over sewers.	1291.	Penalty for non-payment.
1285.	Proceedings to establish and construct.	1292.	Payment, how enforced.
1286.	Order to appraisers.	1293.	Officers' fees.
1287.	Majority may act.	1294.	Superintendent—Engineer.
1288.	Schedule filed—Construction.	1295.	Town may pay part of cost.
1289.	Apportionment of cost.	1296.	Terms of letting.
1290.	Collection of cost.	1297.	Protection of sewer—Tapping.
		1298.	Intention of act.

[Acts 1867, p. 205. In force March 11, 1867.]

1284. Power over sewers.—1. The board of trustees of any incorporated town in this state shall have full power and authority to construct and repair any sewer along any street or alley in any incorporated town in this state, or along any part of a street, block, or square in any incorporated town in this state; and they shall be the sole judges of the necessity and utility of the construction of such sewer. R. S. 1894, § 4429.

See Cities and Towns, *ante*, §§ 1090 and 1107, and notes; also, Cities, *ante*, § 124, clauses 26 and 43, and *ante*, § 127, and notes.

Notice—Constitutional law.—This act is not void for failure to provide for notice to the property owner affected or assessed for benefits. Kizer v. Town of Winchester, 141 Ind. 694.

Liability of town.—If a drain is established under the direction of the circuit court, the same extending through the town, but the town having nothing to do with its construction, and never having repaired it or drained into it, the town can not be held liable for injuries resulting from a defect in such drain. Town of Monticello v. Fox, 3 App. 481.

Same—Negligence in construction—Contributory negligence.—If a municipality so negligently construct a sewer that it overflows the basement room of a house, the municipality is liable in damages, unless the party whose property is injured is himself guilty of contributory negligence in the construction of the building. City of Valparaiso v. Ramsey, 11 App. 215; Town of Princeton v. Gieske, 93 Ind. 102.

Same—Consequential damages—Unskillful plan and construction.—Municipal corporations are not responsible for consequential injuries resulting from the building of sewers and the improvement of streets, where the work is done in a careful and skillful manner; nor is the corporation liable for mere errors of judgment as to the plan of a public improvement, but is responsible for negligence in devising the plan of an improvement as well as for negligence in executing the work. City of North Vernon v. Voegler, 103 Ind. 314; City of Evansville v. Decker, 84 Ind. 325; Town of Princeton v. Gieske, 93 Ind. 102; City of Peru v. Brown, 10 App. 597; City of Terre Haute v. Hudnut, 112 Ind. 542; City of New Albany v. Ray, 3 App. 321; City of Valparaiso v. Adams, 123 Ind. 250; Elliott Roads and Streets, p. 336.

Reliance on promise to repair—Contributory negligence.—The fact that the corporation promised to repair a defect in a sewer, and the reliance of the property owner on such promise, will not relieve the property owner from the effect of contributory negligence on account of defects in the construction of a building or the arrangement of the premises, during the time of such reliance. City of Valparaiso v. Ramsey, 11 App. 215.

1285. Proceedings to establish and construct.—2. Whenever the board of trustees of any incorporated town in this state shall determine to construct any sewer authorized by this act, such board of trustees shall, upon their records, specify and determine the place of beginning and termination of such sewer, its route, course, and distance, and shall also determine and specify, in their said records, the depth below the grade at which such sewer shall be sunk, the size or diameter of the same, and of what materials the same shall be constructed. And thereupon such board of trustees shall appoint three appraisers, freeholders and voters in said town, not in any way interested in the proposed sewer, whose duty it shall be to examine all the in-lots, out-lots, and parts of in-lots and parts of out-lots in said town, that would in any manner be benefited by the construction of the proposed sewer; and shall assess the amount of benefits to each lot or parts of lots, that will result thereto by the construction of such sewer. And said appraisers shall make out a schedule of said lots or parts of lots, with the said appraisement thereto; and shall append to such schedule their affidavit that the said assessment is, in all respects, a true and impartial assessment of the benefits resulting to each lot and part of lot in any way benefited by the said proposed sewer, according to the best of their judgment. And the said appraisers shall file said schedule with the clerk of the board of trustees of such town, who shall record the same in the records of said board of trustees; and from and after the recording of said schedule above directed, the assessments therein made shall be a lien upon the lots and parts of lots, respectively, against which they are made, to be in no manner divested only as hereinafter provided. R. S. 1894, § 4430.

Appraisers—Presumption as to discharge of duties.—In actions to enforce sewer assessment liens it will be presumed that the appraisers discharged the duties enjoined upon them by statute and assessed benefits to each and all lots and parts of lots benefited by the proposed work. Kizer v. Town of Winchester, 141 Ind. 694.

1286. Order to appraisers.—3. Before said appraisers shall proceed to discharge their duties as in the preceding section, said board of trustees shall cause to be issued to them a certified copy of their order, giving the commencement, termination, distance, route, depth below the grade, and the materials of which such sewer is to be constructed, and of their appointment. R. S. 1894, § 4431.

1287. Majority may act.—4. The majority of said appraisers shall be competent to act; and two of them concurring in the same proposition, such concurrence shall be taken as the decision of said appraisers on such proposition. R. S. 1894, § 4432.

1288. Schedule filed—Construction.—5. As soon as the said schedule of assessment, made by the said appraisers, is returned and recorded in the records of said board of trustees, such board of trustees shall proceed and cause the said sewer to be constructed in accordance with their previous plans and specifications, as near as can be done, making such alterations from the original plan, only, as the necessity of the case or the better construction of the work may seem to require. R. S. 1894, § 4433.

1289. Apportionment of cost.—6. As soon as the board of trustees ascertain the cost of the construction of such sewer, they shall make a division of the cost of said sewer among the owners of said lots and parts of lots so assessed for the construction of such sewer; and as the whole amount of assessment made for the construction of said sewer is to the whole cost of construction of such sewer, so shall the lots and parts of lots owned by each individual be to the amount each individual shall pay upon each lot or part of lot so owned by him for the construction of said sewer. And the said board of trustees shall cause a list of the owners' names of said lots or parts of lots, with the description of said lots attached thereto, and append the amount in dollars and cents so found as being the share properly chargeable against each lot and part of lot so owned by any one person, to be made out by the clerk of said board of trustees, and cause it to be recorded in the records of the said board of trustees of such town. R. S. 1894, § 4434.

1290. Collection of cost.—7. The clerk of the board of trustees of said town shall make out, under his hand and the seal of said town, a certified copy of said list, showing the amount chargeable against each lot or part of lot in said town, and deliver the same to the treasurer of said town, which shall be full authority for him to receive and collect the amount specified in said list; and the said treasurer of said town shall have full power and authority for collecting such sums, and is vested with all the power and authority in the collection of the same that the marshal of such town has in the collection of taxes levied by said town, and shall be governed by the same rules and regulations, so far as applicable, that county treasurers are in collecting taxes in this state. And the owners of said lots or parts of lots shall have sixty days from the time such list is placed in the hands of such treasurer, within which they may pay the same without cost. Such treasurer as soon as he receives such list from the clerk of said town, shall cause notice to be given thereof, either by publication of such list in a weekly newspaper printed in said town, or by posting up three copies of said list in three public places in said town. R. S. 1894, § 4435.

1291. Penalty for non-payment.—8. At the expiration of sixty days from the time such list is placed in the hands of the said treasurer, he shall add thereto 10 per cent. on the amount so charged against each lot and part of lot remaining at that date, which shall be collected as a penalty for non-payment within the sixty days; and

from that date there shall be charged 6 per cent. interest on all remaining unpaid. R. S. 1894, § 4436.

1292. Payment, how enforced.—9. The same lien created by this act on the said lots or parts of lots by the assessment shall be in favor of the said town in which such lots are situated, and the same may be enforced by an action in the name of the town in any court of competent jurisdiction; and in such action the presumption of law shall be that all the provisions of this act have been complied with; and the only defense that the defendant shall be allowed to set up in said action shall be that he has paid the amount with which said lots or parts of lots are charged, and that said lots or parts of lots are not benefited to the amount assessed against the same. R. S. 1894, § 4437.

Enforcement of assessment—Constitutional law.—This statute is not void for failure to provide for notice to the property owner affected or assessed for benefits. The action to enforce the assessment can only be commenced in pursuance of a notice to the owner of the pendency thereof, and in a court in which an ample opportunity is afforded to the defendant to be heard in any of the defenses allowed by the statute. The statute in no way tends to deprive him of his property without due course or process of law. Kizer v. Town of Winchester, 141 Ind. 694; Garvin v. Daussman, 114 Ind. 429; Johnson, etc., v. Lewis, 115 Ind. 490; McEneney v. Town of Sullivan, 125 Ind. 407; Barber, etc., Co. v. Edgerton, 125 Ind. 455.

1293. Officers' fees.—10. The cost of appraisers and town officers in the collection of said funds for building said sewer, and in making provisions for building the same, shall be paid out of the treasury of said town as other fees. R. S. 1894, § 4438

1294. Superintendent—Engineer.—11. The sewers constructed under this act shall be done under the direction of the board of trustees, and to their satisfaction and acceptance, and they may appoint an agent to oversee the same, and also employ an engineer to lay off and make specifications and plans of the work. R. S. 1894, § 4439.

1295. Town may pay part of cost.—12. The board of trustees shall have a power to pay a part of the construction of said sewer out of the general funds or treasury of said town, when, in their judgment, the same would be fair and equitable, and when they so determine, they shall order and specify what part of the construction of said sewer shall be paid out of the general funds of such town, before making the pro rata dividend upon said assessment on said lots or parts of lots to be benefited; and shall, in that case, take into consideration, in making said pro rata dividend, the amount to be paid out of the general funds of said town, and making said amount to be paid by the owners of the lots and parts of lots less the amount paid out of the general funds of said town. R. S. 1894, § 4440.

1296. Terms of letting.—13. In letting the said work, the said trustees shall specify and agree with the contractor, as to the time and manner of payment therefor. R. S. 1894, § 4441.

1297. Protection of sewer—Tapping.—14. The board of trustees of such town shall, by an ordinance, provide for the protection of said sewer and the manner and terms that any person or persons may tap,

open or intersect said sewer; and no person shall be allowed to tap, open or intersect, or in any manner interfere with the same, without first procuring a permit from said board of trustees. R. S. 1894, § 4442.

Tapping sewer—Liability of town—Negligence.—A municipal corporation is liable to one who, by its invitation or permission, for his private benefit, connects his premises with a sewer constructed by the corporation, and is injured by the back flow of water into his premises, resulting from the negligent construction of the sewer or the negligent failure of the corporation to keep it in repair and free from obstruction; but the corporation is not liable where the owner of the premises has voluntarily tapped the public sewer, and made the connection therewith without invitation or authority. Town of Monticello v. Fox, 3 App. 489; City of Ft. Wayne v. Coombs, 107 Ind. 75.

1298. Intention of act.—15. It is not the intention of this act to take away the power that the board of trustees of incorporated towns now have, by law, to build sewers and pay for the same out of the general funds, of such town, but the intention is to create an additional means for construction of sewers, whereby those most benefited by their construction will pay most therefor. R. S. 1894, § 4443.

ARTICLE 8.—TOWN BUILDING.

SEC.
1299. May be incorporated.
1300. Notice.
1301. Written statement.
1302. Statement to be recorded.
1303. Twenty may organize.
1304. When incorporated.
1305. Powers.
1306. Records—Evidence.
1307. Trustees may convey.

[Acts 1858 S., p. 26. In force December 22, 1858.]

1299. May be incorporated.—1. Where any persons may have heretofore associated themselves together for the purpose of building a town within any county in this state, they may be incorporated as hereinafter provided. R. S. 1894, § 4574.

1300. Notice.—2. Notice of the intention to organize such corporation, and of the time and place of holding the first meeting, signed by one or more persons, shall be published in some newspaper of the county where such town has been located; or, if none, then in some newspaper of an adjoining county, for at least twenty-one days before such meeting is held. R. S. 1894, § 4575.

1301. Written statement.—3. At such first meeting, a temporary or permanent presiding officer and secretary shall be selected, and a written statement prepared specifying the object of such association, its name, and the time and manner of giving such notice, to be signed by such presiding officer and secretary. R. S. 1894, § 4576.

1302. Statement to be recorded.—4. Such statement and a copy of such published notice shall be filed in the office of the recorder of such county, and by him shall be recorded in the record of deeds, for which he shall be entitled to a fee of two dollars. R. S. 1894, § 4577.

1303. Twenty may organize.—5. It shall not be necessary for a

majority of the members of such association to be present at such first meeting, but any twenty or more shall be sufficient to hold the meeting and organize the corporation. R. S. 1894, § 4578.

1304. When incorporated.—6. From the time of filing such statement as aforesaid, such association shall be deemed and held a body corporate and politic by the name selected as aforesaid, with full powers to sue and be sued, contract and be contracted with, have a common seal, make laws for their own government, and may exercise all such other powers as are incident to corporations, for the purpose of carrying into effect the object of their association. R. S. 1894, § 4579.

1305. Powers.—7. Such corporation may acquire, by purchase or otherwise, real estate, and may hold and convey the same, or any part thereof, in such manner as it may see fit; but nothing herein contained shall be so construed as to exempt such lands from taxation as other lands are taxed. R. S. 1894, § 4580.

1306. Records—Evidence.—8. Such corporation shall keep a record of its proceedings; and such record or copies thereof, duly attested by its clerk or secretary, may be read in evidence in all suits at law where the interests of such corporation are concerned. R. S. 1894, § 4581.

1307. Trustees may convey.—9. Wherever any persons have associated for the purpose aforesaid, and have purchased real estate prior to the passage of this act, and have taken deeds to one or more persons in trust for such association, and such association shall hereafter become incorporated under the provisions of this act, then such trustees may and shall convey to such corporation all such real estate, and shall assign to such corporation all such title-bonds as may have been executed to them in trust for such association; and such conveyance and assignment shall pass as good and perfect a title to such corporation for such lands as if such association had been incorporated at the date of the execution of such deeds and said deeds had been executed to the corporation. R. S. 1894, § 4582.

CHAPTER 8.

MISCELLANEOUS STATUTES AND PROVISIONS.

ART.

1. Highways—Streets.
2. Railroads.
3. Street railways.
4. Gas and water companies.
5. Telephone companies.
6. Crimes and misdemeanors.
7. Prisons—Police matron—Stolen property.
8. Protection from fire.
9. Firemen's pension fund.
10. Policemen's pension fund.
11. Education.
12. Libraries.

Under the title of this chapter have been grouped certain statutes and provisions having some relation to municipal affairs, but which are not incorporating acts, nor acts amendatory thereof, nor supplemental thereto. Neither the limits nor the scope of this work permits a full compilation of statutes of this character, though some of these it has been deemed advisable and proper to set forth in full; and, where they are not, and the subject of the statute from which the provisions are taken bears any close relation to municipal law, reference is made to the full text as found in Burns' Revised Statutes, 1894, and Burns' Supplement, 1897, where full annotations of the decisions are made.

ARTICLE 1.—HIGHWAYS—STREETS.

SEC.

1308. Notice and duty of viewers—Highway on boundary line of city or town.
1309. Petition by abutting owners.
1310. Action on petition.
1311. Power of petitioners.
1312. Exemption from work on highways.
1313. Incorporated towns.
1314. Towns and cities—Residents exempt.
1315. Cities may pay.

Highways.—R. S. 1894, ch. 76 (§§ 6726–6959); Burns' Supp. 1897, ch. 76 (§§ 6726–6957).

See chapter note preceding this article.

1308. Notice and duty of viewers—Highway on boundary line of city or town.—16. The auditor of such county shall issue a precept to the sheriff thereof, commanding him to notify such viewers of the time, place and object of their meeting, such viewers, at such time, after having taken an oath, before some officer authorized to administer oaths, to faithfully perform their duties, shall proceed to view the highway to be located, or the change proposed, and if they shall deem the highway to be located, or the change to be made of public utility, they shall lay out and mark the same on the best ground, not running through any person's enclosure of one year's standing with-

out the owner's consent, unless, upon examination, a good way can not otherwise be had, without departing essentially from the route petitioned for: *Provided*, That where the road is laid out upon the line dividing the land of two individuals, each shall give half the road: *And provided, further*, That whenever the location of a highway is petitioned for upon and along any line, which forms also the boundary or corporate limits of any incorporated city or town, the county commissioners shall, for the purpose of locating such highway, have jurisdiction over the lands and lots lying within such corporate limits, and immediately affected by such proceedings and location; and the owners of such lands and lots so affected, shall have the same rights and remedies in the matter of the locating of such highway as the owners of the lands lying on the opposite side of said highway and outside of said incorporated city or town. [As amended, Acts 1899, p. 116. In force February 24, 1899.]

Jurisdiction of county commissioners.—Boards of county commissioners have original and exclusive jurisdiction of the location and establishment of all highways of their counties not within the limits of municipal corporations. Rassier v. Grimmer, 130 Ind. 219; Chicago, etc., R. Co. v. Sutton, 130 Ind. 405; Gold v. Pittsburg, etc., R. Co., Ind. Sup. Ct., March 28, 1899.

The county commissioners have no authority to locate or open a highway within the limits of an incorporated town without the consent of the board of trustees. Sparling, etc., v. Dwenger, 60 Ind. 72; Tucker v. Conrad, 103 Ind. 349; Chicago, etc., R. Co. v. Sutton, 130 Ind. 405.

Road supervisors have no authority over the streets of a town. State v. Mainey, 65 Ind. 404.

[Acts 1881 S., p. 542. In force September 19, 1881.]

1309. Petition by abutting owners.—1. Owners of real estate abutting upon any street, alley or highway in this state may petition the proper authorities of the town or city, or the board of county commissioners of the county where the street, alley or highway may be located, to grant right of way for the improvement of such street, alley or highway. R. S. 1894, § 6767.

1310. Action on petition.—2. When such petition has been signed by persons of lawful age who are the owners in fee-simple of more than half the real estate abutting upon any street, alley or highway in this state (if the petitioners are also a majority of those who own such real estate), it shall be the duty of the proper officers of the town or city where such street or alley may be situated, or of the board of county commissioners of such county where such highway may be located, to grant right of way for such improvement. R. S. 1894, § 6768.

1311. Power of petitioners.—3. When right of way has been granted for the improvement of any street or alley, the persons who have signed the petition for such improvement may proceed, under the supervision of a competent civil engineer, to be employed by the town or city where the same is located, to grade and pave or gravel such street or alley. R. S. 1894, § 6769.

1312. Exemption from work on highways.—9. On application to

the township trustee any person liable to work on highways may be exempt therefrom if it be shown that he is unable from bodily infirmities to work thereon and that he is too poor to pay the commutation therefor; also any person who is a bona fide member of a legally organized fire company, organized and located in any incorporated city or town in this state. And in such cases the township trustee shall execute to such person a certificate thereof, which shall, on being presented to the supervisor entitle him to such exemption. [As amended, Acts 1895, p. 178. In force March 9, 1895.] Burns' Supp. 1897, § 6823.

See *ante*, §§ 260, 1152.

Statute construed.—It is only the members of a fire company organized by the town board, and under its control, that are entitled to exemption from work upon the highways of the town. Leedy v. Town of Bourbon, 12 App. 486.

Mandamus.—If the township trustee improperly refuses to give a person entitled thereto a certificate showing his exemption, the trustee may be compelled by a mandate to issue such certificate. State v. Porter, 134 Ind. 63.

To entitle a person to a certificate showing that he is exempt from liability to work on highways on account of such person being a member of a legally organized fire company, it must be shown that all the steps required by statute to organize such company have been performed. Porter v. State, 141 Ind. 488.

Exemption from labor—Township trustee.—Exemption from labor on highways is to be determined exclusively by the township trustee; the ground merely, on which he might exempt a person from road work, is insufficient to constitute a defense to an action for a failure to perform such work. Winfield Tp. v. Wise, 73 Ind. 71.

Certificate.—The certificate is a good defense to a suit for failure to perform labor unless it is shown that such certificate is false. Shideler v. Clinton Tp., 23 Ind. 479.

[Acts 1883, p. 62. In force March 2, 1883.]

1313. Incorporated towns.—36. For the purpose of working and keeping the streets, alleys and roads within the limits of incorporated towns in repair and good condition, and for raising money and applying the same thereon, the boards of trustees of such towns are hereby invested with the same power, and are required to perform similar duties within their respective towns, as are given by this act to township trustees. And town marshals are hereby invested with the same power, and are required to perform similar duties, as are by this act given to road supervisors, to be exercised within their respective towns. R. S. 1894, § 6850.

1314. Towns and cities—Residents exempt.—38. Residents of towns and cities subject to road work shall not be subject to the provisions of this act, except that the respective boards of trustees of towns and the common councils of cities may require them to work within the corporate limits of their respective towns and cities, and tax levies to be made under the provisions of this act by township trustees shall not apply to or affect any property within the corporate limits of any city or town, and any tax levy to be made under this act by the board of town trustees, shall not apply to any property outside of such towns. This act shall not affect any existing law which

authorizes cities and towns to raise money and make application thereof upon the streets and alleys thereof, and cities and towns shall have the same power and authority over its streets and alleys as if this act had not been passed. R. S. 1894, § 6852.

1315. Cities may pay.—17. When any road to be improved under and by virtue of this act begins or terminates in any city or incorporated town, the corporate authorities of such city or town may, upon the recommendation of the board of commissioners, agree to pay, in the bonds of such city or town, an amount not exceeding one-fifth of the entire cost of said road in addition to any amount that may be assessed upon the real estate of such city or town by virtue of the provisions of this act: *Provided*, That the entire tax to be imposed for road purposes by virtue of this section shall not in any one year exceed fifty cents on the one hundred dollars of taxable values of such city or town. R. S. 1894, § 6896.

ARTICLE 2.—RAILROADS.

SEC.
1316. Railroad street crossing—Grading.
1317. Failure to obey notice—Penalty.
1318. Action to recover penalties.
1319. Disposition of penalties.
1320. Work may be done at expense of company.
1321. Public use of railroad right of way and depot grounds—Effect.
1322. Union roads.
1323. Union railway company.
1324. Certificate of incorporation.
1325. How signed and attested.
1326. Rights as owner or lessee.
1327. Powers.
1328. Condemnations.
1329. Streets and alleys—How vacated.
1330. Liabilities.
1331. Lights at street crossings.

Railroads—Organization.—R. S. 1894, ch. 40 (§§ 5134-5280); Burns' Supp. 1097, ch. 40 (§§ 5153-5257).

Railroads—After organization.—R. S. 1894, ch. 41 (§§ 5281-5405); Burns' Supp. 1897, ch. 41 (§§ 5307-5357).

See chapter note preceding § 1308, *ante*.

[Acts 1895, p. 233. In force March 11, 1895.]

1316. Railroad street crossing—Grading.—1. That it shall be the duty of each railroad company whose road or tracks cross, or shall hereafter cross, any street, avenue or alley in any incorporated town or city in the state of Indiana; which said street, avenue or alley has been, or shall hereafter be, by addition, plat or otherwise, dedicated to the public use, to properly grade and plank or gravel its said road and tracks at its intersection with and crossing of said street, avenue or alley in accordance with the grade of said street or avenue, in such manner as to afford security for life and property at said intersection and crossing. Burns' Supp. 1897, § 5172*a*.

See *ante*, § 218, note, Railroads—Street Railways; see also *ante*, § 126, notes.

1317. Failure to obey notice—Penalty.—2. Every such railroad company which fails or neglects to comply with the provisions of the

preceding section after thirty days' written notice by the authorities of such city or town shall be served on such railroad company shall be held liable therefor to the state of Indiana in a penalty of not less than twenty dollars nor more than fifty dollars, to be recovered in a civil action at the suit of said state, in the circuit or superior court of any county in which said crossing may be located. Burns' Supp. 1897, § 5172*b*.

1318. Action to recover penalties.—3. All actions for the recovery of the penalties prescribed in the preceding section shall be prosecuted in the name of the state of Indiana by the prosecuting attorney of any county, when such failure or neglect as aforesaid may occur; and such prosecuting attorney shall be entitled to recover and receive for his services in such cases, as a docket fee, ten dollars in each case, to be taxed as part of the costs in such cases. Burns' Supp. 1897, § 5172*c*.

1319. Disposition of penalties.—4. All penalties collected under the provisions of this act shall, by the clerk of the court where assessed and recovered, be paid over to the treasurer of the county in which said suit was instituted for the benefit of the common school fund of the state. Burns' Supp. 1897, § 5172*d*.

1320. Work may be done at expense of company.—5. Should any such railroad company fail or neglect to comply with the provisions of section 1 of this act within the time prescribed in the notice hereinbefore provided for then said town or city may have said work done at said crossing and intersection in the manner prescribed in said section, and recover the amount of the cost and expenses thereof, including reasonable attorney fees, from said railroad company by suit in any court of competent jurisdiction. Burns' Supp. 1897, § 5172*e*.

Maintenance of street crossing.—Where a railroad company crosses a street or highway with its track, the company must maintain the street or highway in a reasonably safe condition for the use of the public. Pennsylvania Co. v. Frund, 4 App. 469; Evansville, etc., R. Co. v. Carvener, 113 Ind. 51; Louisville, etc., R. Co. v. Smith, 91 Ind. 119; Delzell v. Indianapolis, etc., R. Co., 32 Ind. 45; Indiana, etc., R. Co. v. Barnhart, 115 Ind. 399; Terre Haute, etc., R. Co. v. Clem, 123 Ind. 15; Evansville, etc., R. Co. v. Crist, 116 Ind. 446; Louisville, etc., R. Co. v. Pritchard, 131 Ind. 564; Ohio, etc., R. Co. v. Trowbridge, 126 Ind. 391; Seybold v. Terre Haute, etc., R. Co., 18 App. 367; Elliott Railroads, § 1092.

Approaches—Company's duty—Joint liability of company and city.—The approaches to the part of the street and sidewalk crossing the track and right of way are a part of the crossing, and it is incumbent upon the company to place and maintain the approaches, as well as the crossing, in a condition reasonably calculated, in contemplation of the surrounding circumstances, to insure the safety of persons passing over the track and upon the street and sidewalk at the crossing. That it is the duty of the city, in such case, to provide and maintain a reasonably safe street and sidewalk, can not relieve the railroad company. The general rule in such case is that both are primarily liable. Cincinnati, etc., R. Co. v. Claire, 6 App. 390.

Street and railroad crossings.—A railroad company is required by statute to construct crossings over its tracks where the same cross the streets of an incorporated town, and the failure of a town to enact an ordinance requiring a railroad company to construct such crossing will not relieve the company of such duty. This duty is imposed by statute, but exists also independent of any statute. Evansville, etc., R. Co.

v. State, 149 Ind. 276; Indianapolis, etc., R. Co. v. State, 37 Ind. 489; 3 Elliott on Railroads, §§ 1092, 1102.

The duty of a railroad to construct street crossings over its tracks is the same whether the street or highway was open before or after the railroad was built. Evansville, etc., R. Co. v. State, 149 Ind. 276.

Railroad crossing—Contributory negligence—Presumption.—A person approaching upon a street or highway a railroad crossing known by him to be dangerous must exercise care in proportion to the danger to be avoided. He must use his senses, must listen for signals or the noise of approaching trains, must observe signs put up as warnings, and look for trains where there is a view of the track; if he is injured at the crossing, the fault is prima facie his own, and he must show affirmatively that his own negligence did not contribute to the injury; and in approaching a crossing, he must assume that there is danger and act with ordinary care and prudence on that assumption. Hancock v. Lake Erie, etc., R. Co., 21 App. 10; Chicago, etc., R. Co. v. Hedges, 118 Ind. 5; Ohio, etc., R. Co. v. Hill, 117 Ind. 56; Louisville, etc., R. Co. v. Stommel, 126 Ind. 35; Smith v. Wabash R. Co., 141 Ind. 92; Cincinnati, etc., R. Co. v. Duncan, 143 Ind. 524; Pennsylvania Co. v. Meyers, 136 Ind. 242. But the rule that the plaintiff must allege and prove absence of contributory negligence has now been changed by statute, negligence of the plaintiff being made matter of defense provable under the general denial. See Acts 1899, p. 58.

Mandate.—Railroad companies may be compelled by mandate to make their tracks conform to the grade of a street, and to make highway crossings safe and convenient, and to restore the highway over which it crosses to its former state of usefulness. Indianapolis, etc., R. Co. v. State, 37 Ind. 489; Cummins, etc., v. Evansville, etc., R. Co., 115 Ind. 417; Clawson, etc., v. Chicago, etc., R. Co., 95 Ind. 152; Elliott Railroads, § 698, notes and cases, and § 1106.

Complaint—Demand.—A complaint against a railroad company by an incorporated town to require it to construct street crossings across its tracks which alleges the refusal of such company to construct the crossings, need not allege a demand upon the part of the town. Evansville, etc., R. Co. v. State, 149 Ind. 276.

Dedication—Street and railroad crossings.—Where, by platted additions to a town, streets are dedicated to the public which cross a railroad track, and the railroad company constructed crossings over its track, and such streets and crossings were used by the public for general use as a public highway for six or seven years, the public acquired such rights therein as could not be divested by the railroad company tearing up the approach and crossing. Evansville, etc., R. Co. v. State, 149 Ind. 276.

[Acts 1899, p. 477. In force April 27, 1899.]

1321. Public use of railroad right of way and depot grounds—Effect.—1. That the use by the public [of the] right of way or depot grounds of any railroad in this state by riding, driving or walking thereon, shall not ripen into a right to continue to do so even though it has been so used for a period of twenty years or more; nor shall such use be evidence of a grant to do so except where such use is made across such ground to connect a street or highway on each side thereof, and except where a court of competent jurisdiction has adjudged the existence of a street or highway.

[1 R. S. 1852, p. 421. In force May 6, 1853.]

1322. Union roads.—1. It shall be lawful for two or more railroad companies, running railroads to the same town or city, to locate,

construct, keep up, repair and use a common or union railroad of one or more tracks, connecting the railroads of such companies, for business purposes. R. S. 1894, § 5221.

[Acts 1885, p. 30. In force March 2, 1885.]

1323. Union railway company.—1. That where two or more railroad companies own or operate railroads extending into, through or near the same city or town, such companies, or any two or more of them, may form a union railway corporation, according to the provisions hereinafter contained. R. S. 1894, § 5232.

1324. Certificate of incorporation.—2. The railroad companies uniting in the formation of such corporation are designated as proprietary companies, and shall make a certificate of incorporation, in which they shall specify the name of the company to be incorporated thereunder, the amount of the capital stock of such company, the number and the par value of the shares into which it shall be divided, the aggregate amount of the par value of the shares of each proprietary company, the county or counties in which said union railway shall be situate, with the name of the town or city within or near which said union railway is to be constructed. R. S. 1894, § 5233.

1325. How signed and attested.—3. Such certificate of incorporation shall be signed by the president or vice-president, and attested by the secretary of each of said proprietary companies, and shall be sealed with its corporate seal, and shall be acknowledged by the respective companies by their said officers before some person authorized to take and certify the acknowledgments of conveyances of real estate and shall be filed and recorded in the recorder's office of the county or counties in which said union railway company may be situated; and upon the filing of such certificate as aforesaid, the union company so formed shall be a corporation of this state, with all the powers incident thereto, and such other powers as are conferred by this act. R. S. 1894, § 5234.

1326. Rights as owner or lessee.—6. Any such union railway company may, as owner or lessee thereof, operate any belt railroad extending around, or partly around, the town or city in or near which such union railway may be situated, the track of which belt road connects with the track of said union railway company, or with the track of any of its proprietary companies, to the end that such town or city may be relieved, as far as practicable, of the passage through it of through freight cars or through freight trains. R. S. 1894, § 5237.

1327. Powers.—7. Any such union railway company may erect, construct, rebuild and replace, in connection with its tracks, union depots, car sheds, and such other structures and appliances as the company may deem necessary to facilitate the transaction of its business, and the business of its proprietary companies, and of other railroad companies whose tracks may connect therewith, and which may acquire from such union railway company the right to use said union tracks and their appliances. And such union company shall also

have power to locate, construct, rebuild, keep up, change and repair such union railroad and its tracks, side-tracks, switches, depots, sheds and other structures and appliances, and to take conveyances and releases in fee-simple, or otherwise, of rights of way and of such real estate as it may deem necessary for the purposes aforesaid, and may condemn in fee-simple, or otherwise, so much real estate and such rights of way as it may deem necessary for the purposes aforesaid, or any of them; also, to construct, own, maintain and operate union passenger stations, local freight stations, transfer and connecting tracks, between the property of such union company and property and tracks of other railroad companies. R. S. 1894, § 5238.

Rules and regulations respecting transfer companies, hacks, etc., see Indianapolis, etc., R. Co. v. Dohn, Ind. Sup. Ct., May 23, 1899.

1328. Condemnations.—8. The condemnations authorized in the last section may be made and had according to the provisions of the charter of any or either of said proprietary companies, or under and according to the general railroad law of this state, in force at the time providing for the condemnation of real estate for railroad purposes, or according to the provisions of article 30 of chapter 2 of the Revised Statutes of 1881, providing for the writ of assessment of damages. R. S. 1894, § 5239.

1329. Streets and alleys—How vacated.—10. If any such union railway company, in carrying out the powers granted by this act, shall deem it necessary that any part of any street, avenue or alley in any town or city in which such union railway shall be situated should be vacated, it shall be lawful for the president and trustees of such town, or for the common council of such city, or for the board of aldermen and common council of such city, as the case may be, to vacate any part of any street, avenue or alley of such town or city for the purposes contemplated by this act: *Provided, however,* That as a basis of such vacation, such union railway company shall present to and file with the proper municipal body or bodies of such town or city its petition, setting forth a description of the part of the street, avenue or alley proposed to be vacated, and the purpose for which the ground is proposed to be used, and there shall be appended to such petition, as a part of the basis of such vacation, the written consent to the granting of the prayer of such petition of the owners in fee-simple of more than one-half of the real estate fronting on both sides of said street or alley, which, or part of which, is proposed to be vacated, estimated by the frontage in feet upon such street or alley, such frontage to commence at a line drawn across such street or alley equidistant from the termini of that portion of the street or alley proposed to be vacated, and extending along said street or alley from said line fifteen hundred feet in each direction, unless such street, avenue or alley shall not be continuous in either direction from said line fifteen hundred feet, in which case the consent of owners above provided for shall only be required for the distance that it is continuous. Before granting the prayer of the petition, such municipal body, or bodies, shall ascertain and determine that the consent of the owners of the

requisite number of front feet has been obtained as aforesaid, and such finding shall be made a matter of record, and shall be conclusive of the facts so found in all collateral proceedings: *Provided, however,* That before said petition is presented, twenty days' notice shall be given by such union railway company, by publication by three insertions in two newspapers of general circulation printed and published in the town or city in which such union railway may be situated, setting forth that on a day, to be therein named, or at the next meeting thereafter of such municipal body or bodies, a petition for the vacation of the portion of the street or alley in question, describing it, will be presented to such municipal body or bodies for action thereon. R. S. 1894, § 5241.

Vacation—Obstruction of street—Right of recovery—Question of law, of fact—Degree of injury.—Upon the vacation of a street and the erection of structures on the vacated part, as to whether one whose access to his property has not been cut off by the vacation may recover, is a question of law. The degree of injury is a question of fact. Dantzer v. Indianapolis, etc., R. Co., 141 Ind. 604.

Remote obstruction—Injury in common with community—Easements of access, light and air.—Where lot does not abut upon the street obstructed, and the owner is only affected by an inconvenience in traveling to and from his premises, the inconvenience is one suffered alike by all the community, and no recovery therefor can be had. Easements of access, of light and of air, are all confined to the street in front of the lot, and if a remote obstruction does not affect these, there is no legal injury or tort even though the access be rendered more inconvenient or a more circuitous route is necessitated. Dantzer v. Indianapolis, etc., R. Co., 141 Ind. 604.

Obstruction of easement of access—Damages—Recovery.—The obstruction of the easement of access need not always be upon the immediate front of the lot, the owner of which is affected, but if the obstruction, though remote, render access to such lot impossible, or impairs it in a substantial manner at the point where it abuts upon the street, the property right of the lot owner is invaded, and he may recover. Dantzer v. Indianapolis, etc., R. Co., 141 Ind. 604.

1330. Liabilities.—15. Every such union railway company shall be primarily liable to the public and to third persons on its contracts and for its torts, but it shall be competent as between themselves for such proprietary companies, such associate companies, and said union railway company, to agree among themselves that the ultimate liability for damages for any class of injuries to persons or property shall fall upon one or more of said companies, and such agreement as to such ultimate liability may be enforced as between the companies parties to such agreement: *Provided, however,* That nothing herein contained shall prevent any person suing for an injury to persons or property from joining as defendants any or all of said companies, if the facts would have justified such joinder if this section had never been passed. R. S. 1894, § 5246.

[Acts 1893, p. 302. In force May 18, 1893.]

1331. Lights at street crossings.—That the common councils of all cities of this state, not working under a special charter granted by

the legislature of the state of Indiana, shall have the power to provide by ordinance or resolution for the security and safety of citizens and other persons from the running of trains through any city by requiring railroad companies running and operating a railroad through any city to keep and maintain lights on all nights that the common council may direct, at the points where the railroad tracks cross a street in any city, and may in such ordinance or resolution provide what kind of lights the railroad company shall maintain, and the manner of enforcing the compliance with the said resolution or ordinance by the railroad company, and for that purpose shall have power to pass and enforce a penal ordinance: *Provided*, That no city shall have authority under this act to pass any resolution or ordinance requiring any railroad company to maintain any different kinds of lights than that maintained by said city. R. S. 1894, § 5173.

See *ante*, § 124, clause 42.

Provisions construed—Security and safety of citizens.—The power granted by this section is to be exercised for the security and safety of citizens and other persons from the running of trains through the city. The purpose of the statute is not street lighting, or track lighting, and an ordinance passed by a city the purpose of which is to secure street lighting regardless of the security and safety of citizens and other persons from the running of trains through the city is void. City of Shelbyville v. Cleveland, etc., R. Co., 146 Ind. 66; Cleveland, etc., R. Co. v. City of Connersville, 147 Ind. 277.

The power granted by this statute is a general one, and the mode and manner of its exercise are not prescribed, but are left to the discretion of the city; the courts may therefore inquire whether in the enactment of an ordinance under the power granted there was a reasonable exercise of the power. City of Shelbyville v. Cleveland, etc., R. Co., 146 Ind. 66.

Under the power granted by this section the common council can not require that the electric lights prescribed by the ordinance should be of a particular pattern; and an ordinance which requires railroad companies to maintain a light wherever the tracks of such companies cross a public street in said city, which fails to provide definitely for the times during which the lamps should be lit, is not a reasonable exercise of the power granted. City of Shelbyville v. Cleveland, etc., R. Co., 146 Ind. 66; Cleveland, etc., R. Co. v. City of Connersville, 147 Ind. 277.

An ordinance passed under this act providing that "all railroad companies whose tracks cross or intersect any public street of the city shall place, keep and maintain at all points where such railroad crosses any public street, electric lights of 2,000 nominal candle power, which shall be kept burning every night from twilight until dawn," and prescribing a penalty for its violation, was repealed by implication by a later ordinance which provided that all railroad companies running and operating a railroad through said city should keep and maintain electric lights at such points and for such times as were specifically stated in the ordinance, prescribing a penalty for the violation thereof. There being no reservation in the later ordinance respecting pending actions under the former, such actions must fail. Terre Haute, etc., R. Co. v. City of South Bend, 146 Ind. 239.

An ordinance requiring a railroad company to erect and maintain arc electric lamps or lights and keep them lighted from dusk to dawn on each and every night, at the points where the railroad crosses the streets of the city, where the railroad runs no trains over its road through said city after eight o'clock at night, exceeds the power vested in a city by this statute and is void. Cleveland, etc., R. Co. v. City of Connersville, 147 Ind. 277.

ARTICLE 3.—STREET RAILWAYS.

SEC.
1332. Construction of tracks—Use of by other companies—Cities of 35,000.
1333. Construction of tracks—Use of by other companies—Cities of 100,000.
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SEC.
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1369. Heating of street cars.
1370. Penalty.

Street railway companies.—R. S. 1894, ch. 44 (§§ 5450–5479); Burns' Supp. 1897, ch. 44 (§§ 5452–5479*b*); Acts 1899, pp. 209, 230, 260, 378, 408.

See chapter note preceding § 1308, *ante*.

1332. Construction of tracks—Use of by other companies, cities of 35,000.—5. Such company may construct its track, switches, sidetracks or turnouts upon the streets of said cities or towns under the following conditions and restrictions: The said track shall be constructed upon the center or side of said streets, and shall conform exactly to the established grade of such street. The free passage of the streets of such city or town, occupied or used by said company, shall be impeded or obstructed by such company, only to the extent necessary for the purposes for which said company was organized. The points where such track shall intersect and cross the streets of such city or town shall be so arranged by said company as to render the crossing as passable and in as good condition as any other portion of the street. The track shall be from four to five feet in width. Every company organized under the provisions of this act and owning and operating a street railroad within any city having a population of thirty-five thousand and not exceeding forty-nine thousand

people, according to the last preceding United States census, shall permit the use of its track or tracks by any incorporated interurban passenger railway company from the corporate limits of such city or town to some central point in such city or town, for the purpose of receiving and discharging passengers, whenever the board of public works and common council of any such city or town shall by ordinance fix such central point and grant a right of way thereto, with a proper loop for turning its cars, to such interurban passenger railway company upon or over any street, alley, road-bridge or public highway of such city or town now or then occupied in whole or in part by any street railway company with one or more tracks: *Provided*, That such use shall be upon such conditions as the board of public works and common council of such city or town may prescribe, and upon such terms as to compensation as such companies may mutually agree. And in case such companies can not agree as to such compensation within thirty days from the passage of such ordinance, then such use shall be permitted upon such terms as to compensation as may be fixed and determined by an action instituted by either of such companies in the circuit court of the county in which such city or town may be situate: *Provided*, Said company may use such tracks from the time of filing the said action, and no appeal shall operate to stay the use of such track or tracks as fixed and determined in said action: *And provided, further*, That in case the company owning and operating street railroad system in such city can not furnish power to propel the cars of the suburban company, then in that event the suburban company shall have a right to construct and maintain feed and trolley wires on the poles of the company in such city to such terminal point designated by the board of public works and the common council of such city, and the compensation for the use of the poles for the construction of such wires is to be fixed as above provided for the use of tracks; or in case conduits or other methods of placing or carrying wires for power are used, the said conduits or methods may be used for placing the feed wires for power. *Provided, further*, That such interurban or entering company shall not erect other poles or lay any additional rails or poles in or on any such streets, alleys or highways already occupied. [As amended, Acts 1899, p. 230. In force March 2, 1899.]

See *ante*, § 218, note, Railroads—Street Railways.

The above act amends section 1 of the act of 1891. The succeeding section is an act passed two days later by the same legislature and assumes also to amend section 1 of the act of 1891. Section 1 of the act of 1891 amended section 5 of the act of June 4, 1861. It is the opinion of the compiler that the later act (see succeeding section) is not effective, but it has been deemed best to set it forth. Feibleman v. State, 98 Ind. 518, 576; Ford v. Booker, 53 Ind. 395; Blakemore v. Dolan, 50 Ind. 194.

Duties as to streets and highways.—It is the duty of a street car company to maintain its tracks so as to preserve the public highway in a reasonably safe condition for public use and travel, whether there is any ordinance requiring it to be done or not, and whether the tracks are upon a street within the corporate limits of the city or upon a highway beyond the corporate limits. Citizens' Street R. Co. v. Ballard, Ind. App. Ct., Jan. 24, 1899.

1333. Construction of tracks—Use of by other companies—Cities of 100,000.—1. [5.] Such company may construct its tracks, switches, side-tracks or turn-outs upon the streets of said cities or towns under the following conditions and restrictions: The said track shall be constructed upon the center or side of said streets, and shall conform exactly to the established grade of said street. The free passage of the streets of such city or town, occupied or used by said company, shall be impeded or obstructed by such company, only to the extent necessary for the purposes for which said company was organized. The points where such track shall intersect and cross the streets of such city or town shall be so arranged by said company as to render the crossing as passable and in as good condition as any other portion of the street. The track shall be from four to five feet in width. Every company organized under the provisions of this act and owning and operating a street railroad within any city having a population of one hundred thousand and upwards, according to the last preceding United States census, shall permit the use of its track or tracks by any incorporated suburban passenger railway company from the corporate limits of such city or town to some central point in such city or town, for the purpose of receiving and discharging passengers, whenever the board of public works and common council of any such city or town shall by ordinance fix such central point and grant a right of way thereto with a proper loop for turning its cars, to such suburban passenger railway company upon or over any street, alley, road-bridge or public highway of such city or town now or then occupied in whole or in part by any street railway company with one or more tracks: *Provided*, That such use shall be upon such conditions as the board of public works and common council of such city or town may prescribe, and upon such terms as to compensation as such companies may mutually agree. And in case such companies can not agree as to such compensation within thirty days from the passage of such ordinance, then such use shall be permitted upon such terms as to compensation as may be fixed and determined by an action instituted by either of such companies in the circuit court of the county in which such city or town may be situated: *Provided*, Said company may use such tracks from the time of filing the said action, and no appeal shall operate to stay the use of such track or tracks as fixed and determined in said action: *And provided, further*, That in case the company owning and operating street railroad system in such city can not furnish power to propel the cars of the suburban company, then in that event the suburban company shall have a right to construct and maintain feed and trolley wires on the poles of the company in such city to such terminal point designated by the board of public works and the common council of such city, and the compensation for the use of the poles for the construction of such wires is to be fixed as above provided for the use of tracks, or in case conduits or other methods of placing or carry[ing] wires for power are used, the said conduits or methods may be used for placing the feed wires

for power: *Provided, further,* That such suburban or entering company shall not erect other poles or lay any additional rails in or on any such streets, alleys or highways already occupied. [As amended, Acts 1899, p. 480. In force March 4, 1899.]

For reasons stated under preceding section, it is the opinion of the compiler that this section is not valid.

Tracks not an additional burden—License or franchise.—A street railway is not an additional burden to that of the general easement which the public has in the street, and the owners of the fee are not entitled to damages on account of the construction thereof on a public street; but a street railway can not be laid upon the streets of a town or city without a grant of a license or franchise therefor, either by the municipality or the legislature. Chicago, etc., R. Co. v. The Whiting, etc., R. Co., 139 Ind. 297; Indianapolis, etc., R. Co. v. Citizens', etc., Co., 127 Ind. 369; Eichels v. Evansville, etc., Co., 78 Ind. 261; 3 Elliott on Railroads, §§ 1088, 1135.

But a street railroad may be an additional burden if it deprive the abutting lot-owner of easement of access, or is operated so as to be a nuisance. 3 Elliott on Railroads, § 1088 and notes and cases.

Right of street railroad to cross steam railroad at street crossing.—The street railway company's right to use the street being founded on the easement in the public, the right of a street railway to cross over the tracks of a steam railway laid on the street is subject to no conditions other than those to which the general public is subject in traveling over such street. A street railroad company which has complied with the laws and regulations relating to such companies, has the right to construct and lay its tracks over and across the track of a steam railroad, at its own expense, without payment of damages, when such steam railroad is laid in and upon a street. Chicago, etc., R. Co. v. Whiting, etc., R. Co., 139 Ind. 297; 3 Elliott on Railroads, § 1135.

Statute construed—Applies to cities under special charters.—The act of June 4, 1861, granting the right to street railway companies to locate and maintain tracks upon the streets of a city, applies to cities organized under a special charter. Eichels v. Evansville, etc., Co., 78 Ind. 261.

[Acts 1897, p. 173. In force March 6, 1897.]

1334. Street improvements, time for payment.—1. That wherein any city or town in said state having therein a street railway operated by electricity or other power operating such street railway, the company is required by its franchise to pave any portion of any street or alley in any city or town, then said city or town shall extend by ordinance or resolution to such street railway company, if it should be so requested by the street railway company, a period of time in which to pay for the said improvement or improvements. Burns' Supp. 1897, § 5454*a*.

1335. Bonds to secure payment.—2. When the franchise of such company requires paving to be done by such company, then the common council of such city, or board of trustees of such town shall, when such company shall so request, and shall execute and file with the clerk of such city or town, the stipulation and agreement waiving objections on account of illegality or irregularity of proceedings, as is now required by law in case of owners of abutting property, by proper resolution or ordinance, enter into an agreement with said street railway company to issue bonds for a period of years not less than ten, or

for any other number of years agreed to by such common council or board of trustees and such street railway company, and shall issue the same according to such agreement. Such bonds to be in such denomination as may be agreed upon, and shall bear interest not to exceed six per cent. per annum. The amount of said bonds shall be equal to the amount due for the improvement, and said bonds shall be divided into a series of equal parts corresponding to the number of years in which the bonds are to be payable. One equal series of such bonds shall become due and payable each year with the interest on the whole of the amount of the bonds which interest shall be payable semi-annually. The said bonds shall be issued and sold by said city, or town, in the same manner, and be governed by the same laws as other street improvement bonds. Burns' Supp. 1897, § 5454*b*.

1336. Acceptance by stockholders.—3. That before the said bonds are to be issued and any street railway company is to receive the rights and benefits conferred by this act, such street railway company shall call a meeting of its stockholders and have them accept the ordinance or resolution passed by the common council of such city, or the board of trustees of such town, and after such action by the stockholders, the directors of such company shall ratify the action of said stockholders, and certified copies of the minutes of the meetings are to be properly attested and filed with the clerk of such city or town. Burns' Supp. 1897, § 5454*c*.

1337. Lien of bonds.—4. That such improvement bonds shall have the same priority over other liens as have assessments for other street improvements, and are to be the first lien on all the property, assets and franchises of said street railway company. Burns' Supp. 1897, § 5454*d*.

1338. Default in payment, collection.—5. Should any street railway company fail to pay any such bonds, or interest thereon, at maturity, then all of the said bonds shall become due and payable at the option of the holder, or holders of the same, or of such common council, or such board of trustees, and the same may be foreclosed as any other street improvement bonds; in which action the plaintiff or plaintiffs may have a receiver appointed for said company to take charge of, and sell all the property and assets of the defendant to satisfy such improvement bonds: *Provided, however*, That no action shall be brought against any street railway company under this act until there is a default which has been continued for six months after the payment of the principal or interest of such bonds is due. Burns' Supp. 1897, § 5454*e*.

1339. New bonds in lieu of old.—6. If any street railway has entered into any agreement prior to the passage of this act, by and under which bonds have been issued for any street improvement, and said city desires to make further street improvements, for which said company would be liable, then such city may issue new bonds in lieu of any bonds that may have been heretofore issued, and the proceeds thereof shall be paid to the holders of the outstanding bonds, and

such reissue of bonds shall retain the same priority as the original. Burns' Supp. 1897, § 5454*f*.

1340. Liability of city or town.—7. Nothing in this act shall be construed to mean as extending the liability of any city or town on account of such improvements beyond the liability existing as to other street improvement bonds. Burns' Supp. 1897, § 5454*g*.

Change of ordinance.—Where an ordinance provides that a street railway company shall keep the space between the rails and a certain space outside each rail in repair, the city can not, by a subsequent ordinance, impose on such company, without its consent, the obligation of paying a proportionate share of the cost where a street occupied by its railway is improved. Western, etc., Co. v. Citizens', etc., Co., 128 Ind. 525, 534.

Consideration—Parol evidence.—An ordinance amending a section of an ordinance which required the Citizens' Street Railway Company to pave between its tracks provided that such company should only be required to keep the space between the rails in good repair. The city by a subsequent ordinance sought to compel the company to pay a part of the street improvements. This ordinance was not accepted by the company. Afterward the city granted to the Citizens' Street Railroad Company, the purchaser of the street railway, all the rights, privileges and franchises of the Citizens' Street Railway Company, in consideration that the former company should assume all the obligations and duties of the latter. It was not competent to prove by parol that the new company, in consideration of the passage of the ordinance ratifying and approving the sale, accepted the ordinance which sought to make the old company liable for street improvements. Western, etc., Co. v. Citizens', etc., Co., 128 Ind. 525, 538.

Exacting costs for improvements.—Where the charter of a street railway company provided that the company should pave the space between the tracks, an ordinance providing for the paving of the street, on which the tracks were, required the cost of paving between the tracks to be assessed against the company, such provision was valid, and the contractor could not require the cost of paving such part of the street to be assessed against the abutting owners. State v. City of Michigan City, 138 Ind. 455.

Contract, ordinance.—A city by an ordinance authorized the paving of a street and the mayor to enter into a contract for the work. The ordinance provided that the property owners should pay for a portion of the paving, and that a company operating a street railway on the street should pay for the balance. The contract provided that the work should be done "according to the ordinance and specifications." The work was done, and after it was finished the contractor acquiesced in the manner of payment. The ordinance was made a part of the contract, not only as to the manner in which the work should be done, but also as to the manner in which it should be paid for. State v. City of Michigan City, 138 Ind. 455.

Charter to be strictly construed.—A street railway charter is to be strictly construed against the railway company, and it has no doubtful rights under such charter, for where there are doubts they are construed against the grantee and in favor of the city. Western, etc., Co. v. Citizens', etc., Co., 128 Ind. 525, 530.

Amendatory ordinance—Consideration.—A compliance by the Citizens' Street Railway Company with the conditions expressed in the amendatory ordinance of 1878, passed by the common council of the city of Indianapolis, was a sufficient consideration for the amended ordinance, and when it was accepted by the company and its conditions complied with it became a binding contract. Western, etc., Co. v. Citizens', etc., Co., 128 Ind. 525, 531.

Liability for assessment—Estoppel.—A street railway company, whose property is not subject to assessment for street improvements, is not estopped to deny its liability for an assessment, because it stands by without objection until the improvement is completed, if it is one which the city has authority to make. Western, etc., Co. v. Citizens', etc., Co., 128 Ind. 525, 539.

1341. By-laws—Rates of fare—Penalty.—9. The directors of such company shall have power to make by-laws for the management and disposition of stock, property and business affairs of such company not inconsistent with the laws of this state, and prescribing the duties of officers, artificers and servants that may be employed, and for the appointment of all officers for the carrying on all business within the objects and purposes of such company and for regulating the running time, fare, etc., of said road or roads: *Provided, however,* That in cities in this state having a population of 100,000 or more, according to the United States census of 1890, the cash fare shall not exceed three cents for any one trip or passage upon the street railroad or roads of the same, and every passenger upon such road or roads shall, upon his or her request or demand, without any further cash fare or charge, be transferred from the line upon which he may take passage to and upon any other line or lines in such city owned, controlled or operated by such company to which he paid his cash fare, and such company, its officers, servants, agents or employes shall, upon the request or demand of any passenger, give a transfer ticket or pass to such passenger entitling him to passage upon the line or lines to which he desires to be transferred, so that he may have one continuous trip or passage over and upon any two of its lines, without any additional cash fare or charge to the point nearest his destination: *Be it further provided, however,* That such directors may provide reasonable regulations for the transfer of such passengers as to the place where such transfers shall be made and when such transfer tickets shall expire, but every passenger desiring to be so transferred shall be given a reasonable opportunity to do so and to be carried upon the line to which he desires to be transferred. And should any street railroad company in any such city charge, receive or collect more than three cents cash fare, or refuse or neglect to transfer passengers as herein provided, then said company shall forfeit and pay to the person from whom it receives, charges or collects the said cash fare in excess of three cents, or whom such company refuses to transfer as herein provided, the sum of one hundred dollars, to be recovered in a civil action in any court of competent jurisdiction; and the city in which such railroad company is doing business, running and operating its line or lines of road or roads may, upon the failure of such street railroad company to comply with any of the provisions of this act, declare the rights, terms, contracts and franchises of such company to the use and occupancy of the streets, alleys, and highways of such city for street railroad purposes forfeited and at an end and may proceed to oust such company from the use and occupancy of such streets, alleys and highways, and may contract and let to any other street railroad company the use and occupancy of such streets, alleys and highways for street railroad purposes, the same to be granted and let in accordance with the provisions of this act and the laws governing cities having a population of 100,000 or more according to the United States census of 1890. [As amended,

Acts 1897, p. 201. In force April 14, 1897.] Burns' Supp. 1897, § 5458.

Constitutional.—This section as amended is constitutional. City of Indianapolis v. Navin, 151 Ind. 139; *contra*, Central Trust Co. of New York v. Citizens', etc., Co., 82 Fed. Rep. 1.

1342. Charging unlawful fare, penalty.—2. That it shall be unlawful for any company organized under the provisions of this act and owning, controlling, running or operating any street railroad or system of street railroads in any city having a population of 100,000 or more according to the United States census of 1890, or any officer, agent, servant or employe of such company to demand, charge, receive or collect from any passenger upon its road or system of roads a cash fare of more than three cents for any one trip or passage upon the same, and for any violation of the provisions of this section, such company, officer, agent or employe, shall, upon conviction thereof, be fined in any sum not less than fifty dollars and not more than five hundred dollars. Burns' Supp. 1897, § 5458*a*.

1343. Refusal to transfer, penalty.—3. That it shall be unlawful for any company organized under the provisions of this act, and owning, controlling, running or operating any street railroad system or street railroad in any city having a population of 100,000 or more according to the United States census of 1890, or any officer, agent, servant or employe of such company, to refuse or neglect to transfer any passenger upon the same, after he shall have paid his fare, from any of its line or lines upon which he may have become a passenger to any other of the lines of such company owned, controlled, run or operated by it in such city and to which he may have requested or demanded to be transferred; or neglect or refuse to give to any passenger after he shall have paid his fare, upon demand or request, a transfer or pass ticket, entitling such passenger to be transferred or carried upon any other of its lines in such city to the point of his destination thereon, or who shall neglect or refuse to receive and carry any passenger after he shall have received a transfer ticket or pass entitling him to be transferred and carried by and upon some line or lines other than that upon which he originally took passage, shall, upon conviction thereof, be fined in any sum not less than fifty dollars and not more than five hundred dollars. Burns' Supp. 1897, § 5458*b*.

[Acts 1897, p. 154. In force April 14, 1897.]

1344. Municipal control of street railways—Termination of franchise, proceedings.—12. Nothing in this act contained shall be so construed as to take away from common councils of incorporated cities the exclusive powers now exercised over the streets, highways, alleys and bridges within the corporate limits of such cities; and all street railroad companies which may be organized under the provisions of this act, shall first obtain the consent of such common council to the location, survey, construction and operation of any street railroad,

through, or across, the public streets, alleys, and other public places of any city, before the construction of the same shall be commenced. And any street railroad company having heretofore, or which shall hereafter enter upon, use, and occupy, any of the streets, alleys, highways, or other public places of any city in this state, now having a population of more than 100,000 inhabitants, as shown by the last United States census, under any ordinance, or ordinances, contracts, or agreements, therein and thereby fixing, or purporting to fix, or limit, the period of time for the use and occupancy, for street railway purposes, on any or all of the streets, or other public places, in such city; or where such a time arrangement has been made, and the same has been extended by ordinance, or otherwise, for a further definite named period of time, upon a good and sufficient consideration; then, and in all such cases, upon the final expiration of such time, the rights to use such tracks in such streets, and other public places, laid in such city by any such railway company, its successors or assigns, or any other company, claiming under such ordinances, arrangements or agreements, shall immediately terminate and cease forever; and no street railroad company shall have the right to operate such tracks upon the streets of any such city, except under and in pursuance of an ordinance or contract, specifically stating the period of occupancy. When any contract or arrangement, heretofore or hereafter made between any such city and any street railway company, its successor or assignee company, or other grantee or assignee, has expired or shall hereafter expire, then on, or after such expiration such company may remove its tracks and appurtenances from such streets, alleys, and other public places, doing no more damage to the streets and other public places, than is necessary, and when the same are removed, such company shall restore the streets, as nearly as may be, to the condition in which the same were prior to such removal; which removal shall be made within a time to be fixed by the mayor of such city, and the work shall be done under the supervision of the street commissioner, or other officer having the charge and supervision of the streets therein, and upon failure so to remove the same, the city may cause the same to be removed at the expense of the owner: *Provided*, That at or before the expiration of the contract period of the occupying company, such city, through its board of public works, shall open to free competition the further occupancy, for a period of thirty years, the streets of such city for the purpose of operating an electric street railroad, and such city, through its board of public works, shall prescribe all conditions and limitations for such use of such streets, and may prescribe what streets shall and what streets shall not be occupied for such purpose; also prescribe the maximum cash and ticket fares to be charged; what paving between the tracks and outside thereof shall be required of said company or companies so competing, and such other conditions as shall best promote the interest of such city and the public, and in such competition no company now organized or hereafter organized for such purpose

shall be excluded. And if the occupying company shall not be the successful competitors, then such company as shall be successful in the competition, shall, immediately after the acceptance of his bid by said city, through its board of public works, file in the circuit court of the county in which such city is located, a complaint or petition for an appropriation or assessment of damages of the occupying company, describing the plant, property, power houses, cars, electric lines and poles and all other appurtenances and appliances connected with and used as a part of such railway system of such occupying company to be appropriated, to which proceedings all persons having an interest in or a lien upon such property shall be made parties: *Provided*, That such new or other company or corporation at the time of filing its proceedings for an appraisement of the property of the occupying company, shall also file in such circuit court a bond in such an amount as shall be required by the court, which bond shall be approved by the court; and said bond shall require that such new or other company or corporation shall take the property of the occupying company at its appraised value, and in default of so doing such new or other company or corporation shall forfeit all contract rights it may have with the city for occupying its streets, and shall be liable on such bond, either to the city or occupying company, or both, for any damage that may accrue to either the city or the occupying company, or both, for failure of such new or other company or corporation to pay the appraised value of the property of the occupying company. And the practice and proceedings in, and the value of such plant and property, shall be ascertained by, and in the same manner as, is now by law provided for the appropriation of property, for railway purposes, under the general laws of this state. And when the value is so ascertained, if a prior contract is expired, and, if not expired, then upon such expiration, such new company shall, within the time to be fixed by such court, thereafter pay such sum into the office of the clerk of the said court, on payment of which such company shall be seized, and become the owner, free and unincumbered, of all the title to, and of the property so appropriated, and shall proceed immediately to take possession of and operate such railway system, under its contract, if, and when, such term of such prior company is expired; and upon failure to do so, the common council of such city shall have the power by ordinance to revoke and cancel such contract. In case the railway company owning the property to be appropriated has theretofore acquired rights to lay and maintain tracks outside of the corporate limits of such city, secured from the board of commissioners of such county, which tracks, at the time of such appraisement, by reason of the extension of the corporate limits, are within such city, the same, at the election of the owner, may be embraced in such proceedings and appraisement. [As amended, Acts 1897, p. 154. In force April 14, 1897.] Burns' Supp. 1897, § 5464.

Exclusive privileges of street.—A city can not give an exclusive right to a street railway company to occupy all its streets, to the exclusion of all other companies, and

so prevent it afterward giving similar grants to other companies. But if it make such a grant and then make a similar grant to another company, that company which first occupies a street, or which first enters upon the construction of a particular line of street railroad, and has expended its money in the prosecution of the work, is entitled to possession of such street, or to the streets over which such particular line passes, although the effect is that such company thus acquires the exclusive possession of such street or streets for the purpose of a street railroad. Indianapolis, etc., R. Co. v. Citizens', etc., R. Co., 127 Ind. 369; 3 Elliott on Railroads, § 1083; Elliott Roads and Streets, pp. 332, 566, 569.

[Acts 1899, p. 260. In force March 3, 1899.]

1345. In cities of more than 100,000—Contract with city.—1. That it shall and may be lawful for any street railroad company now or hereafter organized under the laws of the state of Indiana for the purpose of operating a street railroad in any city the population of which by the federal census immediately preceding the incorporation of such railroad company exceeds one hundred thousand persons, and for such city to enter into a contract defining the terms upon which such railroad company shall exercise its franchise within such city, subject to all the provisons of this act.

1346. Terms, conditions and period of contract—Methods of propulsion—Extension of lines—Use of tracks by other companies—Forfeiture.—2. In any such contract shall be specified the term, not exceeding thirty-four years from the taking effect of the contract, during which the franchise of such corporation shall continue; the rate of fare to be charged, which shall be for a single cash fare not more than five cents for each passenger over the age of five years, with provisions in the contract securing the right of transfer for such cash fare to and over any other line of said company, and that six tickets, entitling the holder to passage and such transfer, shall be sold for not to exceed twenty-five cents, and that twenty-five of such tickets with like transfers, shall be sold for not to exceed one dollar, and said contract shall provide that such tickets shall be kept for sale on all cars when the same are carrying passengers, and all such tickets shall be received as fare from any passenger presenting the same. The ordinance granting such franchise and approving such contract shall specify the method or methods of propulsion that shall or may be used under such contract, providing that such ordinance and contract shall reserve to such city the right to require that such methods of propulsion shall at any time be introduced as will insure first-class and efficient service; and shall state the consideration to be received by said city. Said ordinance shall provide further, that the company making such contract shall be required to pave the space occupied by and between its tracks, and for a space of eighteen inches on the outside thereof, to repave the same when necessary and ordered by the board of public works, and to keep the same in repair; said paving and repairing to be done under specifications, both as to material and manner, as provided by the board of public works, and under the supervision of the city engineer, and shall further provide that, at all

times during the period of such franchise, said city may require such reasonable extensions of the lines of said company or the construction of such new lines as may be necessary for the efficient operation of such railway and for the convenience of the public, and shall provide further that said company shall not extend any of its said lines or enter upon any new streets in said city without the consent of the common council of said city first had and obtained, and in making such contract said city shall reserve to itself the right to at all times exercise such reasonable control over such company and the operation, maintenance and construction of its lines as will secure efficient and first-class service. And such ordinance and contract may contain such other terms, conditions or requirements, not inconsistent with the provisions of this act, as may be agreed upon between the parties, or may be necessary to make effectual all the terms of the contract. As a part of any contract entered into pursuant to the provisions of this act, and as a part of the consideration therefor the company entering into said contract shall first make an absolute surrender to such city of all franchises and rights to the use and occupancy of the streets, alleys and public places of such city owned, held, or claimed by such company within the corporate limits of such city at the time of the making of such contract pursuant to the provisions of this act, or theretofore owned, held or claimed by such company. Any city entering into any contract with any company under the provisions of this act for the use and occupancy of the streets, alleys and public places in such city for street railroad purposes may at any time within two years and not later than one year before the expiration of said contract purchase of such company its property of every description whatsoever, and if any such city and company shall be unable to agree upon the terms of such purchase, then such city may file its complaint or petition in the circuit court of the county in which such city is situated for a determination of the value of such property in the manner prescribed in section eight of this act, and when the value of such property is so ascertained such city may, upon the expiration of such contract after tendering the amount of the value of such property as determined by said court at once take possession of such property and operate such street railroad for its own use and purposes, and such city is hereby authorized to issue bonds for the payment in whole or in part of such sum fixed as the value of such property. Should said company habitually, continually or continuously violate any of the provisions of this act, or fail to comply with the ordinance approving said contract or such other ordinances as are passed by the common council under the provisions of this act, then said company shall forfeit all its rights, title and interest in or to the use and occupancy of the streets, alleys and highways of said city for street railroad purposes, its contract and franchise for the same shall be at an end, and the prosecuting attorney of the county in which such city is located shall, upon the written complaint of five hundred resident freeholders of said city stating wherein

said company shall have violated the terms of such contract or ordinances or provisions of this act, bring an action in the circuit or superior court of the county in which such city shall be situated on relation of the state of Indiana, to forfeit the said contract and franchise and declare the same at an end, and such action shall be tried as other actions are tried, and upon a finding and judgment that such company has violated its said contract or said ordinances or provisions of this act, as hereinbefore provided, then said court shall enter a judgment and decree declaring said contract and franchise forfeited and at an end, and said city shall, through its board of public works, proceed to relet the use and occupancy of its streets, alleys and public places for street railroad purposes in the manner and upon the terms and conditions provided in section eight of this act, and if said action shall be determined in favor of such company, then the petitioners shall be liable for the costs of said action. Any such company so contracting with said city shall permit the use of its track or tracks by any incorporated suburban or interurban railroad company from the corporate limits, or from the nearest connecting point within the corporate limits of such city to some central point in such city, for the purpose of discharging and receiving passengers, with the right of such company to run its cars thereon to some loop and return thereon out of said city, whenever such use has been permitted by the board of public works and common council of said city by contract approved by ordinance. That the board of public works shall require in any such franchise granted hereunder, such consent to be given in such franchise with the right on the part of the board of public works and common council to establish such central point and designate the track or tracks to be used in going to and from the same in such city. That such use shall be upon such conditions and under such regulations as the board of public works and the common council of such city shall prescribe, and upon such terms as to compensation as may be agreed upon by such companies; and in case such companies can not agree as to such compensation within thirty days after application made for the same, then such use shall be permitted upon such terms as to compensation as may be fixed and determined in an action instituted by either of such companies in the circuit court of the county in which such city may be situated; and pending such controversy or suit, such suburban or interurban company shall have the right to use the track or tracks designated by the board of public works or common council, upon executing a bond in such amount and with such security as shall be approved by said court, conditioned for the payment to such company owning and operating such railway in such city the compensation which may accrue up to the time of the final decision in said action, shall be fixed by the court: *And, provided,* That in case the company owning and operating such railway in such city can not furnish power to propel the cars of such suburban or interurban company, then, in that event, such suburban or interurban company shall have the right to con-

struct and maintain a feed and trolley wire on the poles or in the conduits of such company to such terminal points as may be designated by the board of public works and common council of such city, and compensation for the use of poles and conduits for the construction and maintenance of such wires is to be fixed as above provided for the use of the tracks; and in such case such suburban or interurban company shall have the right to establish and maintain power houses and place its wires on such poles or in such conduits. *Provided, however,* That the provisions of this section shall not apply to any suburban or interurban railway company whose line, including the track or tracks so designated within said city, does not extend to a distance of six or more miles from such central point.

1347. Terms binding during life of contract.—3. All the terms and covenants of any contract so made, as aforesaid, shall be binding and conclusive for the period fixed therein, and no longer, and the mutual rights, powers, obligations and liabilities of the parties thereto, shall be as therein expressed, subject, however, to all the provisions of this act.

1348. May acquire other franchises.—4. It shall be lawful for any such railroad company contracting as aforesaid with such city, to acquire by purchase, lease or otherwise, the property and franchises, or any portion of the same, of any other street railroad company or companies now or hereafter incorporated under the laws of the state of Indiana, owning or operating or possessing a franchise, to own and operate a street railroad within such city, or connecting therewith in territory adjacent thereto, for money, shares of stock, or bonds or other obligations; and to issue in payment for the property and franchises so purchased or otherwise acquired, its bonds, obligations or shares of stock to such amount, in such manner, and upon such terms, as its board of directors may think proper and contract; and it shall also be lawful for such company in addition to the powers possessed under the general laws for the incorporation of street railroad companies and the amendments thereto to secure payment of all bonds or obligations so issued by it, by mortgage upon its corporate franchises, rights, privileges, property, real and personal, and mixed, as well as upon the franchises, rights, privileges, property, real, personal and mixed, purchased by it as aforesaid: *Provided,* That no bonds shall be issued by said company for a period extending beyond the time of the expiration of the contract executed under the provisions of this act.

1349. May sell and convey property.—5. Any street railroad company now or hereafter incorporated under the laws of the state of Indiana owning or operating or possessing a franchise to own and operate a street railroad in such city or connecting therewith in territory adjacent thereto, may sell, lease or otherwise transfer its property, franchises and assets of every description and wheresoever situated or any portion of the same to any other company authorized to acquire the same by purchase, lease or otherwise, under section four hereof for

money, stock or bonds or other obligations: *Provided, however,* That such sale, lease or transfer shall be authorized by the vote of a majority in value of all the shares of said company, given at a meeting of the shareholders called for the purpose; at such meeting a resolution specifying the consideration, terms and conditions of such sale or transfer shall be submitted to the shareholders for their approval or disapproval; and upon the vote of a majority in value of said shareholders the board of directors of the said company shall cause the contract authorized by such resolution to be duly executed and delivered to such purchaser, lessee or transferee by the proper officers of the company; such meeting of said company shall be called in pursuance of a resolution of its board of directors instructing the proper officers of the company to call the same, and after twenty days' notice, which shall be given by written or printed notice mailed to every stockholder at his last known postoffice address.

1350. Remedy of dissatisfied shareholders.—6. If a sale be made, approved by a vote of the majority in value of all the shares of the company as aforesaid, any shareholder or shareholders of such company not voting in favor of such sale, and who may be dissatisfied with the terms thereof, may apply by petition to the circuit court of the county in which such railroad is located, within thirty days after such shareholders' meeting, praying said court to appoint three disinterested persons to estimate and appraise the value of the property so sold, over and above any liens or incumbrances thereon and claims or indebtedness for the payment of which the same may be liable, and having so appraised said property and franchises, to estimate and ascertain the value thereof, and the value of said shares having been so appraised by the said commissioners by the vote of a majority thereof, shall be reported to said court, and when confirmed by the said court shall be final and conclusive on all parties. The value of the shares thus ascertained shall be paid to the said petitioning shareholder by the street railroad company purchasing the property and franchises and other assets sold as aforesaid upon surrender to the purchasing company of the shares so appraised. In case said petitioning shareholders shall not present their shares to the purchasing company for surrender within sixty days from the date of said award, or in case of minority or other legal disability said purchasing company shall make payment of the amount of said award to the clerk of the court, and upon such payment to the clerk of court, the property or franchises purchased shall be released from the lien of said award. The cost of such proceeding shall be paid by the purchasing company.

1351. Rights of creditors—Liens—Unimpaired.—7. All rights of creditors and liabilities for damages and all liens or incumbrances upon the property or franchises sold or transferred, pursuant hereto, shall continue unimpaired, and may be enforced as against such property and franchises as if said sale or transfer had not been made.

1352. Period of contract—Removal of tracks—Free competition.—8. No street railroad company shall hereafter have the right to use or occupy for street railroad purposes the streets, alleys, highways or other public places of any such city except under and in pursuance of an ordinance or contract specifically stating the period of such use or occupancy. Where such use or occupancy is now or shall hereafter be had by any street railroad company under any ordinance, or ordinances, contracts or agreements in which is fixed or limited, or attempted to be fixed or limited, the period of time of such occupancy, or in which an extension of time originally so fixed or limited has been made, and the right and franchises of such use or occupancy shall not in nine or more months prior to the final expiration of the period of time so limited or extended have been granted for a further definite period of time to said company, or some company which has acquired the property and franchise of said company by a contract entered into by such city and said company under the provisions of this act, then, and in all such cases, upon the final expiration of the time so originally limited or extended, the right to such use or occupancy by said company, its successors and assigns, or any other company claiming under such ordinance, contracts or agreements, shall immediately terminate and cease forever. Thereupon, such company, its successors or assigns, may remove its tracks and appurtenances from such streets, alleys and other public places, doing no more damage thereto than is necessary, and when the same are removed such company, its successors or assigns, shall restore such streets, alleys and public places as nearly as may be to the condition in which the same were prior to such removal; which removal shall be made within a time to be fixed by the mayor of such city, and the work shall be done under the supervision of the street commissioner or other officer having the charge and supervision of the streets therein, and upon failure so to remove the same, and to elect to have the same appropriated by its successor in such use and occupancy as hereinafter provided, the city may cause the same to be removed at the expense of the owner: *Provided, however,* That not later than nine months before the expiration of the period of time so originally limited or extended, in the event that no contract for the further use and occupancy of such streets, alleys and public places has been entered into under the provisions of this act between such city and the said company, its successors or assigns, such city, through its board of public works, shall open to free competition the further occupancy for a period not exceeding thirty years of the streets, alleys and public places of such city, for the purpose of operating therein an electric or other street railroad, and such city, through its board of public works, shall prescribe in the form of a contract to be entered into by the successful bidder, all conditions and limitations for such use of said streets, alleys and public places as prescribed in section two of this act; and such other conditions as shall best promote the interests of said city and the public, and also a bond or undertaking with sure-

ties to be approved by said board of public works, conditioned that the bidder, if successful, will enter into the prescribed contract in accordance with the terms and conditions thereof and of the bid, and in case of failing or refusing or forfeiting as hereinafter provided, the right to enter into such contract, to pay to such city all damages it may sustain by reason of such failure, refusal or forfeiture, and, as to bidders other than the occupying company, that the bidder, if successful, and in case the occupying company elects not to remove its tracks and other property from the streets, will immediately institute, as hereinafter provided, proceedings to appropriate the property of said company and pay the assessed value of such property to said company or other person entitled thereto as hereinafter provided. In such competition no company now or hereafter organized for such purpose shall be excluded. If the occupying company shall not be the successful competitor, and elects not to remove its tracks or other property from the streets, then the company that shall be successful in the competition shall immediately after the acceptance of its bid by such city through its board of public works, file in the circuit court of the county where such city is located, a complaint or petition for an appropriation of the property of the occupying company and an assessment of its damages by reason of such appropriation, describing the plant, property, power houses, cars, electric lines and poles, and all other appurtenances and appliances connected with and used as a part of the railway system of the occupying company to be appropriated, and showing the execution of the bond or undertaking aforesaid, to which proceeding all persons having an interest in or lien upon such property shall be made parties. The practice and proceedings upon such appropriation, and in ascertaining the value of such plant and property, shall be as is now provided for the appropriation of property for railway purposes under the general laws of this state. When the value of such property is so ascertained upon the expiration of the contract of the occupying company, or if such contract has expired before the ascertainment of such value, then, within a time to be fixed by such court, such appropriating company shall pay such value to the clerk of the court for the use of the occupying company or other person entitled thereto as determined by the court; and upon such payment, the appropriating company shall be seized and become the owner, free and unincumbered, of all the title to and of the property so appropriated, and shall take possession of and operate such railroad system from and after the expiration of the contract of the occupying company; and upon failure to institute such proceedings, or to enter into or perform the contract in accordance with its bid, all right of the successful bidder to enter into the contract, or to the use and occupancy of the streets, shall be forfeited, and such city, through its board of public works, shall proceed to relet the use and occupancy of the streets, alleys and public places for street railroad purposes in the manner and upon the terms and conditions heretofore provided in this section, and several actions may

be maintained upon such bond or undertaking by such city, occupying company or other company or person interested, for such failure to perform its conditions. In case the railroad company owning the property to be appropriated has theretofore acquired rights to lay and maintain tracks outside of the corporate limits of such city secured from the board of commissioners of the county, which tracks at the time of such appraisement, by reason of the extension of the corporate limits, are within such city, the same, at the election of the owner, may be embraced in such proceedings and appraisement.

1353. Exclusive powers over streets, etc.—9. Nothing contained in this act shall be so construed as to take away from the board of public works and common council of any such city the exclusive powers now exercised over the streets, highways, alleys and bridges within such city, or the rights and powers now possessed by such board of public works and common council to enter into contract with reference to the use of streets, alleys and public places in such city for street railroad purposes, except in so far as such powers and rights shall be affected by contracts entered into pursuant to the provisions of this act, and except as such powers are reserved to such city by the provisions of this act.

1354. Penalty for charging excessive fares.—10. It shall be unlawful for any railroad company operating under a contract secured under the provisions of this act or an employe of the same, to charge or receive any greater amount for fares than that provided for in this act, and it shall be unlawful to fail or refuse to keep on sale tickets as provided in this act, and any one violating any of the provisions of this section shall be fined in any sum not to exceed one hundred dollars.

For decisions of various questions under the street railway laws arising between the City of Indianapolis, the Citizens', etc., R Co., and the City R. Co., see Citizens', etc., R. Co. v. City R. Co., 56 Fed. Rep. 746; Citizens', etc., R. Co. v. City R. Co., 64 Fed. Rep. 647; City R. Co. v. Citizens', etc., R. Co., 166 U. S. 557; City of Indianapolis v. Navin, 151 Ind. 139; Central Trust Co. v. Citizens', etc., R. Co., 82 Fed. Rep. 1; City R. Co. v. Citizens', etc., R. Co., Ind. Sup. Ct., Dec. 16, 1898.

In the last case cited, rehearing granted. Action dismissed.

[Acts 1879 S., p. 175. In force March 29, 1879.]

1355. Extension beyond city or town—Consent of county board.—1. Any street or horse-car railway company organized under the laws of the state of Indiana, and operating such railway within any of the incorporated towns or cities of this state, and desiring to extend its road beyond such town or city limits on any state or county road or other public highway; or any other company organized under the laws of the state of Indiana, for similar purposes; or any person or persons desiring to build a horse or street railway outside of any city, on any public highway—may do so, after procuring the consent of the board of county commissioners of such county. R. S. 1894, § 5465.

Right of street railroad to cross steam railroad at street and highway crossing—Injunction.—A street railway is not an additional burden to that of the easement

which the general public has in the street or highway, and the street railway company's right to use the street or highway is founded on that easement. The right of a street railway to cross over the tracks of a steam railway laid on a street or highway is subject to no conditions other than those to which the general public is subject in traveling over the street or highway, and a steam railway company will be enjoined from interfering with a street railway company where the latter is proceeding to construct a proper crossing at its own expense. The same principle applies where the crossing is a public highway, not a street. Chicago, etc., R. Co. v. The Whiting, etc., R. Co., 139 Ind. 297; 3 Elliott Railroads, § 1135.

Street railroad—Collision with locomotive at crossing—Injury to passenger—Complaint.—In an action against an electric street railway company, by a passenger for personal injuries sustained by a collision of the electric car with a locomotive at a crossing, it is not necessary to allege that the electric railway was located on a public highway, and that those in charge of the locomotive had given the proper signals designating an intention to cross the highway, when it is alleged that neither the locomotive nor the electric car gave any signal of its approach to the crossing, and that those in charge of the electric car saw the locomotive approaching and knew that it would reach the crossing at the same time with the electric car. Hammond, etc., R. Co. v. Spyzchalski, 17 App. 7.

1356. Consent of gravel road company.—2. If such road or highway be graveled or planked by a gravel or plank road company, such street or horse car railway company shall also be required to procure the consent of such gravel or plank road company, to run its road over such gravel or plank road; which consent, when given, shall not be revoked by such gravel or plank road company. R. S. 1894, § 5466.

[Acts 1865, p. 63. In force March 6, 1865.]

1357. Protection and regulation.—3. Such street or horse car railway company operating such road outside of such town or city limits shall have the same protection, and, in its running, be governed by the same regulations prescribed for it within such town or city. R. S. 1894, § 5467.

[Acts 1879 S., p. 175. In force March 29, 1879.]

1358. Track on highway—Agreement—Proviso.—4. Such street or horse car railway company shall, in all cases in which any road or highway shall be used by it for the purposes expressed in this act, locate its tracks on such part of such highway as may be agreed upon between the parties making such application for the use of such highway and the board of county commissioners of the county: *Provided*, That nothing in this act shall interfere with any vested right heretofore acquired by any street railway company organized under the laws of the state of Indiana. R. S. 1894, § 5468.

[Acts 1891, p. 68. In force March 3, 1891.]

1359. Use of electric power.—1. That any street or horse railroad heretofore or hereafter organized in this state may, with the consent of the common council of the city in which such railroad or any part thereof is located and operated, and with the consent of the board of

commissioners of the county where such railroad or any part thereof is operated beyond the limits of such city, use electricity for motive power: *Provided*, That nothing in this act contained shall be so construed as to take away from the common councils of incorporated cities the exclusive powers now exercised over the streets, highways, alleys and bridges within the corporate limits of such cities, and all such street railroad companies shall first obtain the consent of such common council for the operation by electricity of their cars along, through or across the public streets or alleys of any city before the operation by electricity of their cars shall be commenced: *Provided*, That in giving such consent such common council, or board of county commissioners, may do so upon such terms and conditions as they may see fit to impose. R. S. 1894, § 5472.

Motive power—Rival companies.—A city, having control over its streets, may prescribe the motive power to be used in moving cars, and when it prescribes one kind of power the company can not use another; and in a contest between two rival street railway companies for the possession of a street, one of which is using a motive power not authorized by its charter, the other company may attack its right to such street by showing such violation of its franchise. Indianapolis, etc., R. Co. v. Citizens', etc., R. Co., 127 Ind. 369, 393.

[Acts 1895, p. 193. In force March 9, 1895.]

1360. Street railway companies furnishing light, heat and power.—1. That any street railway company whose lines of street railway are, or may hereafter be operated, in whole or in part, by electrical power, may, with the consent of all the stockholders of such company, for the purpose of supplying electricity and steam, for light, heat and power, in the town or city, and its vicinity, in which such street railway is operated, purchase, or otherwise acquire, and hold and use the plant and other property, real and personal, rights, contracts, privileges, easements and franchises of any incorporated company which, or person or persons who, may be engaged in supplying electricity or steam for light, heat or power in such city or town, or its vicinity, with like consent of all the stockholders of such latter company, or of such person or persons. Burns' Supp. 1897, § 5472*a*.

1361. Conveying and encumbering property.—2. Any street railway company engaged in the business of supplying electricity or steam for light, heat and power, shall have the same right to sell, convey, mortgage, or otherwise dispose of or encumber its property and franchise acquired and used for the purposes of said business, either separately or in connection with its street railway property and franchises, as it possesses with reference to such street railway property and franchises. Burns' Supp. 1897, § 5472*b*.

[Acts 1899, p. 378. In force March 3, 1899.]

1362. Consolidation of companies.—1. Wherever two or more street railroad companies have heretofore become associated, or shall hereafter become associated, in jointly making or running their roads under any contracts formed or to be formed by such companies, and

desire to consolidate their stock and to assume one common name, it shall and may be lawful for such companies, by resolution of their respective boards of directors entered upon their records, to make such consolidation and to assume such name as shall be mutually agreed upon. *Provided*, That only such companies shall be permitted to consolidate under this act as have connecting and continuous lines constructed or in process of construction.

1363. Resolution recorded.—2. It shall be the duty of said street railroad companies, upon such consolidation and the adoption of such common name, to cause a copy of the resolution of their respective boards to be recorded in the recorder's office of the different counties through which the roads of said companies may run or be located. And thereafter, during the term of such consolidated association, such association may have and use the common seal, contract and be contracted with, sue and be sued by such adopted name in any and all matters relating to such consolidated road, and shall have full power, by such association, to locate, construct, keep up, change, repair and operate such consolidated road, as by their respective charters and amendments thereto they are allowed to do: *Provided, however*, That nothing herein contained shall be construed to abridge such companies of any of the powers, privileges and franchises to them belonging by their respective acts of incorporation and amendments thereto: *And, provided further*, That nothing herein contained shall be construed to prevent said companies from suing and being sued in their original corporate names for all rights accrued and for all liabilities incurred before such consolidation and the adoption of such common name.

1364. Connections.—3. Any street railroad company organized and incorporated under the general laws of this state for the purpose of building a street railroad from any point in the state to a point on the state line, and any consolidated company, as in the prior sections of this act provided for, shall be authorized to connect with any other street railroad already made from such point on the state line, at any convenient point of intersection within this state.

1365. Concerning completion of lines.—4. Any such street railroad company or consolidated company so connected with the road of another street railroad company shall not be required to complete its own road to the state line so long as it shall continue to be thus associated with a company owning such other street railroad already built from the state line, but its franchises and powers to build and complete its own road to the terminal point on the state line whenever it shall be necessary so to do, shall remain unimpaired: *Provided*, That a consolidation either temporary or permanent effected under the provisions of this act with any street railroad company whose branches or any of them may be jointly used or occupied, or where a right by law exists to use and occupy the same by any other street railroad company, shall not in any manner affect the rights therein vested or secured by any act heretofore passed upon that subject.

1366. Rights and privileges.—5. Any street railroad company organized as in this act provided, and completing its connection with its terminal point on the state line by connecting with the street railroad of any other company as authorized by this act shall be taken and deemed to be a company owning and constructing a street railroad to the state line, and shall possess all the rights, franchises and privileges and be subject to all the obligations and duties of a street railroad company owning a street railroad to the state line as prescribed by any general law of this state not inconsistent with the provisions of this act.

1367. Intersecting and joining other roads.—6. Any street railroad operated by electric or other power organized under the laws of this state shall have the power to intersect, join and unite its street railroad with any other street railroad by whatsoever power operated, constructed or in process of construction in this state or in any adjoining state at such point on the state line or any other point as may be mutually agreed upon by such company. And such companies are authorized to merge and consolidate the stock of the respective companies, making one stock company of the said street railroads thus connected, upon such terms as may be by them mutually agreed upon, in accordance with the terms and provisions of this act and with the laws of the adjoining state with whose street railroad or street railroads connections are thus formed: *Provided*, Their charters authorize said street railroads to go to the state line or to other point of intersection.

1368. Contracts and agreements.—7. Any street railroad company heretofore organized or which may hereafter be organized under the laws of the state of Indiana, and which may have been constructed or commenced the construction of its street railroad so as to meet and connect with any other street railroad in an adjoining state at the boundary line of this state, shall have the power to make such contracts and agreements with any such street railroad constructed in an adjoining state for the transportation of passengers or for the use of its said street railroad, as to the board of directors may seem proper.

[Acts 1899, p. 209. In force April 27, 1899.]

1369. Heating of street cars.—1. That every street car used for the transportation of passengers, shall during the months of November, December, January, February and March of each year, be comfortably heated by electricity or otherwise.

1370. Penalty.—2. Any corporation, company, officer, agent, or any person violating the provisions of this act shall, upon conviction, be fined in any sum not less than twenty-five dollars, nor more than one hundred dollars for each day such car is permitted to remain unprovided with heat, as provided in section one of this act.

ARTICLE 4.—GAS AND WATER COMPANIES.

SEC.
1371. Marine railways—Gas pipes.
1372. Gas and water-works companies.
1373. Completion of unfinished canals—Purposes—Record.
1374. Right of way.
1375. Power of directors.
1376. Effect of act.
1377. Water-works companies—Powers.
1378. Consent of town necessary.
1379. Existing companies.

Gas and water companies—Manufacturing and mining companies.—R. S. 1894, ch. 38 (§§ 5051-5123); Burns' Supp. 1897, ch. 38 (§§ 5051-5122*f*).

Water-works companies.—R. S. 1894, ch. 49 (§§ 5537-5540); Burns' Supp. 1897, ch. 49, § 5537.

See chapter note preceding § 1308, *ante*.

[1 R. S. 1852, p. 358. In force May 6, 1853.]

1371. Marine railways—Gas pipes.—5. Corporations building steam-boats and other vessels shall have the right to construct marine railways, and all other necessary fixtures and machinery for repairing and launching the same; and gas light companies may lay pipes through the streets and alleys of any incorporated city or town, by repairing or making good any injury done thereto. R. S. 1894, § 5056.

[Acts 1883, p. 17. In force February 21, 1883.]

1372. Gas and water-works companies.—1. That any gas-light or water-works company in any city or town of this state shall be authorized and empowered to extend their pipes and mains beyond the corporate limits of such city or town, not to exceed a distance of five miles from the corporate limits of any such city or town, for the purpose of supplying persons or corporations with gas or water, and any such company shall be authorized and empowered to furnish and supply gas or water to any persons or corporations residing or located within five miles of the corporate limits of any such city or town. R. S. 1894, § 5057.

[Acts 1852 S., p. 93. In force November 6, 1852.]

1373. Completion of unfinished canals—Purposes—Record.—1. Any and all persons, corporations or associations who may have purchased from the state of Indiana any of the unfinished canals of the state, or any part of either of them, and their successors and assigns, or any of them, may proceed to the completion of any such canal in whole or in part, or to the construction of any water-works or waterways in connection therewith, either for navigation or hydraulic purposes or for the purpose of supplying cities or towns with water, upon complying with the regulations and subject to the restrictions in this act provided. But nothing in this act shall be so construed as to permit any such company to use such hydraulic works; or to take water from the canal for either of the purposes herein designated, unless such company shall first complete and place such canal in good navigable order from the point of commencement (or from the city of In-

dianapolis) of the Central canal to the point where it is proposed to construct hydraulic works, or take water for the supply of cities and towns as aforesaid: *Provided, however,* That no association or company which may have succeeded, by purchase or otherwise, to the rights or interest of the state in any canal or the appurtenances thereunto belonging shall acquire or exercise any of the rights or powers specified in this act, until such association or company shall have executed to the state an additional bond, with such penalty and with such securities as may be designated and required by the governor, auditor and treasurer of state, or either of them, to indemnify the state against all liability on account of any leases heretofore granted by the state of the water-power connected with such canal, if required so to do by the officers aforesaid or either of them; and such additional bond shall be required unless the state is already sufficiently indemnified against or on account of such leases. R. S. 1894, § 4687.

Lands appropriated for canal—Title, fee.—When land was appropriated for the purposes of a canal, the canal company acquired a fee. Blair v. Kiger, 111 Ind. 193; Water Works Co. v. Burkhart, 41 Ind. 364; Nelson v. Fleming, 56 Ind. 310; Cromie v. Board, etc., 71 Ind. 208; City of Logansport v. Shirk, 88 Ind. 563; Brookville, etc., Co. v. Butler, 91 Ind. 134; Shirk v. Board, etc., 106 Ind. 573; Frank v. Evansville, etc., R. Co., 111 Ind. 132; Quick v. Taylor, 113 Ind. 540; Board, etc., v. Ft. Wayne Water Power Co., 17 App. 36.

Construction of canal in public street—Abandonment of canal—Revival of original easement.—Where the state entered upon and constructed the Wabash and Erie canal in and through a public street in the town, now city, of Logansport, the easement of the public and abutting lot owners in such street was not thereby destroyed, but remained in abeyance during the occupancy and use of the street for the purposes of such canal; and upon the subsequent abandonment of the canal, when the street was no longer occupied or used by or for such canal, the original easement of the public and the private rights of abutting lot owners at once revived and became effective in, on and over such street. City of Logansport v. Shirk, 88 Ind. 563.

Purchasers—Bridges—Cities and towns.—Purchasers of the canal and its appurtenances under foreclosure sale acquired a fee-simple title, subject to the burden of any easement of the public of which they were bound to take notice. The statutes did not impose on the trustees of the canal the duty of constructing and maintaining bridges in towns or cities, but did impose such duty as to bridges on state and county roads crossing the canal, and a purchaser succeeding to the rights of the state, takes the canal burdened with this duty. Board, etc., v. Ft. Wayne Water Power Co., 17 App. 36; Shirk v. Board, etc., 106 Ind. 573; Lowrey v. City of Delphi, 55 Ind. 250.

As to the rights of the purchasers of the Central canal under deed by state, see Indiana, etc., Co. v. State, 53 Ind. 575.

Bridge—Notice of easement.—The continuous use by the public, for nearly forty years, as a part of a highway, of a bridge constructed by the state, having a wagon way for public travel and a towing path for navigators of the canal, was possession and notice of the easement. Shirk v. Board, etc., 106 Ind. 573.

1374. Right of way.—5. Any such association or corporation shall have the right to take possession of, and appropriate to its own use or occupation, wholly or in part, for either of the purposes herein specified, sufficient lands for a right of way, upon first making payment or tender of payment therefor, or for the damages occasioned to the owner

thereof, in accordance with the requirement of the constitution of this state; and the value of such property so appropriated, or the damages occasioned to the owners of any such property, shall be assessed, awarded, and adjudged, and payment or tender of payment therefor made, as provided in the act entitled "An act to provide for the incorporation of railroad companies," and the proper courts shall have the same jurisdiction and powers, and shall cause the same proceedings to be had in every such case; and the associations herein provided for shall, in all such cases, acquire all such rights in relation to the use, occupation and ownership of lands, rights of way for their uses and purposes, as are provided in the said act in regard to associations organized for the construction of railroads, so far as the provisions of the said act can be made applicable to the purposes of this act. R. S. 1894, § 4691.

1375. Power of directors.—8. In the construction of any of the unfinished canals of this state, it shall be lawful for the board of directors of such company to direct the separation of the water-works or manufacturing privileges from the navigation purposes of the same, and to make such disposition of such parts thereof, as the board of directors may deem best for the interests of the company; provided said disposition does not injure or impair the right and franchises of any other company. R. S. 1894, § 4694.

1376. Effect of act.—9. Nothing in this act shall be so construed as to affect, in any manner, the charter of any water-works company heretofore granted. R. S. 1894, § 4695.

1377. Water-works companies—Powers.—1. That whenever any company incorporated under the provisions of ch. 35, R. S. 1881, for the purpose of constructing and operating water works in or for any incorporated city or town, shall have obtained and shall hold by franchise, ordinance or resolution from said city or town, the right and privilege of operating such water works, and of laying necessary pipes, mains and conduits through the streets of said city or town, such corporation shall possess the powers and be subject to the liabilities and restrictions expressed in the following:

First. To cause such examinations and surveys as may be necessary to the selection of the most advantageous positions and locations for the source of supply, the pumping stations, the settling basins, the filtering basins or tanks, the storage reservoir, the supply mains, the delivery reservoir, tank or stand-pipes, and the delivery mains, any or all of these, and the necessary lines of pipes connecting them; and for such purposes, by its officers, agents and servants to enter upon the lands and waters of any person, but subject to responsibility for all damages they shall do thereto.

Second. To receive, hold and take such voluntary grants and donations of real estate, money and other personal property, as shall be made to it, to aid in the construction, operation and maintenance of such water works; but the real estate thus received by voluntary grants shall be held and used for the purpose of such grants only.

Third. To purchase, and by voluntary grants and donations receive and take, and by its officers, agents and servants, enter upon, take possession of, hold and use all such real estate, water rights and other property as may be necessary for the construction and operation of the said water works, and other accommodations necessary to accomplish such construction and operation; but not until the compensation to be made therefor as agreed upon by the parties or ascertained as herewith prescribed shall have been paid to the owner or owners thereof, or deposited as hereinafter directed, unless the consent of such owner be given to enter possession.

Fourth. To determine and lay out the site for, construct and use the pumping stations with necessary accommodations and roads thereto, the settling basins, the filtering basins or tanks, the storage reservoirs, the delivery reservoirs, tanks or stand-pipes, and all the necessary accommodations thereto.

Fifth. To lay necessary mains, conduits and pipes under and across any parcel of land, water course, road, highway or railroad, which the route thereof shall intersect, in such manner, however, as to afford security for life and property and to cause no interference to traffic: *Provided,* That such parcel of land, water course, road, highway or railroad shall be restored to the same conditions, as far as possible, as it was in at the time the excavations for said mains and pipes were commenced.

Sixth. To enter upon such lands under or across which the said mains, pipes and conduits are laid, and to re-excavate the same for the purpose of change or repair, but subject to responsibility for all damage which it shall do thereto.

Seventh. To use and distribute water from any lake or natural stream of water in the county in which said water works are to be built, and by permission from the board of commissioners of said county, to lay out and construct a dam across the same, upon paying the assessed damages caused thereby to the owner or owners so damaged.

Eighth. To take up and change the route of the pipes, mains and conduits, to change the source of supply and remove the pumping stations, to vacate and reconstruct the various reservoirs, and to change the position of the tanks, stand-pipes and other appurtenances belonging to said water works company, whenever it shall be deemed necessary or advantageous to do so. [As amended, Acts 1895, p. 243. In force March 11, 1895.] Burns' Supp. 1897, § 5088.

The above is an amendment of § 1 of the act of March 6, 1889, and the same section of the same act was sought to be amended by an act approved February 25, 1897, Acts 1897, p. 62. Said last act is omitted because believed to be clearly void upon the principle that an act professing to amend a section of a statute which has already been superseded by amendment is unconstitutional and void. Blakemore v. Dolan, 50 Ind. 194; Brocaw v. Board, etc., 73 Ind. 543; Eversole v. Chase, 127 Ind. 297; Hall v. Craig, 125 Ind. 523; Feibleman v. State, 98 Ind. 516.

Incorporation of water companies.—Companies organized for the purpose of constructing, owning, and operating water-works systems can incorporate only under the

act for the incorporation of manufacturing and mining associations; R. S. 1894, §§ 5537-5540, provide for the organization, not of companies to construct, own and operate, but of companies having purchased systems of water-works at sales under judgment or decrees of courts of competent jurisdiction within the state. Clow v. Brown, 134 Ind. 287.

Appropriation of land—Water privileges—New appraisement—Exceptions to.—A new appraisement in a proceeding by a water-works company to appropriate to its use real estate and water privileges, is made in the same manner as the first appraisement; and where exceptions are duly filed to the new appraisement, it is reversible error for the court to refuse to hear the exceptions. Werley v. Huntington, etc., Co., 138 Ind. 148.

Liability to riparian owner.—If a water-works company causes an extraordinary diversion of water in a lake in such quantity as to be unreasonable, to the damage of the riparian owner, such owner may recover the damage. Valparaiso City Water Co. v. Dickover, 17 App. 233.

1378. Consent of town necessary.—9. This act shall not grant the powers and privileges herein conferred to any corporation other than such as have, by ordinance or otherwise, obtained legal consent and full right of way for the operation of water-works and the laying of the necessary pipes, mains and conduits along and through the streets, alleys, avenues and public grounds of the city or town in which such water-works are operated or located, from the common council of such city or board of trustees of said town. [As amended, Acts 1895, p. 243. In force March 11, 1895.] Burns' Supp. 1897, § 5096.

1379. Existing companies.—10. Any water-works company heretofore incorporated and now existing, which holds or shall obtain franchise in this act, shall have the powers and privileges conveyed herein and be limited by the restrictions and liabilities set forth in this act. R. S. 1894, § 5097.

Natural gas and oil companies—Rights of way, etc.—For cases involving questions as to proceedings to acquire right of way to lay pipe lines in highways, the rights of adjacent land-owners, power of county commissioners to grant consent, etc., see Board, etc., v. Indianapolis, etc., Co., 134 Ind. 209; Consumers', etc., Co. v. Huntsinger, 14 App. 156; Indiana, etc., Co. v. Hutsinger, 12 App. 285.

ARTICLE 5.—TELEPHONE COMPANIES.

SEC.
1380. Seal—Powers.
1381. Powers.
SEC.
1382. Duty to supply applicants impartially.

Telephone companies.—R. S. 1894, ch. 47 (§§ 5517-5529); Burns' Supp. 1897, ch. 47, § 5529.

See chapter note preceding § 1308, *ante*.

1380. Seal—Powers.—7. Such company may have a common seal, which may be altered at pleasure; and shall have power to acquire, by purchase or otherwise, and hold and convey, such real and personal estate as may be proper for the purpose of erecting or maintaining its lines of telephone and the appliances and buildings requisite for its business; and shall have the right to acquire such real

estate and rights of way, as may be necessary for its business, under the writ of assessment of damages, as fully as if the act in relation to said writ were incorporated in this act and made part of the same. The life of a corporation organized under this act shall be limited to fifty years. R. S. 1894, § 5523.

1381. Powers.—8. Any telephone company organized under this act shall have power to lease, or attach to other telephone lines or exchanges by lease or purchase. R. S. 1894, § 5524.

[Acts 1885, p. 151. In force April 8, 1885.]

1382. Duty to supply applicants impartially.—2. Every telephone company with wires wholly or partly within this state, and engaged in a general telephone business, shall within the local limits of such telephone companies' business supply all applicants for telephone connections and facilities with such connections and facilities without discrimination or partiality, provided such applicants comply or offer to comply with the reasonable regulations of the company; and no such company shall impose any conditions or restrictions upon any such applicant that are not imposed impartially upon all persons or companies in like situation, nor shall such companies discriminate against any individual or company engaged in any lawful business, or between individuals or companies engaged in the same business, by requiring as a condition for furnishing such facilities that they shall not be used in the business of the applicant, or otherwise for any lawful purpose. R. S. 1894, § 5529.

The act of 1885 (Acts 1885, p. 227) regulating the use of telephones and fixing the rates thereof was repealed by the act of 1889 (Acts 1889, p. 49).

"Telephone" defined.—The word "telephone," as used in the act of April 13, 1885 (Acts 1885, p. 227), was intended to designate, and did in fact refer to an apparatus composed of all the usual and necessary instruments for the transmission and reception of telephonic messages, and not to a single instrument only. The word "telephone" having become a term of art, evidence is admissible to explain its proper meaning. Hockett v. State, 105 Ind. 250, 261.

The word "telephone," as used in the act of April 13, 1885 (Acts 1885, p. 227), has reference to an organized apparatus, or combination of instruments, usually in use in transmitting and receiving telephonic messages, and not to a single instrument technically known as a telephone. Central, etc., Co. v. Bradbury, 106 Ind. 1, 9; Central, etc., Co. v. State, 118 Ind. 194, 206.

Common carrier.—The telephone is an instrument of commerce, and persons or corporations engaged in the general telephone business are common carriers of news in the sense in which a telegraph company is a common carrier. Hockett v. State, 105 Ind. 250, 258; Central, etc., Co. v. Bradbury, 106 Ind. 1, 8; Central, etc., Co. v. State, 118 Ind. 194, 206; Central, etc., Co. v. Fehring, 146 Ind. 189.

The rule that requires a common carrier to serve all, so far as able, with impartiality, is applicable to a telephone company, engaged in a general telephone business. Central, etc., Co. v. Bradbury, 106 Ind. 1, 8; Central, etc., Co. v. Swoveland, 14 App. 341; Central, etc., Co. v. Fehring, 146 Ind. 189.

Contract against its own negligence.—The rule that a common carrier can not relieve itself by contract from liability, on account of its own negligence, applies to telephone companies. Central, etc., Co. v. Swoveland, 14 App. 341.

Toll service.—A telephone company is required, under the toll service, to send a messenger for a person wanted at the telephone, if he lives within a reasonable distance from the receiving station. Central, etc., Co. v. Swoveland, 14 App. 341.

Connections and facilities for use.—Telephone companies are not only required to furnish an applicant the instrument, and properly connect the same with its exchange, but it is also their duty to supply all the connections and facilities necessary for the use of the instrument. Central, etc., Co. v. Fehring, 146 Ind. 189.

Mandamus—Discrimination—Statutory proviso.—A person or corporation engaged in operating telephone lines, furnishing connections, facilities and service to business houses, persons and companies, can be compelled by mandate, on the petition of one discriminated against, to furnish to such a one the same service that it furnishes to others, independent of any statutory provision against discrimination. Central, etc., Co. v. State, 118 Ind. 194, 207; Central, etc., Co. v. State, 123 Ind. 113, 116.

Statute violated—Penalty—Mandamus.—The fact that the statute prescribes a penalty for the violation of its provisions does not abridge the right of an aggrieved party to compel the telephone company, by mandamus, to furnish him with the service to which he is entitled. Central, etc., Co. v. State, 118 Ind. 194, 209.

Property devoted to public use.—In legal contemplation, all the instruments and appliances used by a telephone company in the prosecution of its business are devoted to a public use, and property thus devoted to such use becomes a legitimate subject of legislative regulation. Hockett v. State, 105 Ind. 250, 258; Eastman v. State, 109 Ind. 278; City of Rushville v. Rushville, etc., Co., 132 Ind. 584.

The legislature has power to regulate, as in the act of April 13, 1885 (Acts 1885, p. 227), the price which a telephone company, engaged in a general telephone business, may charge for the use of its instruments, notwithstanding the patented quality of the latter. Central, etc., Co. v. Bradbury, 106 Ind. 1, 6.

Statute—When violated.—One who, being the owner and operator of a telephone line, in violation of the provisions of the act of April 13, 1885 (Acts 1885, p. 227, repealed by Acts 1889, p. 49), charges and collects a monthly rental in excess of three dollars, the rate fixed by such act for one telephone, is subject to the penalty therein prescribed. Johnson v. State, 113 Ind. 143, 147.

Extra charges for non-subscribers.—A fixed charge of one dollar per month, in excess of the three dollars allowed by the statute, for non-subscribers, which is charged and collected whether the telephone is used by non-subscribers or not, and without regard to the number of such persons who may use it, is a violation of the law. Johnson v. State, 113 Ind. 143, 148.

Rental charges—Toll stations.—A company doing a general telephone business in this state can not evade the acts of April 8 and April 13, 1885 (Acts 1885, p. 227), prescribing the duties of such companies and regulating the rental to be charged for the use of telephones by ceasing to do a rental business and establishing public toll stations, but under such acts any person, within the local limits of the business of such a company in a town or city, has the right to demand and receive a telephone, with connections, facilities and service, at the rate per month fixed therein. Central, etc., Co. v. State, 118 Ind. 194, 208.

Act of April 8, 1885, valid.—The state has the right to prescribe the maximum price which a telephone company shall charge for the use of its telephones, and the act of April 13, 1885 (Acts 1885, p. 227), limiting the rental price of such instruments, and also the amount which shall be collected for conversations between cities and villages, is constitutional. Hockett v. State, 105 Ind. 250, 254; Central, etc., Co. v. Bradbury, 106 Ind. 1, 9; Johnson v. State, 113 Ind. 143, 145; Central, etc., Co. v. State, 118 Ind. 194, 207.

Lines extending into other states.—The acts of 1885, relating to telephone companies, apply merely to the service to be provided to persons within this state, and they

are, therefore, not open to the objection that they are void as attempting to regulate interstate commerce, although the lines of a company doing business in this state may extend into other states. Central, etc., Co. v. State, 118 Ind. 194, 209.

Patent—Act of April 13, 1885.—The fact that the telephone and appliances are articles patented under the constitution and laws of the United States, while vesting in the patentee, his heirs and assigns, the exclusive right, for a limited time, to make, use and vend the tangible property brought into existence by the application of the discovery covered by the letters-patent, does not preclude state regulation of the property thus brought into existence. Hockett v. State, 105 Ind. 250, 256; New v. Walker, 108 Ind. 365, 367; Hankey v. Downey, 116 Ind. 118.

Legislative intention.—There being nothing in the act of April 13, 1885 (Acts 1885, p. 227), or in other laws, which requires a telephone company to construct a new line against its will, or to maintain an old line longer than it may feel justified in doing, evidence that it could not construct or continue to use a particular line at the price limited without loss can not be considered in determining the legislative intention in passing such act. Hockett v. State, 105 Ind. 250, 258.

Municipal service—Extra territorial lines.—In an action by a resident of a city to compel a telephone company to furnish him with telephonic service within such city, an answer that the lines of the company extend outside of the state, and that by furnishing the plaintiff with an instrument and service he would be placed in communication with points outside of the state, is bad. Central, etc., Co. v. State, 118 Ind. 194, 210.

ARTICLE 6.—CRIMES AND MISDEMEANORS.

SEC.
1383. Crimes not punishable by city or town.
1384. Driving on sidewalk.
1385. Misdemeanor.
1386. Vehicles not to stand on street.
1387. Obstructing highway, etc.
1388. Obstructing highway with cars.
1389. Obstructing highway.
1390. Failing to give signals.
1391. Signals at crossings.
1392. Penalty for failure.
1393. Suits for.
1394. Damages.
1395. Penalty to school fund.
1396. Railroad company to destroy weeds and thistles.
1397. Failure—Action of debt.
1398. Waiting-rooms.
1399. Penalty.
1400. Waiting-rooms and closets.
1401. Penalty.
1402. Street railway prohibited—Monument place.
1403. Vestibule street cars.
1404. Violating act, penalty.
1405. Penalty for selling or offering to sell vote.

SEC.
1406. Reward for conviction.
1407. Acts repealed.
1408. Prosecutions—Limitation.
1409. Stealing public records.
1410. Officer stealing or destroying records.
1411. Altering records.
1412. Embezzlement of public funds.
1413. Embezzlement by officers.
1414. Embezzlement by treasurers.
1415. Embezzlement of public funds.
1416. Bribery of public officers.
1417. Bribery of officer.
1418. Presenting false claim.
1419. Officer acting without qualifying.
1420. Officer interested in public contracts.
1421. Breaking quorum in common council.
1422. Conviction of felony vacates office.
1423. Injuring telegraph or telephone poles or wires.
1424. Telephone disclosure.
1425. Not providing fire escape.
1426. Not providing out-swinging doors.
1427. Running horses in towns.
1428. Interfering with electric plants—Penalty.

SEC.
1429. Altering gas connections.
1430. Making gas connections without consent.
1431. Refusal to deliver gas mixtures.
1432. Setting fire to gas.
1433. Penalty.
1434. Natural gas—Preventing waste.
1435. Jumbo burners—When lighted.
1436. Penalty.

Crimes.—R. S. 1894, ch. 5 (§§ 1975–2364); Burns' Supp. 1897, ch. 5 (§§ 1980–2354). See chapter note preceding § 1308, *ante*.

[Acts 1881, p. 114. In force September 19, 1881.]

1383. Crimes not punishable by city or town.—67. Whenever any act is made a public offense against the state by any statute and the punishment prescribed therefor, such act shall not be made punishable by any ordinance of any incorporated city or town; and any ordinance to such effect shall be null and void, and all prosecutions for any such public offense as may be within the jurisdiction of the authorities of such incorporated cities or towns, by and before such authorities, shall be had under the state law only. R. S. 1894, § 1709.

See *ante*, § 118.

This section is constitutional. Jett v. City of Richmond, 78 Ind. 316.

Misdemeanor—Invalidity of ordinance.—Where an act is made a misdemeanor punishable under the criminal law of the state, a city or town can not enact an ordinance prescribing a penalty for the same offense. City of Indianapolis v. Higgins, 141 Ind. 1; City of Indianapolis v. Huegele, 115 Ind. 581; Jett v. City of Richmond, 78 Ind. 316; City of Frankfort v. Aughe, 114 Ind. 77.

Intoxicating liquors.—This section does not apply to an ordinance providing a punishment for selling intoxicating liquors without first procuring a license from the town or city, that not being an offense under the state. City of Frankfort v. Aughe, 114 Ind. 77; Clevenger v. Town of Rushville, 90 Ind. 258; Zeller v. City of Crawfordsville, 90 Ind. 262.

Interfering with police officer.—Cities can not make and enforce a penal ordinance for interfering with a member of the police force created by the metropolitan police act of 1883. Indianapolis v. Huegele, 115 Ind. 581.

Prior to the enactment of this section the same act might be made punishable by both the state and municipal authorities. Waldo v. Wallace, 12 Ind. 569; Ambrose v. State, 6 Ind. 351; Williams v. City of Warsaw, 60 Ind. 457; Sloan v. State, 8 Blackf. 361; City of Hammond v. New York, etc., R. Co., 5 App. 526, 535.

Obstruction of street.—The wrongful obstruction of a public street or sidewalk of a city is a misdemeanor punishable under the criminal law of the state, and a city can not enact an ordinance prescribing a penalty for any one who obstructs such street. City of Indianapolis v. Higgins, 141 Ind. 1.

[Acts 1867, p. 194. In force March 9, 1867.]

1384. Driving on sidewalk.—1. It shall be unlawful for any person to ride or drive upon the brick, stone, plank, or gravel sidewalk of any town or village, or upon any similar sidewalk for the use of foot-passengers by the side of any public highway in this state, unless in the necessary act of crossing the same. R. S. 1894, § 4398.

See *ante*, § 1200, clause 11.

The statute making it a misdemeanor to ride or drive upon a brick, stone, plank or gravel sidewalk, being a penal one, is to be strictly construed, and does not apply to

the act of riding or driving upon sidewalks constructed of other materials than brick, stone, plank or gravel. Town of Whiting v. Doob, Ind. Sup. Ct., February 2, 1899.

Bicycle—City and town ordinances.—A bicycle is a vehicle, and riding a bicycle upon the brick, stone, plank or gravel sidewalks of a town or city is a public offense against the state, and such offense is not punishable under a city or town ordinance; but under an ordinance prohibiting the riding of a bicycle on the sidewalks upon a proper complaint and proof a person may be punished for riding a bicycle upon a sidewalk other than one of brick, stone, plank or gravel. Town of Whiting v. Doob, Ind. Sup. Ct., February 2, 1899; Bybee v. State, 94 Ind. 443.

Bicycle.—A bicycle is a vehicle, and entitled to the rights of the road, but has no right to the use of the sidewalk, and riding the same upon the sidewalk is unlawful under this section. Mercer v. Corbin, 117 Ind. 450; Holland v. Bartch, 120 Ind. 46.

Misdemeanor—Driving across a sidewalk.—Any one driving on a sidewalk of a city or town, unless to cross it, is guilty of a misdemeanor under this section, and may be punished. The city or town can not make, by ordinance, the same act a penal offense. City of Indianapolis v. Higgins, 141 Ind. 1.

Town—Includes city.—The word "town" as used in this section is generic and includes cities. City of Indianapolis v. Higgins, 141 Ind. 1.

[Acts 1859, p. 185. In force August 6, 1859.]

1385. Misdemeanor.—3. Any person who shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not exceeding three dollars. R. S. 1894, § 4399.

[Acts 1893, p. 310. In force March 3, 1893.]

1386. Vehicles not to stand on street.—9. It shall be unlawful for any vehicle to be located, stationed or kept on said Circle street (in city of Indianapolis), to be used for hire as a common carrier in the transportation of persons, merchandise or any kind of property, and the penalty for each such offense shall be a fine of not less than five dollars nor more than ten dollars. R. S. 1894, § 8372.

1387. Obstructing highway, etc.—63. Whoever, in any manner, wrongfully obstructs any public highway, tow-path, canal, turnpike, plank or coal road, or injures any toll or other bridge, or toll-gate, culvert, embankment, or lock; or makes any breach in any canal; or injures any material used in the construction of such roads or canal, shall be fined in any sum not more than five hundred dollars, to which may be added imprisonment in the county jail not more than three months nor less than ten days. R. S. 1894, § 2043.

Municipal corporations.—Municipal corporations can not authorize the permanent obstruction of a street. City of Tell City v. Bielefeld, 20 App. 1; State v. Berdetta, 73 Ind. 185; Adams v. Ohio Falls Car Co., 131 Ind. 375; Sims v. City of Frankfort, 79 Ind. 446; Pettis v. Johnson, 56 Ind. 139.

Temporary obstruction for building purposes may be authorized. Wood v. Mears, 12 Ind. 515; City of Indianapolis v. Doherty, 71 Ind. 5; City of Warsaw v. Dunlap, 112 Ind. 576.

Cities and towns—Ordinance—Criminal offense.—The obstruction of sidewalks and streets in cities and towns is a criminal offense, punishable under state law. Cities and towns can not by ordinance prescribe punishment for same offense. City of Indian-

apolis v. Higgins, 141 Ind. 1; State v. Berdetta, 73 Ind. 185; Bybee v. State, 94 Ind. 443.

Criminal and civil statutes construed.—R. S. 1894, § 2043, describing the offense of, and providing a penalty for, the obstruction of a public highway, is not repealed by § 23 of an act approved March 2, 1883 (R. S. 1894, § 6837). The one provides a criminal prosecution for obstructing a highway, the other a civil remedy for the benefit of the road fund of the proper district. Harvey v. State, 5 App. 422, 423.

Way over street—Question of fact.—A public street is a public highway, and the wrongful obstruction of a public street is a misdemeanor and is punishable as such, under the provisions of R. S. 1894, § 2043, and the erection or maintenance of any structure for private use, such as an inclosed passage way over and above a public street or highway, which obstructs or may obstruct such street or highway, is a misdemeanor within the meaning of the statute, and is punishable as a public nuisance. Whether or not the particular structure, so erected or maintained, obstructs or may obstruct wrongfully the public street or highway, is a question of fact, in every case, for the court or jury trying the cause. Bybee v. State, 94 Ind. 443, 446.

Corporation may be prosecuted.—A corporation may be prosecuted criminally for obstructing a public highway. R. S. 1894, §§ 1970 and 2043; State v. Baltimore, etc., R. Co., 120 Ind. 298, 299; Cleveland, etc., R. Co. v. Wynant, 119 Ind. 539.

Removal of obstruction—Mandate.—The fact that a corporation may be compelled by mandate to remove an obstruction placed by it in a public highway is not a defense to a prosecution for maintaining such obstruction. State v. Baltimore, etc., R. Co., 120 Ind. 298, 299.

A railroad company which leaves its cars standing in a public highway is guilty of an unlawful obstruction thereof, under R. S. 1894, § 2043, notwithstanding it may leave a portion of the center of the roadway open for the passage of vehicles. Pittsburgh, etc., R. Co. v. Kitley, 118 Ind. 152, 156.

Supervisors of highways have no authority over the streets of incorporated towns and cities, and may be guilty of obstructing the same while attempting to make repairs thereof. State v. Mainey, 65 Ind. 404.

Criminal action—Charge.—As to what will constitute a sufficient charge for obstructing a highway in a criminal action, see State v. Buxton, 31 Ind. 67; State v. Baker, 58 Ind. 417; State v. Stewart, 66 Ind. 555; Nichols v. State, 89 Ind. 298; Bybee v. State, 94 Ind. 443; State v. Berdetta, 73 Ind. 185.

Penalty.—A fine of $25 for obstructing a highway is not excessive. Hoch v. State, 20 App. 64.

1388. Obstructing highway with cars.—254. Whoever being a conductor or other person having charge of or running a railroad train carrying or used for carrying freight permits or suffers the same or any car or locomotive engine composing the same to remain standing across any public highway, street, alley or farm crossing, or who whenever it becomes necessary to stop such train across any public highway, street, alley or farm crossing, fails to leave a space of sixty feet across such public highway, street, alley or farm crossing, shall be fined not more than twenty dollars nor less than three dollars. [As amended, Acts 1893, p. 296. In force May 18, 1893.] R. S. 1894, § 2291.

Indictment—Duplicity.—An indictment which charged that the defendant, being then and there a conductor, etc., did "unlawfully permit and suffer" the train "to remain and stand across" the street, and did "fail and neglect to leave a space of sixty feet across said street," is not bad for duplicity. State v. Malone, 8 App. 8.

An indictment against the conductor of the train is not bad for failure to state the name of the railroad. State v. Malone, 8 App. 8.

The leaving of cars in any portion of a public highway is a violation of this section. Pittsburgh, etc., R. Co. v. Kitley, 118 Ind. 152.

Injury to runaway horse—Liability.—Where a railroad company leaves its cars in highway in violation of this section, and a horse through fright, without the fault of the driver, becomes uncontrollable and runs away, and is killed in attempting to leap through the coupled cars, the company is liable. Grimes v. Louisville, etc., R. Co., 3 App. 573.

A public street a public highway.—A public street is a public highway, and the wrongful obstruction of a public street is a misdemeanor and is punishable as such. Bybee v. State, 94 Ind. 443.

1389. Obstructing highway.—260. Whoever, being the conductor of any passenger train, allows the same to remain standing across any public highway or street, to the hindrance of travel, for a longer time than five minutes, shall be fined in any sum not more than fifty dollars nor less than five dollars. R. S. 1894, § 2297.

1390. Failing to give signals.—262. Whoever, having charge of a locomotive engine upon any railroad, fails or neglects when such engine is approaching any road crossing to sound the engine whistle at a distance of not more than one hundred nor less than eighty rods from such crossing, shall be fined not more than fifty dollars, nor less than ten dollars; and if any person be injured or killed by reason of such failure or neglect, he shall be imprisoned in the state prison not more than fourteen years, nor less than two years. But nothing herein contained shall be so construed as to interfere with any ordinance or by-law that has been or may be passed by any city or town regulating the management or running of engines or trains within such city or town. R. S. 1894, § 2299.

Police regulations.—Enactments of this character are within the police power of the legislature and are valid. Pittsburg, etc., R. Co. v. Brown, 67 Ind. 45; State v. Indiana, etc., R. Co., 133 Ind. 69; 3 Elliott Railroads, § 1114.

Failure to give signals—Negligence.—A failure to give signals required by law on approaching a road crossing, is such negligence as gives a cause of action against the railroad company by persons who are on the track and are injured without fault on their part. It is conclusive evidence of negligence. Terre Haute, etc., R. Co. v. Brunker, 128 Ind. 542; Ohio, etc., R. Co. v. Hill, 117 Ind. 56; Ivens v. Cincinnati, etc., R. Co., 103 Ind. 27; Chicago, etc., R. Co. v. Boggs, 101 Ind. 522; Indiana, etc., R. Co. v. Barnhart, 115 Ind. 399; Lake Shore, etc., R. Co. v. Boyts, 16 App. 640; Baltimore, etc., R. Co. v. Walborn, 127 Ind. 142; Hadley v. Lake Erie, etc., R. Co., 21 App. 675; Chicago, etc., R. Co. v. Fenn, 3 App. 250, 253; 3 Elliott Railroads, § 1114.

In such case the omission to give the signals is conclusive evidence of negligence; the company will be liable for injuries to animals upon highway crossings, in the absence of negligence upon the part of the owner. Chicago, etc., R. Co. v. Fenn, 3 App. 250.

Failure to give signal—Negligence per se.—It is negligence *per se* for a railroad company to fail to give the statutory signals at public crossings, but to entitle an injured party to recover he must show that such negligence was the proximate cause of the injury, and that he was not guilty of contributory negligence. Baltimore, etc., R. Co. v.

Conoyer, 149 Ind. 524; Baltimore, etc., R. Co. v. Young, 146 Ind. 374. But the rule that the plaintiff must allege and prove the absence of contributory negligence has now been changed by statute, negligence of the plaintiff being made matter of defense, provable under the general denial. See Acts 1899, p. 58.

A person approaching a railroad crossing has a right to assume that the company will obey the law, by giving the required signals of an approaching train; and if such person, after having exercised due care, and employed his senses of seeing and hearing, to ascertain if a train is approaching, and thereby avoid danger, can neither see nor hear an advancing or moving train, he is justified in presuming that he can pass over the crossing in safety. Baltimore, etc., R. Co. v. Conoyer, 149 Ind. 524.

When may refrain from giving signal.—If, in approaching a crossing, the engineer should see and know that a traveler upon the highway is in imminent peril, from a frightened team, on account of the approaching train, it is his duty to refrain from giving the statutory signals. Louisville, etc., R. Co. v. Stanger, 7 App. 179.

[Acts 1881 S., p. 590. In force September 19, 1881.]

1391. Signals at crossings.—1. It shall be the duty of all railroad companies operating in this state to have attached to each and every locomotive engine a whistle and a bell, such as are now in use or may be hereafter used by all well-managed railroad companies; and the engineer or other person in charge of or operating such engine upon the line of any such railroad shall, when such engine approaches the crossing of any turnpike or other public highway in this state, and when such engine is not less than eighty nor more than one hundred rods from such crossing, sound the whistle on such engine distinctly three times and ring the bell attached to such engine continuously from the time of sounding such whistle until such engine shall have fully passed such crossing: *Provided*, That nothing herein shall be so construed as to interfere with any ordinance that has been or may hereafter be passed by any city or incorporated town in this state regulating the management or running of such engines or railroads within the limits of such city or incorporated town: *Provided, further*, That all penalties incurred under the act of March 29, 1879, are hereby repealed. R. S. 1894, § 5307.

Constitutional.—This statute is a police regulation, clearly within the scope of legislative authority, and is constitutional and valid. Pittsburgh, etc., R. Co. v. Brown, 67 Ind. 45; State v. Indiana, etc., R. Co., 133 Ind. 69.

Statutes construed.—This section requires the whistle upon a locomotive engine to be sounded upon approaching any highway crossing, and the bell to be rung until the crossing is reached. The succeeding section makes the company liable in damages to any person who shall be injured in person or property by reason of the omission of such signals. Pittsburgh, etc., R. Co. v. Shaw, 15 App. 173.

Such liability will not exist if the person injured fails to use diligence to discover the approach of the train. Miller v. Terre Haute, etc., R. Co., 144 Ind. 323.

Failure to give signals—Negligence per se.—The failure to give signals of the approach of a train at a street crossing is negligence *per se*, and fixes the liability of the railroad company to one who, without concurring negligence, is injured thereby. Lake Shore, etc., R. Co. v. Boyts, 16 App. 640; Hadley v. Lake Erie, etc., R. Co., 21 App. 675; Louisville, etc., R. Co. v. Rush, 127 Ind. 545; Railway Co. v. Butler, 103 Ind. 31; Railroad Co. v. Fenn, 3 App. 250; Baltimore, etc., R. Co. v. Walborn, 127 Ind. 142;

Terre Haute, etc., R. Co. v. Brunker, 128 Ind. 542; 3 Elliott Railroads, § 1114; Elliott Roads and Streets, pp. 605, 606.

It is negligence for a railroad company to run a locomotive and train of cars across a public street in a populous city without sounding the whistle or ringing the bell, and without giving any warning of its approach. Aurelius v. Lake Erie, etc., R. Co., Ind. Sup. Ct., March 16, 1898.

[Acts 1879, p. 173. In force May 31, 1879.]

1392. Penalty for failure.—2. Every engineer or other person in charge of or operating any such engine, who shall fail or neglect to comply with the provisions of the preceding section, shall be held personally liable therefor to the state of Indiana, in a penalty of not less than ten dollars nor more than fifty dollars, to be recovered in a civil action, at the suit of said state, in the circuit or superior court of any county wherein such crossing may be located; and the company in whose employ such engineer or person may be, as well as the person himself, shall be liable in damages to any person or his representatives who may be injured in property or person, or to any corporation that may be injured in property, by the neglect or failure of such engineer or other person as aforesaid. R. S. 1894, § 5308.

See *ante*, § 1390.

1393. Suits for.—3. All actions for the recovery of the penalties prescribed in the preceding section shall be prosecuted in the name of the state of Indiana, by the prosecuting attorney of any county where such failure or neglect, as aforesaid, may occur; and such prosecuting attorney shall be entitled to recover and receive for his services in such cases, as a docket fee, twenty dollars in each case, to be taxed as part of the costs in such cases. R. S. 1894, § 5309.

1394. Damages.—4. The amount of damages which may be recovered under the provisions of this act, whether for bodily injuries or death, shall be within the discretion of the court or jury trying the cause: *Provided*, That in case of death such damages shall not exceed the sum of five thousand dollars. R. S. 1894, § 5310.

The act of April 7, 1881 (R. S. 1894, § 285), repealed by implication so much of this section as limits the amount of damages that may be recovered to five thousand dollars, and damages to the amount of ten thousand dollars may be recovered. Pittsburg, etc., R. Co. v. Burton, 139 Ind. 357.

1395. Penalty to school fund.—5. All fines and penalties collected under the provisions of this act shall be appropriated to the benefit of the common school fund of the state; and the clerk of the court wherein such fines and penalties may be assessed and recovered shall, upon receipt thereof, pay the same over to the treasurer of said county, for the purpose aforesaid. R. S. 1894, § 5311.

[Acts 1889, p. 146. In force May 10, 1889.]

1396. Railroad company to destroy weeds and thistles.—1 That all railroad corporations doing business in this state shall, between the

first day of July and the twentieth day of August in each year, cause all thistles, burrs, docks and other noxious weeds growing on lands occupied by them in any city, village or township of this state, to be cut down and destroyed. R. S. 1894, § 5399.

1397. Failure—Action of debt.—2. In case any railroad company shall refuse or neglect to comply with the requirements specified in the first section of this act, such company shall be liable in a penalty of twenty-five dollars, to be prosecuted for in an action of debt by any person feeling himself aggrieved. Said suit may be brought before any justice of the peace in the county, who shall require of the complainant surety to pay costs in case he fails to maintain his action; summons may be served on any agent or officer of the company. R. S. 1894, § 5400.

[Acts 1891, p. 70. In force June 3, 1891.]

1398. Waiting-rooms.—1. That all railroad companies operating lines through cities and towns of two hundred and fifty population or more shall provide and maintain suitable waiting-rooms together with separate water closets for men and women for the convenience of the traveling public, and shall keep such rooms open for a period of not less than one hour next preceding the arrival of all passenger trains that are allowed by schedule to stop at such stations. R. S. 1894, § 5188.

1399. Penalty.—2. Any railroad company failing to comply with the provisions of the above shall be guilty of a misdemeanor and be fined for not more than three hundred dollars and not less than twenty dollars. R. S. 1894, § 5189.

Indictment—Insufficiency of.—The indictment for failing to keep open waiting-rooms is insufficient, which fails to aver that the defendant had provided and maintained such waiting-rooms. State v. Cleveland, etc., R. Co., 137 Ind. 75.

[Acts 1895, p. 99. In force June 28, 1895.]

1400. Waiting-rooms and closets.—1. That all railroad companies operating lines through cities and towns of one hundred population or more shall provide and maintain suitable waiting-rooms together with separate water-closets for men and women, for the convenience of the traveling public, and shall keep such rooms open for the period of not less than one hour next preceding the arrival of all passenger trains that are allowed by schedule or flagging, to stop at all stations. Burns' Supp. 1897, § 5189*a*.

See *ante*, § 1398.

1401. Penalty.—2. Any railroad company failing to comply with the provisions of the above section shall be guilty of a misdemeanor and be fined in any sum not more than five hundred dollars and not less than twenty dollars for each offense. Burns' Supp. 1897, § 5189*b*.

[Acts 1893, p. 310. In force March 3, 1893.]

1402. Street railway prohibited—Monument place.—8. It shall be unlawful to build and operate or maintain a street railway track and cars, or tramway, upon the street, or any part thereof, surrounding Monument place, said street being known as Circle street, in the city of Indianapolis, and the penalty for each such offense shall be a fine of not less than one hundred dollars nor more than five hundred dollars for each day such violation of the law shall continue. R. S. 1894, § 8371.

[Acts 1895, p. 157. In force June 28, 1895.]

1403. Vestibule street cars.—1. That every electric street car, other than trail cars which are attached to motor cars, shall, during the months of November, December, January, February and March of each year, be provided, at the forward end thereof, with a screen constructed of glass or other materials, which shall fully and completely protect the driver, or motorman, or gripman, or other persons stationed on such forward end and driving, guiding or directing the motive power by which such cars are propelled, from wind and storm. Burns' Supp. 1897, § 5479*a*.

1404. Violating act, penalty.—2. Any corporation, company, officer, agent, or any person violating the provisions of this act shall, upon conviction, be fined in any sum not less than twenty-five dollars, nor more than one hundred dollars for each day each such car belonging to, used, or controlled by any such corporation, company, officer, agent, or other person is permitted to remain unprovided with the screen required in section one of this act; and it is hereby made the duty of the prosecuting attorney of each county where such cars are, or may be used, to institute the necessary proceedings to enforce the provisions of this act Burns' Supp. 1897, § 5479*b*.

[Acts 1899, p. 381. In force April 27, 1899.]

1405. Penalty for selling or offering to sell vote.—1. That whosoever sells, barters or offers to sell or barter his vote, or offers to refrain from voting for any candidate or candidates for any office at any general, special or primary elections or convention either for money or property, or thing of value, or for any promise or favor or hope of reward, or who shall accept any money, property or thing of value, with the promise or pretense of voting for, or refraining from voting for any candidate or candidates, shall upon conviction therefor be disfranchised and rendered incapable of holding any office of profit or trust, for a period not less than ten years nor more than twenty years.

1406. Reward for conviction.—2. Any person or persons having knowledge or information of the violation of the provisions of this act, who shall procure or furnish or cause to be procured or furnished the testimony necessary to secure a conviction of the person or persons violating the same shall be entitled to a reward of $100 payable out of the treasury of the county in which such conviction shall be

had and the right to such reward shall be a valid claim against such county.

1407. Acts repealed.—3. Sections three and four of an act entitled "An act concerning elections and nominating conventions, to maintain political purity, and prescribing the punishment for any violation thereof, approved March 9, 1889," and an act entitled "An act to secure the purity and freedom of the ballot and to repeal sections one, two, three and five of an act entitled an act to protect the ballot box, to procure fair elections, to prevent the purchase or sale of votes, to provide means of proving such offenses prescribing the penalty therefor and repealing sections 268 and 269 of an act concerning public offenses, and their punishment," approved April 14, 1881, being sections 2184 and 2185 of the Revised Statutes of 1881, and repealing all laws and parts of laws in conflict with the provisions of this act, approved March 9, 1889, and "An act concerning public offenses and their punishment," approved March 8, 1897, and all laws and parts of laws in conflict with the provisions of this act are hereby repealed.

1408. Prosecutions—Limitation.—4. Prosecutions may be brought, under this act, at any time, within six years after the commission of the offense.

[Acts 1881 S., p. 174. In force September 19, 1881.]

1409. Stealing public records.—36. Whoever steals, takes, and carries away the whole or any part of any record, record-book, or order book authorized to be made by any law of this state, or belonging or pertaining to any court of record, justice of the peace, or any state, county, township, or municipal office or officer, or any other public record, document, or proceeding of any court of record, justice of the peace, state, county, township, or municipal office or officer; or any paper, pleading, exhibit, or other writing filed within or by any such court of record, justice of the peace, office or officer, is guilty of felony, without reference to the value of the same, and, upon conviction thereof, shall be imprisoned in the state prison not more than fourteen years nor less than six months, fined not exceeding one thousand dollars and disfranchised and rendered incapable of holding any office of trust or profit for any determinate period. R. S. 1894, § 2014.

1410. Officer stealing or destroying records.—37. Whoever, being an officer or his deputy, having the custody of any record, book, document, paper, or proceeding specified in the foregoing section, steals, or fraudulently takes away, secretes, withdraws, or destroys any such record, book, document, paper, or proceeding filed or deposited with him, upon conviction thereof, shall be imprisoned in the state prison not more than fourteen years nor less than two years, fined not exceeding one thousand dollars and disfranchised and rendered incapable of holding any office of trust or profit for any determinate period. R. S. 1894, § 2015.

1411. Altering records.—38. Whoever, maliciously, mischiev-

ously, or fraudulently alters, defaces, injures, mutilates, or destroys the whole or any part of any record authorized to be made by any law of this state, belonging or pertaining to any court of record, justice of the peace, or any state, county, township, or municipal office or officer; or any other public record so authorized; or any paper, pleading, exhibit, or other writing filed with, in, or by any such court, office, or officer, shall be imprisoned in the state prison not more than fourteen years nor less than six months, fined not exceeding one thousand dollars and disfranchised and rendered incapable of holding any office of trust or profit for any determinate period. R. S. 1894, § 2016.

1412. Embezzlement of public funds.—41. Whoever being charged, or in any manner entrusted, with the collection, receipt, safe keeping, transfer, or disbursement of any money, funds, securities, bonds, choses in action, or other property belonging to or under the control of the state or of any state officer, or belonging to or under the control of any county, civil or school township, city, or town in this state, converts to his own use, or to the use of any other person or persons, corporation or corporations, in any manner whatever, contrary to law; or uses, by way of investment in any kind of property; or loans, either with or without interest; or deposits with any person or persons, corporation or corporations, contrary to law; or exchanges for other funds, except as allowed by law, any portion of such money, funds, securities, bonds, choses in action, or other property, is guilty of embezzlement, and upon conviction thereof, shall be imprisoned in the state prison not more than twenty-one years nor less than two years, fined not exceeding double the value of the money or other property embezzled, and disfranchised, and rendered incapable of holding any office of trust or profit for any determinate period. R. S. 1894, § 2019.

Statute construed.—Any treasurer, trustee, or other custodian of public funds, who uses such funds by way of investment in any kind of property, or who loans them, either with or without interest, is guilty of embezzlement. Winchester, etc., Co. v. Veal, 145 Ind. 506.

County treasurer—Loaning county funds.—A county treasurer, who loans the county funds in violation of this section, can not maintain an action for the recovery of the same, although the county itself might maintain such action. Winchester, etc., Co. v. Veal, 145 Ind. 506.

Indictment—Deputy county treasurer—Statute of limitations.—An indictment of a deputy county treasurer for embezzlement of the county funds is not bad for failure to state the time at which the crime was committed, for the reason that time is not of the essence of the offense. Armstrong v. State, 145 Ind. 609.

1413. Embezzlement by officers.—42. Any county treasurer, county auditor, sheriff, clerk, or receiver of any court, township trustee, justice of the peace, mayor of a city, constable, marshal of any city or incorporated town, or any officer or agent of any county, civil or school township, city, or incorporated town, who shall fraudulently fail or refuse at the expiration of the term for which he was elected or appointed, or at any time during such term, when legally required by the proper person or authority, to account for, deliver, and pay over to such

person or persons, as may be lawfully entitled to receive the same, all moneys, choses in action or other property which may have come into his hands by virtue of his said office, shall be deemed guilty of embezzlement, and, upon conviction thereof, shall be imprisoned in the state prison for any period of not more than five years nor less than one year, and fined in any sum not exceeding one thousand dollars, and rendered incapable of holding any office of trust or profit for any determinate period. R. S. 1894, § 2020.

Not repealed.—This section was not repealed by the act of March 5, 1883 (Acts 1883, p. 106), modifying the case of State v. Mason, 108 Ind. 48. State v. Wells, 112 Ind. 237.

Indictment.—An indictment against a county treasurer for embezzlement need not state the fund to which the money embezzled belonged. Hollingsworth v. State, 111 Ind. 289.

An indictment against an officer for failing to pay over money to his successor must allege that such failure was either unlawful or felonious. Stropes v. State, 120 Ind. 562.

In charging an officer for failure to pay over money required by law to be paid at stated times, such facts must be stated as will show a clear violation of his duty. State v. Record, 56 Ind. 107.

An indictment against an officer for failing to pay over money to his successor must allege that the term of such officer has expired, and that he failed to pay over to his successor a sum received by such officer during his term, and which he should have paid over. State v. Hebel, 72 Ind. 361.

Statute of limitations.—Prosecutions are barred in two years after the expiration of the term of the officer, and a demand made after the expiration of such term will not extend the time for beginning the prosecution. State v. Mason, 108 Ind. 48.

Demand.—No demand need be made by the successor of an officer for the payment of the funds embezzled before a prosecution for the offense. Hollingsworth v. State, 111 Ind. 289.

1414. Embezzlement by treasurers.—49. If the treasurer of state, or any county treasurer or city treasurer, or the treasurer of any town shall use the money of any particular fund, or the money appropriated by law for any particular purpose, to pay any warrant drawn upon any other fund or appropriation, he shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be imprisoned in the county jail not more than six months nor less than one month, and fined in any sum not more than five thousand dollars nor less than one hundred dollars. R. S. 1894, § 2028.

1415. Embezzlement of public funds.—50. A member of the common council of any city or of the board of school trustees of any city or town, or the board of trustees of any town, or the mayor, president, officer, agent, attorney, clerk, or servant of such corporation, or any township trustee, who knowingly diverts, appropriates, or applies any funds or part of any fund raised under any law by taxation or otherwise, to any other use or purpose than that for which it was raised or appropriated; or who knowingly diverts, appropriates or applies, or assists in diverting, appropriating, or applying, any money, borrowed on any bond of the corporation, or any part of the proceeds of such bond, to any other use or purpose than that for which such loan was

made or bond issued, or to any use or purpose than is authorized by the charter or law governing such corporation, shall be deemed guilty of embezzlement, and, upon conviction thereof, shall be imprisoned in the state prison not more than five years nor less than one year, fined not more than one thousand dollars nor less than one dollar, and disfranchised and rendered incapable of holding any office of trust or profit for any determinate period. R. S. 1894, § 2029.

1416. Bribery of public officers.—104. Whoever corruptly gives, promises or offers to any member, officer, clerk, or employe of the general assembly, or of either house thereof, or any state or other officer, agent, or employe of the state, or person holding any office of trust or profit under the laws of this state, or any officer intrusted with the administration of justice, or prosecuting attorney, either before or after his election, qualification, appointment, or employment, any money or valuable thing; or corruptly offers or promises to do any act beneficial to any such person, to influence his action, vote, opinion, or judgment in any matter pending or that might legally come before him; and whoever, being a member, officer, clerk, or employe of the general assembly, or state or other officer, agent, or employe of the state, or person holding any office of trust or profit under the laws of this state, or any officer intrusted with the administration of justice, or prosecuting attorney, either before or after his election, qualification, appointment, or employment, solicits or accepts any such money or valuable thing, to influence him with respect to his official duty, or to influence his action, vote, opinion, or judgment in any matter pending or that might legally come before him, shall, upon conviction thereof, be imprisoned in the state prison not more than fourteen years nor less than two years, fined not exceeding ten thousand dollars, and disfranchised and rendered incapable of holding any office of trust or profit for any determinate period. R. S. 1894, § 2096.

Statute construed—Indictment.—As to what is a sufficient charge of bribery against the township trustee, see Glover v. State, 109 Ind. 391; State v. McDonald, 106 Ind. 233.

A prosecuting attorney was an officer intrusted with the administration of justice under the statute of 1852. State v. Henning, 33 Ind. 189; Collier v. Waugh, 64 Ind. 456.

Under the statute of 1852 the receiving of a promissory note by an officer to influence his action was not bribery, as the note was worthless. State v. Walls, 54 Ind. 561. See Collier v. Waugh, 64 Ind. 456.

An indictment for bribery should distinctly state and charge that the officer charged with being bribed, accepted, or agreed to accept, for his official action, some amount of money or article of value. State v. Stephenson, 83 Ind. 246.

The offering to township trustees of money or property to induce them to purchase school supplies is bribery under this section. State v. McDonald, 106 Ind. 233; Glover v. State, 109 Ind. 391.

1417. Bribery of officer.—145. Any person who shall pay or agree to pay any money, or deliver anything of value, to any state officer, county commissioner, township or town trustee, mayor or common councilman of any city, school trustee of any city, or any other person holding a lucrative office or appointment or agency under the

constitution or laws of this state, for the purpose of procuring any contract for the construction of any state-house, court-house, school-house, bridge or other public building, or the performance of any work or furnishing of any material for the use of the state, or of any county, township, town, or city in this state, over which such person has any official jurisdiction; or who, having any such contract, shall pay or agree to pay to any of the officers or persons above named any money, percentage, reward, drawback, premium, or profits on such contract, upon conviction thereof, shall be fined not more than five thousand dollars nor less than three hundred dollars, and imprisoned in the state prison not more than fourteen years nor less than two years, and disfranchised and rendered incapable of holding any office of trust or profit for any determinate period. R. S. 1894, § 2138.

1418. Presenting false claim.—289. Whoever, knowing the same to be false or fraudulent, makes out or presents for payment, or certifies as correct to the general assembly or either house thereof, or to the auditor of state or other state officer, or to the county auditor or board of commissioners or other officer of any county, or to the treasurer or other accounting officer of any city or town, or to the trustee or accounting officer of any civil or school township, or school city or town, any claim, bill, note, bond, account, pay-roll, or other evidence of indebtedness, false or fraudulent, for the purpose of procuring the allowance of the same, or an order for the payment thereof out of the treasury of said state, county, civil or school township, city or town; and whoever, knowing the same to be false or fraudulent, receives payment of any such claim, account, bill, note, bond, pay-roll, voucher or other evidence of indebtedness from the treasurer of state, or the treasurer or other paying officer of any county, civil or school township, city or town, shall be imprisoned in the state prison not more than fourteen years, nor less than two years, and fined not more than one thousand dollars nor less than ten dollars. R. S. 1894, § 2353.

1419. Officer acting without qualifying.—139. Whoever, having been elected or appointed to any office, or being the deputy of any officer so elected or appointed, performs any of the duties of such office without having taken and subscribed the oath prescribed by law, or before having given and filed the bond required of him and in the manner prescribed by law, shall be fined not more than one thousand dollars nor less than ten dollars. R. S. 1894, § 2131.

1420. Officer interested in public contracts.—144. Any state officer, county commissioner, township or town trustee, mayor or a common councilman of any city, school trustee of any town or city, or their appointees or agent, or any person holding any appointing power, or any person holding a lucrative office under the constitution or laws of this state, who shall, during the time he may occupy such office or hold such appointing power and discharge the duties thereof, be interested, directly or indirectly in any contract for the construction of any state house, court house, school-house, bridge, public building, or work of any kind erected or built for the use of the state, or any county,

township, town, or city in the state, in which he exercises any official jurisdiction; or who shall bargain for or receive any percentage, drawback, premium or profits, or money whatever, on any contract or for the letting of any contract or making any appointment wherein the state, or any county, township, town, or city is concerned—upon conviction thereof, shall be fined not more than five thousand dollars nor less than three hundred dollars, and imprisoned in the state prison not more than fourteen years nor less than two years, and disfranchised and rendered incapable of holding any office of trust or profit for any determinate period. R. S. 1894, § 2136.

Offense defined.—To constitute an offense under this section the officer must become interested in a contract of the city for the construction of a public work, and it is not an offense merely to be interested in the construction of such work. State v. Feagans, 148 Ind. 621.

Indictment.—The indictment must state, by direct averments, facts constituting the offense as defined by the statute, and such a degree of certainty must be shown by its averments as to fully inform the accused of the charge preferred, and the court and jury of the crime of which, upon the trial, he is to be either convicted or acquitted. State v. Feagans, 148 Ind. 621.

Contracts void.—All contracts executed in contravention of the provisions of this section are void. Wingate v. Harrison Tp., 59 Ind. 520; Case v. Johnson, 91 Ind. 477; Benton v. Hamilton, 110 Ind. 294; New v. Walker, 108 Ind. 365.

1421. Breaking quorum in common council.—153. Whenever it shall happen that a quorum shall not be present or voting in the common council of any city of the state of Indiana, at any stated or special meeting thereof, by reason of the willful or intentional absence of any member or members of the same, or of his or their refusal to vote, or to answer to their names on any vote or roll call, any member of such common council so refusing to vote or to be present or to answer to his name, with the intent to defeat, delay, or obstruct legislation or legislative action or the business of such common council, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than one thousand dollars nor less than one hundred dollars. R. S. 1894, § 2146.

[Acts 1899, p. 188. In force April 27, 1899.]

1422. Conviction of felony vacates office.—37. In case any state, county, township, municipal or other public officer shall be convicted of felony, the office held by such officer shall be vacated by such judgment of conviction, and the vacancy existing therein shall be immediately filled by appointment as provided by law: *Provided*, That in case of appeal to the appellate or supreme courts such office shall not be vacated pending such appeal.

[Acts 1881 S., p. 174. In force September 19, 1881.]

1423. Injuring telegraph or telephone poles or wires.—55. Whoever maliciously or mischievously injures any telegraph pole or telephone pole, or the wire or any part of the apparatus thereof, upon

conviction thereof, shall be fined not more than five hundred dollars nor less than five dollars, and imprisoned in the county jail not more than six months nor less than thirty days. R. S. 1894, § 2035.

[Acts 1883, p. 9. In force June 5, 1883.]

1424. Telephone disclosure.—1. That any operator, clerk, servant, messenger or employee of any telephone company doing business in this state who discloses the contents of any dispatch or message, or any conversation had between persons while using the line of any telephone company, except to a court of justice or to a person entitled to know the same, shall be fined not more than five hundred dollars nor less than ten dollars. R. S. 1894, § 2249.

[Acts 1881 S., p. 174. In force September 19, 1881.]

1425. Not providing fire escape.—241. Whoever, being the owner, lessee, superintendent or manager of any hotel or place of entertainment for transient guests or boarders, in any city of five thousand inhabitants or upwards, which is more than two stories in height, conducts, operates or carries on such hotel or place of entertainment, without providing sufficient and suitable fire escapes or ladders at convenient places in the stories of such building above the second, for the speedy escape of such guests or boarders in case of fire, and without causing written or printed notices of the location and manner of using such fire escapes or ladders to be posted in a conspicuous place in the room of each guest or boarder, shall be fined not more than fifty dollars nor less than five dollars for each day of such failure. R. S. 1894, § 2272.

1426. Not providing out-swinging doors.—243. Whoever, being the owner, manager, lessee, trustee or person having the charge of any theater, opera-house, museum, college, seminary, church, schoolhouse or other public building, refuses or neglects to cause all the doors thereof constructed for the purpose of ingress or egress, whether inner or outer doors, to be so hung that the same shall swing outwardly, shall be fined in any sum not exceeding one thousand dollars nor less than ten dollars, to which may be added imprisonment in the county jail for any period not exceeding six months; *provided*, that this section shall not apply to the outer doors of one story churches and school-houses. [As amended, Acts 1891, p. 111. In force March 5, 1891.] R. S. 1894, § 2276.

1427. Running horses in towns.—248. Whoever runs horses, mares, or geldings, or shoots at a mark, within the limits of any town or village, or along or across any street thereof, upon conviction, shall be fined not more than three dollars. R. S. 1894, § 2281.

Town—City—Shooting.—The word town is generic, comprehending city, and hence the law which makes shooting in a town or village a misdemeanor applies to cities. Flinn v. State, 24 Ind. 286; see City of Indianapolis v. Higgins, 141 Ind. 1.

[Acts 1899, p. 58. In force April 27, 1899.]

1428. Interfering with electric plants—Penalty.—1. That, whoever unlawfully and intentionally injures or destroys or permits to be injured or destroyed, any meter, pipe, conduit, wire, line, post, lamp or other apparatus belonging to a company engaged in the manufacture or sale of electricity for lighting, heat, power or other purposes, or unlawfully and intentionally prevents an electric meter from duly registering the quantity of electricity supplied, or in any way interferes with its proper action or just registration, or without the consent of such company unlawfully and intentionally diverts any electric current from any wire of such company, or otherwise unlawfully and intentionally uses or causes to be used, without the consent of such company, any electricity manufactured or distributed by such company, shall be deemed guilty of a misdemeanor and shall for every such offense, be punished by fine not exceeding $100 or imprisoned not exceeding one year, or by both such fine and imprisonment.

[Acts 1891, p. 382. In force June 3, 1891.]

1429. Altering gas connections.—1. It is hereby declared to be unlawful for any person, in any manner whatever, to change, extend or alter, or cause to be changed, extended, or altered any service or other pipe or attachment of any kind connecting or through which natural or artificial gas is furnished from the gas mains or pipes of any person, company or corporation without first procuring from said person, company or corporation written permission to make such change, extension or alteration. R. S. 1894, § 2311.

1430. Making gas connections without consent.—2. It is hereby declared to be unlawful for any person to make, or cause to be made any connection or reconnection, with the gas mains or service pipes of any person, company, or corporation, furnishing to consumers natural or artificial gas, or to turn on or off, or in any manner interfere with any valve or stop-cock, or other appliance belonging to such person, company or corporation, and connected with its service or other pipes, or to enlarge the orifice of mixers, or to use natural gas for heating purposes except through mixers, without first procuring from such person, company or corporation a written permit to turn on or off such stop-cock or valve, or to make such connections or reconnections, or to enlarge the orifice of mixers, or to use gas for heating without mixers, or to interfere with the valves, stop-cocks or other appliances of such person, company or corporation, as the case may be. R. S. 1894, § 2312.

1431. Refusal to deliver gas mixers.—3. It is hereby declared to be unlawful for any person or persons to whom any mixer or mixers or other appliances may be or may have been loaned or rented by any person, company or corporation for the purpose of furnishing gas through the same, to retain possession, or to refuse to deliver such mixer or mixers, or other appliances to the person, company or corpora-

tion entitled to the possession of the same, after such person, company or corporation shall have been entitled to the possession of the same, or to sell, loan, or in any manner dispose of the same to any person or persons, other than said person, company or corporation entitled to the possession of the same. R. S. 1894, § 2313.

1432. Setting fire to gas.—4. It is hereby declared to be unlawful for any person or persons to set on fire any gas escaping from wells, broken or leaking mains, pipes, valves, or other appliances, used by any person, company or corporation in conveying gas to consumers, or to interfere in any manner with the wells, pipes, mains, gate boxes, valves, stop-cocks or other appliances, machinery or property of any person, company or corporation engaged in furnishing gas to consumers, unless employed by or acting under the authority and direction of such person, company or corporation engaged in furnishing gas to consumers. R. S. 1894, § 2314.

1433. Penalty.—5. Any person violating any provision of this act shall, upon conviction, be fined in any sum not less than five dollars nor more than one hundred dollars for such offense. R. S. 1894, § 2315.

[Acts 1891, p. 55. In force June 3, 1891.]

1434. Natural gas—Preventing waste.—1. The use of natural gas for illuminating purposes, in what are known as flambeau lights, is a wasteful and extravagant use thereof, and is dangerous to the public good, and it shall therefore be unlawful for any company, corporation or person, for hire, pay or otherwise, to use natural gas for illuminating purposes in what are known as flambeau lights in cities, towns, highways or elsewhere: *Provided,* That nothing herein contained shall be construed as to prohibit any such company, corporation or person from the necessary use of such gas in what are known as "jumbo" burners enclosed in glass globes, or lamps or by the use of other burners of similar character so inclosed, as will consume no more gas than said "jumbo" burners. R. S. 1894, § 2316.

Act constitutional.—The above act is constitutional. Townsend v. State, 147 Ind. 624.

Offense continuous.—The offense created by this section is a continuous one, and a conviction of the offense bars another prosecution for all violations of the statute by the defendant prior to the conviction. Townsend v. State, 147 Ind. 624.

1435. Jumbo burners—When lighted.—2. All gas lights in said "jumbo" burners and glass globes, or lamps used in all streets and public highways shall be turned off not later than 8 o'clock in the morning each day such lights or burner is used, and the same shall not be lighted between the hours of 8 o'clock A. M. and 5 o'clock P. M. R. S 1894, § 2317.

1436. Penalty.—3 Any one violating any of the provisions of section (1) of this act, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not exceeding twenty-five

dollars, and for a second offense may be fined in any sum not exceeding two hundred dollars. R. S. 1894, § 2318.

ARTICLE 7.—PRISONS—POLICE MATRON—STOLEN PROPERTY.

SEC.
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1438. Superintendent.
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1468. When act not applicable.

[Acts 1879 S., p. 247. In force May 31, 1879.]

1437. County boards may establish work-house.—1. It shall be lawful for the board of commissioners of any county in this state, in its discretion, whenever it shall deem it advisable, to use property then owned by it, or to purchase or provide a tract of land, in the name of the county, and thereon to establish and maintain a work-house—the expense to be paid out of the general fund of the county. R. S. 1894, § 8330.

1438. Superintendent.—2. When such work-house is established in any county, the board of commissioners thereof shall employ some proper person, to be called the "superintendent of the county work-house," to take charge of the same upon such terms, and under such restrictions, rules and regulations as such board may from time to time adopt: *Provided*, That if the work-house be established upon the county poor farm, then the superintendent of the county asylum may be required to take charge and control of the work-house. R. S. 1894, § 8331.

1439. Commitment.—3. When such work-house is ready for occupancy, the board of commissioners shall give notice thereof, by an order entered upon its records and such other notice as it may deem proper; and, thereupon, any court, judge, mayor, magistrate, justice of the peace or other officer, may sentence any person to the county work-house instead of the county jail; which fact shall be stated in the record of the judgment, and set forth on the face of the *mittimus* or other writ issued to the officer whose duty it may be to execute the

same. In every such case, such officer shall deliver such person to the superintendent of the county work-house, who shall receive the prisoner, and hold and restrain him of his liberty for the period he may have been sentenced by such court, unless sooner released by a pardon, remission, or the judgment of a proper court: *Provided,* That in all cases of commitment to such work-house, the judge, mayor, magistrate or justice of the peace who made such commitment is authorized and empowered to remit the penalty imposed by him, for good cause shown. R. S. 1894, § 8332.

1440. Transfer from jail.—4. Whenever any person shall have been sentenced to imprisonment in the county jail, he may be transferred to the work-house at any time during the period of his imprisonment, under such orders, rules and regulations as the board of commissioners of such county may, from time to time, adopt; which orders, rules and regulations, when adopted, the sheriff, jailer or other person having the custody of the county jail, shall obey; and for his neglect or refusal to so obey, he shall be fined by any court of the county having criminal jurisdiction, in any sum not less than fifty dollars, to which may be added imprisonment in the work-house not exceeding sixty days. R. S. 1894, § 8333.

1441. Prisoners kept at labor.—5. All prisoners and other persons held in the work-house shall, as far as may be consistent with their age, sex and ability, be kept at hard labor in such manner as the board of commissioners shall deem most advantageous to such county, and under such rules and regulations as such board may, from time to time, prescribe, such labor to be performed in or about the work-house, or upon any public wharf, street, alley, highway or thoroughfare within the county, or upon any other work or public improvement which such board may deem for the welfare of the citizens of such county, or at such other labor, and in such manner, as such board may deem best. Such work shall be done under the direction and supervision of the superintendent of the work-house; and for this purpose the board of commissioners may meet, at any time, and make all proper orders, which shall be spread upon the records of such court. R. S. 1894, § 8334.

1442. Cities and towns may commit.—6. Any person sentenced to imprisonment, or committed for a failure to pay or replevy any fine, forfeiture and costs, under any ordinance or law of any town or city in such county having a work-house established, may be committed to such work-house, under such contracts and agreements as such town or city and the board of commissioners of such county may, from time to time, make. Such prisoners, at all times, shall be subject to the rules and regulations adopted for the conduct and management of the work-house. R. S. 1894, § 8335.

1443. Quarterly reports—Receipts—Expenses.—7. The superintendent of the work-house shall make a detailed report, in writing, to the board of county commissioners, on the first day of each regular term of such court, showing the income received and the expense in-

curred for the last preceding quarter. All sums received by the superintendent, from any and every source, shall be paid by him to the county treasurer, who shall give him a receipt therefor, to be retained by him, and a duplicate thereof, which said superintendent shall file with said report. All expenses incurred shall be paid by the treasurer out of the county funds, on a proper warrant drawn by the auditor, on the order of the board, as in other cases, and not otherwise. All moneys so received or paid out by the treasurer shall be paid into and out of the general county fund. Such treasurer and auditor shall keep an accurate account of the income and outlay to be known as the county work-house account. R. S. 1894, § 8336.

1444. Inspection by grand jury.—8. The grand jury, at each term of the court of such county for which they are sitting, shall make personal inspection of the condition of the work-house, as to the sufficiency of the same for the safe-keeping of prisoners, their convenient accommodation and health, the manner in which the same has been kept, and how the prisoners have been kept at labor since the last term. They shall further inquire as to the income received and expense incurred since the last term; may examine the books and papers of the work-house, and the records and files of any county office or officer, and may send for books and papers anywhere within the state. The foreman may administer all oaths necessary in making such inquiries, and for any refusal to attend or testify, the court for which they are sitting may punish the offender for contempt, in the manner provided by law. Such grand jury shall make report in writing, to the court for which they are sitting, which shall be spread upon the records thereof, and a duplicate shall be filed with the board of commissioners at their next session. And such board shall consider all complaints and recommendations of the grand jury, and obey the same, or place on record their reasons for not so doing. R. S. 1894, § 8337.

1445. Visitation.—9. The members of the board of commissioners, and any judge, magistrate or justice of the peace of such county, or mayor of any town or city having the right to commit prisoners to the work-house, may visit the same at any time, or the prisoners whenever they may be at work, for the purpose of determining whether the rules and regulations made for the management of said work-house and prisoners are duly enforced. R. S. 1894, § 8338.

1446. Duties of county physician and superintendent.—10. The county physician shall visit the work-house when required by the superintendent. The superintendent shall give bond, with security, for the faithful performance of his duties, to be approved by the board of county commissioners. He, and his subordinates having charge of the prisoners, shall have the right to enforce discipline and obedience of all orders, rules and regulations made for their government, and arrest any escaped prisoner, wherever found within the state, and conduct him to the work-house. R. S. 1894, § 8339.

1447. Use of city or town work-house.—11. In case there is a

work-house in any county owned and maintained by any town or city within such county, it shall be lawful for the board of commissioners of such county to provide, by written contract with such town or city, for the custody and maintenance of any or all able-bodied persons sentenced to confinement within the county jail, and to provide for their removal to and confinement in such work-house. And the sheriff, jailer or other person having the custody of the jail, shall obey, carry out, and perform all orders, rules and regulations of the board made in pursuance of such agreement. For any neglect or refusal, he shall be subject to the like penalties provided in section 4 of this act. R. S. 1894, § 8340.

1448. Punishment of prisoners.—12. Any person sentenced to or held in the work-house, who, being physically able to work, refuses to work, may be subjected to physical punishment, under such rules as the board having control of the work-house may adopt; and may be confined in solitary confinement, or fed on bread and water only, until he consent to work. R. S. 1894, § 8341.

1449. Credit for work.—13. Any person held in or committed to the work-house for a failure to pay any fine or costs shall be required to work as provided for by the provisions of this act, and credited on such fine and costs at the rate of one dollar per day for each day's work. But if such person refuse to work, then, for each day he shall so refuse, he shall not be entitled to receive any credit, and he may also be punished as provided for in this act. R. S. 1894, § 8342.

[Acts 1867, p. 28. In force March 11, 1867.]

1450. When females may be sentenced.—1. When any city, or private corporators, or other persons, shall have established in this state a home for friendless women upon principles of protection and reformation of abandoned or erring women, which, in the opinion of the board of county commissioners of the county in which such home is situated, duly recorded, after examination, is in a condition to provide for and restrain of liberty any one committed to their charge, on conviction of any woman, or girl, of any crime or misdemeanor or violation of any city ordinance, in any of the superior or inferior courts of the state or of any city therein, the punishment whereof shall be imprisonment at hard labor or otherwise, the court may, in its discretion, and with the consent of the trustees or acting authorities of such home for friendless women, and with a view to reformation as well as punishment, order the imprisonment to be made and done in such home for friendless women; and such imprisonment shall be held as legal and rightful, or as if made in any state prison or in any county or city jail in the state. The mayor or city judge of any incorporated city may sentence and commit such persons, on conviction, to such home, for the same period of time that a circuit court could do for a like offense. R. S. 1894, § 8343.

1451. Trustees to enforce judgment.—2. The trustees, managers or other authorities of such home for friendless women, shall, in all

things, be governed by the laws of the state in making such imprisonment at hard labor, solitary confinement or otherwise, as shall be adjudged by the court on any such conviction or convictions. R. S. 1894, § 8344.

1452. Inspection.—3. Any such home for friendless women shall, at all reasonable hours, be open for the inspection of any such court or any grand jury, the governor, any state officer, any committee of the general assembly of the state, the council of any city, or the board of commissioners of the county in which it is situate. R. S. 1894, § 8345.

[Acts 1873, p. 141. In force February 26, 1873.]

1453. Fines for lewdness.—1. In all incorporated cities of this state where there is now or shall hereafter be established an incorporated home for friendless women, incorporated under the laws of this state, all fines and penalties, assessed and collected by the mayor or other judicial officer of such city, for the breach of any ordinance of such city in relation to houses of prostitution, or in relation to the keepers, frequenters or inmates thereof; or for the breach of any ordinance of such city for the suppression of vice or immorality, or for the suppression of houses of ill fame, or for the punishment of the keepers, frequenters or inmates thereof, when so collected, shall be paid over to the board of trustees of such home for friendless women in such city, to be applied to defraying the current expenses of such home. R. S. 1894, § 8346.

Constitutional.—This act is constitutional. The Indianapolis Home for Friendless Women is so far a public corporation, or institution, that an appropriation by the legislature of certain fines, etc., collected for the violation of certain city ordinances, to its support, is not the appropriation of money to a private purpose. City of Indianapolis v. Indianapolis Home, etc., 50 Ind. 215; Heagy v. State, 85 Ind. 263. See Mount v. State, 90 Ind. 32.

1454. Fines for gambling.—2. In all incorporated cities of this state where there is or shall be established a home for friendless women, as described in the preceding section, all fines and penalties imposed or assessed and collected by the mayor or other judicial officer of such city for the breach of any ordinance against professional gambling, or against gaming or gambling of any kind; or against the keepers of gambling houses, or the frequenters or inmates thereof, when so collected, shall be paid over by the city authorities to the board of trustees of such home for friendless women in such city, for the purposes specified in the last section. R. S. 1894, § 8347.

1455. Proceeds of forfeited recognizances.—3. Whenever any person shall be arrested for the breach of any of the ordinances mentioned in either of the two foregoing sections, and shall give a bond or recognizance, with or without security, conditioned for his appearance before the mayor or any other judicial officer having jurisdiction to try the case, to answer the charge, and such bond or recognizance

shall be forfeited, such forfeiture, when collected, shall be paid to the trustees of the home for friendless women which may then exist in such city as aforesaid. R. S. 1894, § 8348.

1456. Mayor's accounts—Statements.—4. The mayor, or other officer collecting any fines contemplated by this act, shall keep a separate account thereof; and, at the end of each period of three months from and after the taking effect of this act, such mayor or other officer shall pay the amount, so collected during the preceding three months, into the city treasury, for the use of the trustees of such home for friendless women; and said mayor shall, at the same time, make a detailed statement to the city council, showing the amount that has been so paid into the city treasury, on what account collected, and that it belongs to the said trustees under the provisions of this act; and, thereupon, the common council of such city shall make an order for the payment of the same to said trustees, for the purpose aforesaid, and the same shall be paid accordingly. R. S. 1894, § 8349.

1457. Reports.—5. It shall be the duty of the trustees of such home for friendless women, on or before the 10th day of January of each year, to make a detailed report to the common council of such city of the operations and business affairs of such home, with a statement of the receipts and expenditures thereof, and such other matters as are usually embraced in reports of kindred institutions, for the year ending on the thirty-first day of the preceding December. R. S. 1894, § 8350.

[Acts 1895, p. 158. In force March 7, 1895.]

1458. Police matron in certain cities.—1. That in cities containing a population of ten thousand or more, the board of police commissioners, or if there be no police commissioners, then the mayor or such other authority as may have the appointment of police officers, may appoint a police matron, with such assistants as may be necessary, whose duty it shall be to receive, take charge of, search and properly care for, at the jail or station house, all female prisoners and all children under the age of fourteen years who shall be arrested and detained in custody in such city. Burns' Supp. 1897, § 3730*p*.

1459. Authority of matron—Removal.—2. Such police matron, when appointed, shall be a member of the police force of such city, and shall have all the authority now delegated to a police officer, and shall be subject to such rules and regulations as shall be prescribed for the government of the police force of such city, and may be removed by the appointing power for good cause shown. Burns' Supp. 1897, § 3730*q*.

1460. Accommodations—Acts as jailer—Salary.—3. Such police matron shall have proper accommodations for herself; and for all prisoners under her control. She shall be jailer in charge of the female department of the station house or jail, when such prisoners are confined in a jail, with all the powers and duties of a member of the police force, and shall have authority to summon any policeman

or other person to her aid, when aid is required. Such police matron and her assistant or assistants shall be paid such compensation or salaries as may be determined by the board of police commissioners or the common council of such city. Burns' Supp. 1897, § 3730*r*.

1461. Attendance in courts.—4. The police matron, or her assistant, shall be in attendance in all courts when women are to be tried and shall have charge of all such women whether criminals or insane, and of all girls while such persons are awaiting trial or transfer to or from any place of detention. Burns' Supp. 1897, § 3730*s*.

1462. Qualifications—Recommendations.—5. Such police matron shall not be under thirty-five years of age, fully qualified, of good moral character, and shall have no other employment; and, before appointment, must be recommended in writing by not less than twenty women and five men, all of whom shall have been residents of such city for at least five years next previous to such appointment. Burns' Supp. 1897, § 3730*t*.

[Acts 1895, p. 293. In force March 11, 1895.]

1463. Stolen property received by police officer—Disposition.—1. That if any money, goods or other property, which has been stolen, lost, abandoned, or taken, or received from a person under arrest, comes into possession of a member of the police force of a city by virtue of his office, he shall deliver the same to such officer or member of the police department as may be designated by the order or rules of such department or commissioners of public safety, and shall thereupon be relieved from further responsibility therefor. Burns' Supp. 1897, § 3541*d*.

1464. Sale of unclaimed property.—2. If any such money, goods or other property remains unclaimed in the possession or control of any such department or commissioners of public safety, or any member thereof, for six months, and the owner and his place of business are unknown, such department or commissioners shall cause such money to be paid into the city treasury, and such goods or other property to be sold at public auction, notice of the time and place of such sale, with a description of the property to be sold, being first given by publishing the same once a week for three weeks consecutively in some newspaper of general circulation printed in such city. Burns' Supp. 1897, § 3541*e*.

1465. Perishable property—Sale of.—3. Any such property which is of a perishable nature, or which will deteriorate greatly in value by keeping, or the expense of keeping which will be likely to exceed the value thereof, may be sold at public auction in accordance with the rules or orders of such department, or commissioners, reasonable notice of the time and place of sale being first given by publishing in some newspaper of general circulation printed in such city. Burns' Supp. 1897, § 3541*f*.

1466. Proceeds of sale—Disposition of.—4. The proceeds of every such sale, after deducting all reasonable charges and expenses in-

curred on such property, shall be paid into the treasury of the city. In cities having a department of finance, the commissioners, upon payment of said money into the city treasury, shall certify to the comptroller, the date and amount of money so paid in, and the comptroller shall keep an account of all money so paid in, and of all sums thereafter drawn from the treasury under the provisions of the following section. Burns' Supp. 1897, § 3541*g*.

1467. Payment to owner of property.—5. If within one year after such sale the owner of any such money, goods or other property makes claim to and proves his ownership thereof, the said money or proceeds, after deducting all reasonable charges and expenses, shall be paid over to him upon the order of the head of such department. After one year said money or proceeds shall be deemed a part of the general fund of such city. Burns' Supp. 1897, § 3541*h*.

1468. When act not applicable.—6. The provisions of this act shall not apply to property seized upon a search warrant, the custody and disposition of which is otherwise provided for by existing laws. Burns' Supp. 1897, § 3541*i*.

ARTICLE 8.—PROTECTION FROM FIRE.

SEC.		SEC.	
1469.	Protection from fire—Egress from buildings.	1472.	Watchmen—Lights—Electric bells, etc.
1470.	Fire escapes.	1473.	Chain and knotted rope.
1471.	Fire escape—Approval by inspector.	1474.	Penalty.
		1475.	Chief inspector—Duties.

[Acts 1899, p. 473. In force April 27, 1899.]

1469. Protection from fire—Egress from buildings.—1. That every building now or hereafter used, in whole or in part, as a public building, public or private institution, sanitarium, surgical institute, asylum, school-house, dormitory, church, theater, public hall, place of assemblage or place of public resort; and every building in which persons are employed above the second story in a factory, workshop or mercantile or other establishment; and every hotel, family hotel, apartment-house, boarding-house, lodging-house, club-house or tenement-house in which persons reside or lodge above the third story; and every factory, workshop, mercantile or other establishment of more than two stories in height, shall be provided with proper ways of egress or means of escape from fire, sufficient for the use of all persons accommodated, assembled, employed, lodged or residing in such building, and such ways of egress and means of escape shall be kept free from obstruction, in good repair and ready for use at all times, and all rooms above the second story in any such building shall be provided with more than one way of egress or escape from fire, placed as near as practicable at opposite ends of the room, and leading to fire escapes on the outside of such buildings or to stairways on the inside provided with proper railings. All external doors subject to the provisions of this section shall open outward, and

all windows open outward or upward. No portable seats shall be allowed in the aisles or passageways of such buildings during any entertainment or service held therein. The proscenium or curtain-opening of all theaters shall have a fire-resisting curtain of some incombustible material, and such curtain shall be properly constructed and shall be operated by proper mechanism; the certificate of the chief inspector of the department of inspection of the state shall be conclusive evidence of a compliance with such requirements.

1470. Fire escapes.—2. In addition to the foregoing means of escape from fire, all such buildings as are enumerated in section 1 of this act, as are more than three stories in height, shall have one or more fire-escapes on the outside of said building, as may be directed by the chief inspector aforesaid, except in such cases as the said chief inspector may deem such fire-escapes to be unnecessary in consequence of adequate provision having been already made for safety in the event of fire, and in such cases of exemption, the said chief inspector shall give the owner, lessee or occupant of said building a written certificate to that effect and his reasons therefor; and such fire-escapes as are provided for in this section shall be connected with each floor above the first, well fastened and secured, and of sufficient strength, each of which fire-escapes shall have landings or balconies not less than nine feet in length and three feet in width, guarded by iron railings not less than three feet in height, and embracing at least two windows at each story and connecting with the interior by easily accessible and unobstructed openings, and the balconies or landings shall be connected by iron stairs, not less than eighteen inches wide, the steps not to be less than six inches tread nor more than nine inches rise, placed at a slant of not more than forty-five degrees, and protected by a well-secured hand-rail on both sides, with a twelve-inch wide drop-ladder from the lower platform, reaching to the ground; except in cases of school buildings, instead of drop-ladder, the ladders reaching from balconies to the ground shall be permanent, and so placed as to stand at an angle of forty-five degrees or less.

1471. Fire escape—Approval by inspector.—3. Any other plan or style of fire-escape shall be sufficient, if approved by the chief inspector, but if not so approved, the chief inspector may notify the owner, proprietor or lessee of such establishment, or if the building in which such establishment is conducted, or the agent or superintendent, or school officer, or either of them, in writing, that any such plan or style of fire-escape is not sufficient, and may, by an order in writing, served in like manner, require one or more fire-escapes, as he shall deem necessary and sufficient, to be provided for such establishment at such location and such plan and style as shall be specified in such written order. Within twenty days after the service of such order the number of fire-escapes required in such order for such establishment shall be provided therefor, each of which shall be of the plan and style and in accordance with the specifications in said order required. The windows or doors to each fire-escape shall be of suffi-

cient size and be located as far as possible consistent with accessibility from the stairways and elevator hatchways or openings, and the ladder thereof shall extend to the roof. Stationary stairs or ladders shall be provided on the inside of such establishment from the upper story to the roof, as a means of escape in case of fire.

1472. Watchmen—Lights—Electric bells, etc.—4. Every keeper of a hotel, boarding or lodging house or apartment house containing fifty and less than one hundred rooms, and being more than three stories high, shall have therein at least one competent watchman on duty between the hours of nine o'clock in the afternoon and six o'clock in the forenoon; and in all hotels, boarding houses, lodging houses or apartment houses containing one hundred or more rooms and being four or more stories in height, not less than two such watchmen shall be provided and kept on duty as aforesaid, each properly assigned. And in all hotels or lodging or other houses as are mentioned in this section, the halls and stairways shall be properly lighted at night, and at the head and foot of each flight of stairs, and at the intersection of all hallways with the main corridors, shall be kept during the night a red light and one or more proper alarms or gongs, capable of being heard throughout the house, shall always remain easy of access and ready for use in each of said buildings, or an electric alarm bell in each sleeping-room, approved by the chief inspector, to give notice to the inmates in case of fire. And every keeper of such hotel, boarding or lodging house or other house, shall keep posted in a conspicuous place in every sleeping-room a notice descriptive of all means of escape.

1473. Chain and knotted rope.—5. Every owner, lessee, proprietor or manager of a hotel or lodging-house of more than three stories high, situated in this state, which is not otherwise suitably provided with fire escapes for the protection of human life in case of fire, shall place or cause to be placed, a chain and a knotted rope, or other better appliance, in every room of said hotel or lodging house used as a lodging room in rooms above the third floor, said chain to be at least ten feet in length and securely fastened at one end of it to a bolt extending through the wall of the building over lintel of window, the other or lower end of said chain to be firmly attached to the knotted rope, which rope shall be at all times kept coiled in an uncovered box, placed near the inside of the window and exposed to the plain view of any occupant of said room, in such manner as to be easily and quickly uncoiled; such rope shall contain knots not more than eighteen inches apart, and a loop on the end at least three inches in length, and shall be not less than one-half inch in diameter and of sufficient length to reach from such window to the ground. Such rope, chain, bolt and fastenings shall be of sufficient strength to sustain a weight of four hundred pounds, and there shall be plain directions how to use such rope or other better appliance printed and posted within six inches of the casing of the window where such appliance or chain rope is fastened.

1474. Penalty.—6. The owner of any building designated in this act, or the lessee or occupant thereof, or any school officer or other officer having charge of public property, who neglects or refuses to comply with any of the provisions of this act, shall be fined not exceeding two hundred dollars, and be deemed guilty of a misdemeanor punishable by imprisonment for not less than one month nor more than two months. And in case of fire occurring in said building or buildings in the absence of such fire escape or escapes, the said person or persons or corporations or public officials shall be liable in an action for damages with a penalty of five thousand dollars for the life of each person killed in case of death, or for damages for personal injuries sustained in consequence of such fire breaking out in said building, and shall also be deemed guilty of a misdemeanor punishable by imprisonment for not less than six months, nor more than twelve months in the county jail; and such action for damages may be maintained by any person now authorized by law to sue as in other cases of similar injuries: *Provided*, That nothing in this act shall interfere with fire escapes now in use approved by the chief inspector.

1475. Chief inspector—Duties.—7. The chief inspector of the department of inspection of the state is hereby charged with the enforcement of this act, and shall see that its provisions are observed and enforced, and for this purpose he or his deputies shall have free access at all reasonable hours to all buildings embraced herein; and the prosecuting attorney in each county of the state shall render all necessary legal assistance as may be required by said chief inspector in enforcing this act.

ARTICLE 9.—FIREMEN'S PENSION FUND.

SEC.

1476. Board of trustees—Cities included in act.
1477. Trustees—Composition of board—By-laws—Oaths.
1478. Fire company defined.
1479. Selection of trustees.
1480. Elections—Time—Terms—Mode of election.
1481. Officers—Election—Duties—Rules.
1482. Pension fund—What constitutes.
1483. Investment of funds—Accounts—Bond of president—Reports.
1484. Beneficiaries, who are.
1485. Deficiency—Pro rata payments.
1486. Amount paid—Retiring members—Payments to dependents.
1487. Pensioners under former laws.
1488. Re-examination of retired members.
1489. Warrants for money.
1490. Exemption of funds from seizure.
1491. Custodian of funds—Liability.
1492. Acts repealed—Saving clause.

[Acts 1895, p. 30. In force February 23, 1895.]

1476. Board of trustees—Cities included in act.—1. That in every city in the state of Indiana, maintaining a regularly organized and paid fire department, there is hereby created a "board of trustees of the firemen's pension fund" to be composed of the persons hereinafter named and to be selected as hereinafter directed; and in all such cities there is hereby created a firemen's pension fund, to be derived

and received from the sources and in the manner hereinafter provided. The said fund to be managed, used and disbursed according to the provisions of this act and in conformity to the by-laws of the board of trustees adopted in compliance herewith: *Provided*, That the provisions of this act shall apply to all cities of this state containing a population of not less than thirty thousand, according to the United States census of 1890, and maintaining a regularly organized and paid fire department, and that in all such cities a board of trustees of the firemen's pension fund is hereby established, and that this act shall apply to all other cities of this state which maintain a regularly organized and paid fire department in case the common council of any such city shall elect to establish a board of trustees of the firemen's pension fund, and if any such city elects to establish such board, its common council shall adopt an ordinance or resolution establishing such board, and upon the adoption of such ordinance or resolution this act shall apply to and govern such city. Burns' Supp. 1897, § 4190*a*.

See *ante*, §§ 489, 646, 800, 948.

Firemen's Pension Fund Act of 1891—Unconstitutional.—The act of March 9, 1891 (Acts 1891, p. 415), for the creation of a firemen's pension fund, etc., was unconstitutional as being in conflict with the provision of the constitution as to the title of acts; also as being in violation of the provisions of the constitution respecting uniform and equal rate of taxation. Henderson, etc., v. The London, etc., Co., 135 Ind. 23.

1477. Trustees—Composition of board—By-laws—Oaths.—2. The "board of trustees of the firemen's pension fund" shall be composed of six members, two of whom shall be the mayor and chief fire engineer or chief of the fire force, who shall be, by virtue of their respective offices, members of such board. Their membership of such board shall continue while in office, and if, in case of death, resignation or removal or by expiration of their respective official terms as mayor and chief fire engineer or chief of the fire force, successors shall be elected or appointed, then such successors shall be *ex officio* members of said board. The other members of the said board of trustees shall be elected from the members of the fire department for the terms and in the manner hereinafter specified and provided. The said board of trustees shall have the management and control of the said firemen's pension fund and of all matters therewith legitimately connected, and shall manage, use and disburse said fund for the purpose hereinafter provided. The said board of trustees shall have power to adopt and enforce such by-laws as may be necessary to enable the said board to effectively and properly carry into execution the purpose for which it was organized and to enable it to properly manage and conduct the business and affairs entrusted to it, *provided* that such by-laws shall not in anywise contravene the provisions of this act, but shall be in conformity thereto. Each of said trustees shall, before entering upon the duties of his office, take an oath to faithfully, honestly and justly perform the duties thereof. The said board of trustees shall be a body having a continuous succession, subject only to the right to modify or repeal, which is hereby reserved. Burns' Supp. 1897, § 4190*b*.

1478. Fire company defined.—3. Each organization or body of

men doing duty as part of the fire department, whether in the telephone or telegraph service or as watchman for fires in a tower or other place, shall be deemed a fire company within the meaning of this act, and whenever the term "fire company" or the term "fire companies," is used herein it shall be construed as meaning and including such organizations as those above mentioned, as well as companies having charge of engines, hose reels, or other apparatus for extinguishing fires. Burns' Supp. 1897, § 4190*c*.

1479. Selection of trustees.—4. The four members of the board of trustees of the firemen's pension fund, selected from the members of the fire department, shall be chosen as follows: Within ten days after this act takes effect the chief fire engineer or chief of the fire force shall designate a day for holding the first election under the provisions of this act, and such officer, within the period aforesaid, shall fix a time for holding a convention to nominate trustees for election, and the time for holding such convention shall be fixed five days earlier than the time for holding such first election. Such convention shall consist of one delegate from each fire company in said city and a delegate to be selected by the chief fire engineer, or chief of the fire force, and his assistant, or if there be more than one assistant, then by such chief and his assistants, acting jointly. The delegate from each fire company shall be elected by ballot by the members of such company at the time fixed by such chief fire engineer, or chief of the fire force, in the call for such convention. The election of such delegates shall be certified by the captain or other officer of such fire company, or, if there be no other officer in command of such company, then by the oldest member thereof present at such convention. Such convention when convened shall nominate six members of the fire department to be voted for as such trustees and the names of the persons so nominated as candidates shall by the delegates to such convention be reported in writing to their respective companies. The said election shall be held at the respective houses or quarters of the respective companies on the day named by the chief fire engineer or chief of the fire force, between the hours of 9 o'clock A. M., and 6 o'clock P. M. Every member of such fire company shall be entitled to one ballot and no ballot shall contain the names of more than four persons, and the persons whose names are placed on said ballots shall be chosen from the six persons nominated by the convention. The candidate receiving the highest number of votes shall hold the office of trustee for four years, the candidate receiving the next highest number of votes shall hold office for three years, the candidate receiving the next highest number of votes shall hold office for two years, and the candidate receiving the next highest number of votes shall hold office for one year, *provided* that the terms of office of the persons elected at such first election shall run from the first Tuesday of January, 1895. The captain or other officer in command of said fire companies on the day of, and immediately after the casting of such ballots shall canvass and count the

same, and certify in writing the number of ballots cast and the number of votes received by each candidate for the office of such trustees. After signing such certificate, said officer shall enclose the same, together with all the ballots cast by said fire company, in an envelope, securely sealed and addressed and deliver the same to the chief fire engineer or chief of the fire force of said city, who shall deliver the same to the mayor of the city as soon as all such certificates and ballots have been received by him. The mayor upon the receipt thereof shall in the presence of said chief fire engineer or chief of the fire force and the city clerk, open said envelopes, examine said certificates, and ascertain and determine the total number of the votes so cast at said election for each of such candidates for the office of trustee and shall issue certificates of their election as such trustee to the four candidates having received the highest number of votes. In case any two or more candidates shall have received the same number of votes, so that there would be no choice under the foregoing provision, then such mayor and chief fire engineer or chief of the fire force shall forthwith by lot determine from the persons so receiving such equal number of votes who shall be trustees. No election shall be set aside for want of formality in balloting by such members, or certifying or transmitting returns of any such election by the officers in charge. Burns' Supp. 1897, § 4190*d*.

1480. Elections—Time—Terms—Mode of election.—5. The regular elections shall be held on the first Tuesday of January in each year, beginning with January, 1896. At each regular election, one trustee shall be elected for a term of four years. The provisions of the preceding section as to the mode of calling the convention, selecting the delegates, conducting the election, the preparation of ballots and all other like matters as well as to the certificates of election, the decision in case of a tie and all matters of like nature, shall govern the holding and conducting of regular elections: *Provided,* That only one trustee shall be elected at each regular election. Burns' Supp. 1897, § 4190*e*.

1481. Officers—Election—Duties—Rules.—6. The chief fire engineer or chief of the fire force, shall be president of the board of trustees of the firemen's pension fund. At the first meeting after each election such board of trustees shall elect a secretary, who may be chosen from one of their own number, *provided* that if the board deem proper a secretary who shall be a member of the fire department may be elected by the companies to serve for a term of four years. It shall be the duty of the secretary to keep, in a book provided for that purpose, a full record of all the proceedings of said board of trustees; and the board shall make all needful rules and regulations for its government in the discharge of its duty, and shall hear and determine all applications for relief or pensions under this act. Burns' Supp. 1897, § 4190*f*.

1482. Pension fund—What constitutes.—7. Such pension fund shall consist:

I. Of all such moneys as may be given to said board or fund by any person or persons for the uses and purposes for which said fund is created. And such board of trustees may take by gift, grant, devise or bequest any money, personal property, real estate, or any interest therein, or any right of property; and any such gift, grant, devise or bequest, may be absolute or in fee-simple, or upon the condition that only the rents, income or profit arising therefrom shall be applied to the purposes for which such fund is established.

II. Of all moneys, fees, rewards or emoluments in money of every nature and description which may be paid or given to the fire department or any of the companies of such department.

III. Every member of said fire department shall be assessed a portion of his salary, and such assessment shall not be less than one-half of one per centum or more than one per centum of his compensation, and all such assessments shall be applied to the pension fund: *Provided, however*, That in no case shall the assessment of any one person exceed fifteen dollars per annum. The board of trustees shall have discretionary power to fix the rate of assessments within the limits herein described. The secretary of the fire department, or the person whose duty it may be to make out pay-rolls, shall place opposite the name of every member of the fire department, on the pay-roll, the amount of assessment on each individual's salary, and the city treasurer or the county treasurer, acting as city treasurer, shall, monthly, deduct from the salary, of every member of said fire department, the sum set opposite his name, and shall place the same to the credit of the firemen's pension fund. Every person who becomes a member of the fire department shall be liable to the aforesaid assessment, and in becoming a member thereof he shall be conclusively deemed to undertake and agree to pay the same and to have it deducted from his compensation as herein provided.

IV. A sum equal to one-tenth of one mill, of each dollar, of the value of all the taxable property annually assessed, in any such city, as the same appears on the yearly tax duplicate thereof, which sum shall be set apart and made part of such firemen's pension fund by the city treasurer or county treasurer acting *ex officio* as city treasurer: *Provided*, That the said sum shall not be used for or devoted to any purpose other than that herein specified. Burns' Supp. 1897, § 4190*g*.

1483. Investment of funds—Accounts—Bond of president—Reports.—8. The board of trustees of the firemen's pension fund, may, at any time after considering the probable demands upon said fund in the near future, determine what portion of such funds may be safely drawn therefrom for investment for revenue purposes; and having determined what portion thereof shall be so withdrawn for that purpose, shall enter their proceedings at length upon their record, and shall cause a warrant to be drawn for such amount payable to the order of its president, which warrant shall upon its face show that such amount is drawn for investment for revenue purposes. And, there-

upon, such board of trustees shall determine in what manner it shall be invested; which may be by the purchase of any of the interest-bearing bonds of the United States, or of the state of Indiana, or of any bonds lawfully issued by any county, city or township, incorporated village or other municipal corporation of this state, or without this state, when there is adequate legislative authority for the issuance thereof. The president shall thereupon draw said moneys from the city treasurer or the county treasurer, acting as city treasurer, upon such warrant and invest the same as directed by said board in the name of "the board of trustees of the firemen's pension fund" of such city. The president shall deposit all securities with the city treasurer, or county treasurer acting as city treasurer, who shall collect all interest due thereon and place the same in the said pension fund. The treasurer shall keep a separate account of said fund, and therein fully and accurately set forth all money received and paid out by him, and he shall make report to the board of trustees of the firemen's pension fund of all moneys received and distributed by him on the first Monday of January and June of each year. And the president of said board shall execute his bond in such sum as the board may deem adequate, conditioned that he will faithfully discharge the duties of his office, and faithfully account for and pay over to the persons authorized to receive the same, all moneys which may come into his hands by virtue of his office, with sureties to the approval of such board of trustees of the firemen's pension fund, which bond shall be filed with the mayor of said city and be preserved by him. The board of trustees of the firemen's pension fund, shall make a full and accurate report of the condition of said pension fund to the common council of such city on the first day of January in each year. Burns' Supp. 1897, § 4190*h*.

1484. Beneficiaries, who are.—9. If any member of the said fire department of such city shall, while in the performance of his duty, become, or be found, upon examination by a medical officer ordered by the director, person or persons having charge or control of the fire department in such city to be physically or mentally permanently disabled, so as to render necessary his retirement from all service in said fire department, such director, person or persons having charge of said fire service shall retire such permanently disabled person from all service in said fire department, and the board of trustees of the firemen's pension fund shall authorize the payment to such permanently disabled person monthly, from the pension fund, the sum provided in section 11 of this act. When any member of said fire department, or retired member on the pension fund thereof, dies, from any cause whatever, and leaves a widow or a child or children under sixteen years of age, the board of trustees shall authorize the payment to such widow, while unmarried, and child or children under sixteen years of age, monthly from the pension fund, the sum or sums provided in section 11 of this act; or if any deceased member shall have a dependent mother or father upon satisfactory proof that such mother or

father was dependent upon said deceased member of the fire department, the board of trustees shall authorize the payment to such mother or father, monthly, from the pension fund, the sum provided in section 11 of this act: *Provided, however*, That no pension shall be paid to the mother or father of a deceased member who leaves a dependent widow; and if the widow of any deceased member shall remarry, her pension shall cease: *Provided, further*, That if there be no widow and no child or children, and no father or mother, but dependent brothers and sisters, then such pension shall be paid to them. Burns' Supp. 1897, § 4190*i*.

1485. Deficiency—Pro rata payments.—10. That if at any time there should not be sufficient money or bonds to the credit of the said pension fund to pay to each person entitled to the benefit thereof, the full amount per month as hereinbefore stated, then and in that event an equal percentage of said monthly payments shall be made to each beneficiary thereof, until said fund is so replenished as to warrant payment in full to each of said beneficiaries. Burns' Supp. 1897, § 4190*j*.

1486. Amount paid—Retiring members—Payments to dependents.—11. The sums to be paid to permanently disabled members and the widows and orphans, or dependent mothers or fathers, or brothers or sisters of deceased members, shall be as follows: Upon retirement with such disability during service he shall receive not less than twenty-five dollars nor more than fifty dollars per month, and in event of his decease while in such service of the fire department or after such retirement, the widow shall receive not less than twenty nor more than twenty-five dollars per month, and their children under sixteen years of age not more than eight nor less than six dollars per month, which sum so paid for the benefit of said children shall be paid to the mother if alive, so long as such children shall reside with and be supported by her. Any member of such paid fire department who has been in the service of said paid fire department, twenty-five years, upon making written application to the director or person or persons having charge of the fire service, at his own option, may without medical examination or disablility, be retired from all services in said fire department; and upon such retirement, the board of trustees of the firemen's pension fund shall authorize the payment to such retired member, monthly, from the pension fund, the sum of not less than twenty dollars per month, nor more than forty dollars per month. The pension of the dependents of such retired members shall be the same in case of death after retirement as provided for dependents of those who die in the service, or after retirement with disability, but the member so retired without special disability, shall always receive the same amount of pension as when he retired. The pension of the dependent mother or father or brother or sister of a deceased member who dies in the service of the fire department, or after retirement, whether voluntary or with disability, shall be the same as that provided for the widows of such members. Any member who may be discharged from the fire department after having served not less

than twenty years, he shall receive not less than fifteen dollars nor more than thirty dollars per month: *Provided*, Such discharge is for any other offense than a criminal act; and in the event of death of such member after retirement, if he leaves a widow or dependents, they shall receive the amount provided for the dependents of those who have died in the service of the fire department. In no case shall the board of trustees depart from the provisions of this section in authorizing the payment of such pensions. Burns' Supp. 1897, § 4190*k*.

1487. Pensioners under former laws.—12. This act shall apply to all persons receiving pensions from the firemen's pension fund of such cities who have been placed on such pension roll under any former law or laws, except widows or children of deceased members of such fire departments, who shall receive the same as they were receiving at the time of the passage of this act; and in any application for pension now pending before the board of trustees, the board herein created, may, in its discretion, place such dependents in the class of pensioners as provided in sections 9 and 11 of this act. Burns' Supp. 1897, § 4190*l*.

1488. Re-examination of retired members.—13. After any member of such fire department shall have been retired upon pension by reason of disability, the board of trustees shall have the right, at any time, to cause such retired member again to be brought before it and again examined by competent physicians and surgeons, and also to examine other witnesses for the purpose of discovering whether such disability yet continues, and whether such retired member should be continued on the pension roll; but he shall remain upon the pension roll until reinstated in the service of the fire department. Such retired member shall be entitled to notice and to be present at the hearing of any such evidence, shall be permitted to propound any questions pertinent or relevant to such matter, and shall also have the right to introduce evidence upon his own behalf. All witnesses so produced shall be examined under oath, and any member of such board of trustees is hereby authorized and empowered to administer such oath to such witnesses. The decision of such board shall be final and conclusive, and no appeal shall be allowed therefrom, nor shall the same be received by any court or other authority. Burns' Supp. 1897, § 4190*m*.

1489. Warrants for money.—14. The payment of all pensions shall be made by warrants drawn by the order of said board of trustees, signed by the president and countersigned by the secretary. Burns' Supp. 1897, § 4190*n*.

1490. Exemption of funds from seizure.—15. No portion of said pension fund shall, either before or after any order for the distribution thereof to members of said fire department, or to the widows or guardians of any such child or children, or to the dependent father or mother or brother or sister of any such deceased, disabled or retired member of such department, be held, seized, taken, subjected to, detained, levied on by virtue of any attachment, execution, judgment,

writ, interlocutory or other order, decree or process, or proceedings of any nature whatever issued out of or by any court in this or any other state for the payment or satisfaction, in whole or in part, of any debt, damages, claim, demand, judgment, fine, amercement of such member or his widow or children, or of the dependent mother or father of any deceased member; but the said fund shall be sacredly kept, secured, promoted and distributed for the purpose of pensioning the persons named in this act, and for no other purpose whatever: *Provided*, The said board may annually expend such sum as they may deem proper from such fund for the necessary expenses connected therewith. Burns' Supp. 1897, § 4190*o*.

1491. Custodian of funds—Liability.—16. The city treasurer, and in those counties where the county treasurer is *ex officio* city treasurer, such county treasurer, is hereby made the custodian of all the moneys belonging to such firemen's pension fund, and all moneys belonging thereto shall be promptly paid to him. He shall be liable on his bond as such for the faithful performance of all the duties imposed upon him by this act, and for the faithful accounting for all moneys and securities which may come into his hands belonging thereto, and he shall keep a separate account thereof which shall at all times show the true condition of such fund. Burns' Supp. 1897, § 4190*p*.

1492. Acts repealed—Saving clause.—17. All acts and parts of acts in conflict herewith are hereby repealed, *provided* that organizations formed under the act of March 9, 1891, entitled "An act to create a firemen's pension fund for the pensioning of disabled firemen, and the widows and the dependent children, mothers and fathers of deceased firemen, to create a board of trustees of such fund, to authorize the retirement from service of disabled members, and of all members after a service of twenty-five years and pensioning of such members, and for other purposes in connection herewith in cities in this state having paid fire departments, and declaring an emergency," shall come under and be reorganized under the provision of this act, and funds raised under such act and in the hands of trustees chosen thereunder shall upon the selection of trustees under this act, be transferred to the control and management of such trustee. Burns' Supp. 1897, § 4190*q*.

ARTICLE 10.—POLICEMEN'S PENSION FUND.

SEC.

1493. Police pension fund—Trustees—Terms of office.
1494. Powers of board of trustees.
1495. Mayor—President.
1496. Duties of officers—President—Treasurer—Secretary.
1497. Sources from which fund is derived.
1498. Investment of funds.
1499. Purposes for which fund shall be used—Pensions.
1500. Retired members subject to orders of superintendent.
1501. Duties of police surgeon—Examinations.
1502. Payment of claims.
1503. Time and place of payment.
1504. Pensions exempt.
1505. Penalty for failure to account for funds.
1506. Pensions discontinued for offenses and misconduct.

[Acts 1899, p. 94. In force February 24, 1899.]

1493. Police pension fund—Trustees—Terms of office.—1. That in every city in the state of Indiana, having a population of 100,000 or more according to the last preceding United States census, there shall be, and is hereby, created a police pension fund, which shall be governed and managed by a board of trustees, to be composed of nine members, as follows: The mayor, the city treasurer, the superintendent of police of such city, who shall be *ex-officio* members of said board, and six members of the police force of such city, to be selected at a meeting of the police force of such city on the second Monday of March, 1899, at the central station of such city—two of such six trustees so chosen shall hold their offices for one year, two shall hold their offices for two years, and two shall hold their offices for three years, to be determined by lot among them, and thereafter there shall be selected on the second Monday of March of each year thereafter two trustees to succeed those whose terms of office shall expire on said date. And such trustees shall hold their said offices until their successors shall be elected and qualified. In the event of the vacancy of any of the six trustees, selected by said police force, as aforesaid, by death, resignation or otherwise, then said police force shall, within a reasonable time, upon the call of the mayor of such city, hold a special meeting and elect a successor or successors. A majority of all said trustees shall constitute a quorum for the transaction of business pertaining to said pension fund. Said trustees shall receive no pay for their services as such and shall be paid only their necessary expenses, except the secretary, who shall be paid such sum for his services as may be fixed by the board of trustees.

See *ante*, §§ 489, 464, 800, 948.

1494. Powers of board of trustees.—2. Said board of trustees shall have power and authority to make all necessary by-laws providing for the manner of the election of said trustees, to be elected as aforesaid, the counting and canvassing of the votes for the same, their meetings, for the collection of all moneys and other property coming or belonging to said fund, and all other matters connected with the care, preservation and disbursement of the same, and for all other matters connected with the proper execution of the purposes and provisions of this act.

1495. Mayor—President.—3. The mayor of such city shall be president of such board of directors, and such city treasurer shall be the treasurer of said board, and said board shall select one of their members to act as secretary of the same.

1496. Duties of officers—President—Treasurer—Secretary.—4. It shall be the duty of the president of said board to preside over the meetings of the same, to call all special meetings of the police force of such city, and preside over the annual called meetings of the same held with relation to said fund. It shall be the duty of the city treasurer of such city, who shall be *ex-officio* the treasurer of said board of trustees, to collect and hold all moneys belonging to such policemen's pension fund; to have the custody of all notes, bonds and other se-

curities belonging to said fund, and to collect the principal and interest of the same, and he shall be liable on his bond, as such city treasurer, for the performance of all the duties imposed upon him by this act, and for the faithful accounting of all moneys and securities which may come into his hands belonging to the same. And he shall keep a separate account which shall show, at all times, the true condition of such fund. Said treasurer shall, upon the expiration of his term of office, account to said board for all moneys, notes, bonds and other securities coming into his hands, and the proceedings of the same, and to turn over to his successor all moneys, notes, bonds and other securities belonging to said fund remaining in his hands. It shall be the duty of the secretary to keep a true and accurate account of the proceedings of such board of trustees and of such police force of such city, when acting upon matters with relation to said fund; to keep a true and correct statement of the account of each member with said pension fund, and to collect and turn over to the treasurer of said board all fees, rewards, fines and other moneys belonging to said fund; said secretary shall render a monthly account of his doings, as such secretary, to said board of trustees, and shall turn over to his successor all books and papers pertaining to such office. Said secretary shall execute a bond to such board of trustees in such amount as may be fixed by them, with surety or sureties to be approved by them, conditioned upon the faithful discharge of his duties as such secretary. Said secretary and treasurer shall make a full, true and accurate report of their said trusts at each annual meeting of such police force in March of each year. Their books shall, at all times, be open to examination by any member of said board of trustees.

1497. Sources from which fund is derived.—5. Such board of trustees shall have full charge and control of the police pension fund of such city, which shall be derived from the following sources:

First. Of all moneys that may be given to said board of trustees or fund or to the board of safety of such city, for the use of said board of trustees or police pension fund, by any person or persons. Such board of trustees may take by gift, grant, devise or bequest, any money, choses in action, personal property, real estate or any interest therein, and any such gift, grant, devise or bequest may be absolute, or upon the condition that only the rents, profits and income arising from the same shall be applied to the uses and purposes of said fund. Such board of trustees shall be authorized to take such gift, grant, devise or bequest under and by the style of the board of trustees of the police pension fund, of....., and to hold the same, or assign, transfer or sell the same, whenever proper and necessary, under and by such name.

Second. All moneys, fees and rewards of every nature and description, which may be paid or given to the police force of such city, or any member of the same, by reason of or because of any service or duty connected with or performed by such police force or members thereof. Also all fines imposed by the board of safety of such city

against any member of such police force for any breach of discipline or duty.

Third. Every member of said police force shall be assessed a portion of his salary, to be fixed and provided for in the by-laws of said police pension fund, and such assessment shall not be more than two per centum of his salary: *Provided, however,* That in no case shall the assessment of any one person exceed fifteen ($15) dollars per annum. The secretary of such board of trustees shall prepare a roll of each of said assessments and place opposite the name of every member of such police force the amount of the assessment against the same, and the treasurer of said board shall deduct and retain out of the salary going to such officer the amount of said assessment and give him credit for the same, and place the same to the credit of said police pension fund. Every person becoming a member of the police force of such city shall be liable to the payment of such assessment, and in becoming a member of such police force he shall be conclusively deemed to undertake and agree to pay the same, and to have such assessment deducted from his salary as before provided.

Fourth. A sum equal to one-tenth of one mill shall be annually assessed and levied by such city upon each dollar of all the taxable property in such city, as the same appears on the tax duplicate thereof, which sum shall be collected by the treasurer of such city, and by him credited to the said police pension fund, and shall not be used or devoted to any other than the purpose of said fund.

Fifth. All moneys derived from the sale of all unclaimed, lost or stolen property taken up by the members of said police force.

Sixth. Such fees paid for the granting of privileges and licenses as may be provided for by the common council of such city.

1498. Investment of funds.—6. The board of trustees of such police pension fund shall determine how much of said fund may be safely invested, and how much shall be retained for the needs, demands and exigencies of said fund. Such investment shall be made in interest-bearing bonds of the United States, or of the state of Indiana, or of any bonds lawfully issued by any county, state or township or incorporated or other municipal corporation of this state, or without this state, and such bonds shall be deposited with and remain in the custody of the treasurer of said board, who shall collect all interest due thereon, as the same becomes due and payable.

1499. Purposes for which fund shall be used—Pensions.—7. Said fund shall be used and devoted to the following purposes:

1st. Any member of the police force of such city, who shall, upon examination by the police surgeon of said city, be found to be permanently disabled, physically or mentally, because of an injury received or disease contracted while in the performance of his duty so as to render necessary his retirement from service on the police force of such city, then said board of trustees shall authorize the payment to such person, from the said pension fund a sum equal to one-half of the salary of the grade held by such officer for one year next pre-

ceding the time of his said retirement. After any member of such police force shall have been retired upon pension by reason of disability, the board of trustees shall have the right at any time to cause such retired member again to be brought before it and examined by the police surgeon of said city and also to examine other witnesses for the purpose of discovering whether such disability yet continues and whether such retired member should be continued on the pension roll, but he shall remain upon the pension roll until reinstated in the service of the police force. Such retired member shall be entitled to notice and to be present at the hearing of any such evidence, shall be permitted to propound any question pertinent or relevant to such matter and shall also have the right to introduce evidence upon his own behalf. All witnesses so produced shall be examined under oath and any member of such board of trustees is hereby authorized and empowered to administer such oath to such witnesses. The decision of such board shall be final and conclusive and no appeal shall be allowed therefrom nor shall the same be reviewable by any court or other authority.

2d. Whenever any member of such police force shall have been in the service of such city fifteen years or more and shall have reached the age of fifty years and be found, after examination by the police surgeon of such city, to be physically or mentally unfit for police duty, such member shall be retired from such police force and shall receive from such fund a sum equal to one-half of the salary of the grade which he held for one year next preceding the time of his retirement: *Provided, however*, That said members, when so retired, shall report to the superintendent of police of such city from time to time, as may be provided for in the by-laws of said board of trustees, for duty, and such superintendent may assign such retired officer to any service or duty within his power to perform, in the opinion of the police surgeon of such city, and shall receive full pay while in the performance of such duty. Should such retired member recover from his disability and be, in the opinion of the police surgeon, again fit for active duty, then such member may again be put on active duty on full pay. To entitle any one to be retired because of age, the time served by such person upon the regularly constituted police force of the city on which he shall then be serving shall only be computed and shall include all time served by such person before, as well as after the taking effect of this act. No time served by any person, as a special police officer or as a police officer upon the request of any private person, firm, corporation, or as a merchant policeman shall be considered in the length of service of such person upon such police force.

3rd. Upon the death of any member of such police force, active or retired, while in the line of duty or from natural causes, there shall be paid for funeral expenses of such deceased member a sum not to exceed $150 and should such deceased member leave a widow, child or children under the age of sixteen years, or both, then there shall be paid to such widow out of said fund $20 per month, and such

children shall each receive $6 per month, until they arrive at the age of sixteen years, respectively, to be paid to the mother of such children, if living, for their benefit, so long as such children shall reside with, or be supported by her, not, however, after said age of sixteen years, and if such children shall reside with, or be supported by some one other than their mother, then such sum shall be paid to the person with whom they shall reside or be supported.

4th. If any member of such police force, active or retired, shall die, leaving a father or mother dependent upon him, such father or mother (but not both) shall, upon satisfactory proof of such dependence being made to said board of trustees receive from such fund not more than $12 per month. The said board of trustees shall determine whether or not such parents be dependent and when they may cease to be dependent, and how much of the amount herein provided for shall be paid to them respectively.

5th. Upon remarriage of any widow entitled to the benefits of said fund, or upon such father or mother ceasing to be dependent, then such payments to them shall cease.

1500. Retired members subject to orders of superintendent.—8. A member of such police force placed on the retired list shall be subject to the orders and discipline of the superintendent of police of such city, and shall perform such duties as may be required of him and for which, in the opinion of the police surgeon of such city, he may be fit, and for any refusal to obey the orders of said superintendent and for a breach of said discipline, the said superintendent of police shall report the same at once to the board of safety for such action as, by it, may be deemed proper for the good of the police force of such city and for the public, and shall be subject to a punishment and to dismissal in the same manner as officers in regular active service. And any pension such retired member may have received shall cease with his expulsion and such pension for any refusal to obey orders and breach of discipline as aforesaid shall be subject to whatever orders may be deemed proper by said board of safety.

1501. Duties of police surgeon—Examinations.—9. It shall be the duty of the police surgeon of such city to make all examinations of the members of the police force of such city, whenever requested to do so by the board of trustees of the police pension fund of such city, or whenever any such member request him to do so for the purpose of certifying to his physical or mental condition to said board, or whenever he deems it proper to do so, and he shall thereupon certify to said board the true physical or mental condition of such person by him examined.

1502. Payment of claims.—10. If, at any time, there should not be sufficient money to the credit of such police pension fund to pay all claims against it in full, claims on account of the death of members of such police force, if there be any such, shall be first paid in full with as little delay as possible, after which an equal percentage shall be

paid upon all other claims to the full extent of the funds on hand, until such fund be replenished so as to pay them in full.

1503. Time and place of payment.—11. All pensions herein provided for shall be paid by the treasurer of said board at his office at the same time, and in such installments as the members of the police force of such city are paid.

1504. Pensions exempt.—12. All pensions granted and payable out of said police pension fund shall be and are exempt from seizure or levy upon attachment, execution, supplemental process, and all other process, whether mesne or final; and such pensions or any payment of the same shall not be subject to sale, assignment or transfer by any beneficiary.

1505. Penalty for failure to account for funds.—13. Any member of such police force failing or neglecting to account for and turn over to the secretary of said fund within three days after the receipt of the same all moneys received by him from any source for or because of any service or duty connected with or performed by such member of such police force as a police officer, shall, upon proof of the same to the satisfaction of the board of trustees of such fund, be deprived of all rights to such pension fund, and shall also be expelled from such police force by the board of safety of such city for such failure or neglect. Said board of trustees shall, however, first give to such officer three days' notice to appear before them and show cause why he should not be deprived of all his rights to such fund, because of such failure or neglect.

1506. Pensions discontinued for offenses and misconduct.—14. Whenever any person who shall have received any benefit from said fund shall be convicted of any felony, or of any misdemeanor for which he shall be adjudged to be imprisoned, or shall become an habitual drunkard, or shall become a non-resident of this state, or shall fail to report himself for examination for duty as required herein, unless excused by the board of trustees of such city, or shall disobey the requirements of said board in respect to said examination for duty, or shall fail to perform such duty as may be required of him, if found able to perform such duty, then such board shall order that the pension allowed and paid to him shall cease, until the further order of such board.

ARTICLE 11.—EDUCATION.

SEC.
1507. Towns and cities.
1508. School trustees in cities and towns.
1509. Duties of school trustees—Graded high schools.
1510. Term of school.
1511. Management of school property.
1512. Schools, control of in certain towns.
1513. Town may abandon control of schools.
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1516. Surplus special school revenue in cities and towns.
1517. Tax—Collection and payment.
1518. Bonds for school buildings.
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1521. Condition before building.

SEC.
1522. Surplus special school revenue.
1523. Title to school property.
1524. Annexation of territory—Title to school property.
1525. Annexation—Reimbursement of school township.
1526. Suits, how brought.
1527. Donations by counties, cities or towns to state university.
1528. Agreements and conditions of donation.
1529. Bonds, issue, sale.
1530. Only one donation.
1531. Aid to educational institutions—Petition.
1532. Appropriating money—Election.
1533. Notice.
1534. Election to conform to general laws.
1535. Form of ballot.
1536. Certificate of vote.
1537. Board of canvassers—Duties.
1538. Tax levy.
1539. Advancements.
1540. City may take stock.
1541. Election officers—Pay.
1542. Forfeiture of rights.
1543. Jurisdiction of circuit courts.
1544. Tax-payers released.

Education.—Constitution, art. 8, R. S. 1894, §§ 182-189; Burns' Supp. 1897, §§ 182, 183; R. S. 1894, ch. 56 (§§ 5750-6033); Burns' Supp. 1897, chs. 56-56*a* (§§ 5750-6033*j*); Acts 1899, pp. 434, 547.

See chapter note preceding § 1308, *ante*.

[Acts 1865, p. 3. In force March 6, 1865.]

1507. Towns and cities.—4. Each civil township and each incorporated town or city in the several counties of the state is hereby declared a distinct municipal corporation for school purposes, by the name and style of the civil township, town or city corporation respectively, and by such name may contract and be contracted with, sue and be sued, in any court having competent jurisdiction; and the trustees of such township, and the trustees provided for in the next section of this act, shall, for their township, town or city, be school trustees, and perform the duties of clerk and treasurer for school purposes. R. S. 1894, § 5914.

School corporation.—Each civil township and each incorporated town or city is a corporation for school purposes distinct from the civil corporation, and, as such, may contract and may be contracted with, sue and be sued, in any court having competent jurisdiction. Harrison S. Tp. v. McGregor, 96 Ind. 185; McLaughlin v. Shelby Tp., 52 Ind. 114; School Town of Princeton v. Gebhart, 61 Ind. 187; Gardner v. Haney, 86 Ind. 17; Wright v. Stockman, 59 Ind. 65; Jarvis v. Robertson, 126 Ind. 281; Braden v. Leibenguth, 126 Ind. 336; Middleton v. Greeson, 106 Ind. 18, 24; Wilcoxon v. City of Bluffton, Ind. Sup. Ct., June 14, 1899.

School property.—If the property of one school corporation is taken into the limits of another school corporation, the title to such property becomes vested in the latter corporation. School Town of Leesburg v. Plain School Tp., 86 Ind. 582; School Tp. of Allen v. School Town of Macy, 109 Ind. 559; Board, etc., v. Center Tp., 143 Ind. 391. See *post*, §§ 1524, 1525.

Cities—School property.—A city, organized under the general law for the incorporation of cities, has no power to buy, and give its promissory notes for, a county seminary, though for school purposes in the city. That power belongs to the school corporation of the city. State v. City of Terre Haute, 87 Ind. 212.

School township—Contract—Mistake—Reformation.—If a contract made by a school township appears upon its face to be made by the civil township, it may, in an action thereon against the school township be reformed upon allegation of mutual mis-

take, and enforced against the latter corporation. Sparta School Tp. v. Mendell, 138 Ind. 188.

Civil corporation not liable for teacher's salary.—A civil township is not liable on a contract of the township trustee, with a teacher of a common school, even though the contract is made in the name of the civil township. Harrison Tp. v. McGregor, 67 Ind. 380.

Contract for school-house.—A civil township has no authority to make a contract for the erection of a school-house. McLaughlin v. Shelby Tp., 52 Ind. 114.

Contract powers—Limitation—Attorneys' fees.—Persons who deal with school corporations are bound to know the limitations placed upon them by law; a school township has no authority to bind the school corporation for the payment of attorneys' fees in a note, such power not having been conferred by the statute. Snoddy v. Wabash School Tp., 17 App. 284; see Noble School, etc., Co. v. Washington School Tp., 4 App. 270.

[Acts 1875, p. 135. In force March 12, 1875.]

1508. School trustees in cities and towns.—5. The common council of each city and the board of trustees of each incorporated town of this state shall, at their first regular meeting in the month of June, elect three school trustees (who shall hold their office one, two and three years respectively, as said trustees shall determine by lot at the time of their organization), and, annually thereafter, shall elect one school trustee, who shall hold his office for three years. Said trustees shall constitute the school board of the city or town; and, before entering upon the duties of their office, shall take an oath faithfully to discharge the duties of the same. They shall meet within five days after their election, and organize by electing one of their number as president, one as secretary, and one as treasurer. The treasurer, before entering upon the duties of his office, shall execute a bond, to the acceptance of the county auditor, conditioned as in ordinary official bonds, with at least two sufficient freehold sureties, who shall not be members of said board, in a sum not less than double the amount of money which may come into his hands, within any one year, by virtue of his office. The president and secretary shall each give bond, with like sureties, to be approved by the county auditor, in any sum not less than one-third of the treasurer's bond. All vacancies that may occur in said board of school trustees shall be filled by the common council of the city or board of trustees of the town; but such election to fill a vacancy shall only be for the unexpired term. The board of school trustees shall, each year, within five days after the annual election of a member, reorganize their board and execute their respective bonds for the ensuing year. Said trustees shall receive for their services such compensation as the common council of the city or the board of trustees of the town may deem just; which compensation shall be paid from the special school revenue of the city or town. R. S. 1894, § 5915.

Duty of common council and board of trustees.—Under this section it was the duty of common councils and boards of trustees at their first regular meeting in June, 1875, to elect three school trustees, who should hold their offices for one, two and three years respectively, as might be determined by lot. Blakemore v. Dolan, 50 Ind. 194.

Trustees may be elected at meetings other than the first regular meeting in June. Sackett v. State, 74 Ind. 486.

School trustee.—A school trustee selected to fill a vacancy is entitled to hold the office until his successor is elected and qualified. Sackett v. State, 74 Ind. 486.

School trustees continue in office until their successors are elected and qualified. School Town of Milford v. Powner, 126 Ind. 528.

A member of the board of trustees of a town may be elected a school trustee of such town. State v. Meyer, 60 Ind. 288.

The office of school trustee is a lucrative office. Chambers v. State, 127 Ind. 365.

[Acts 1899, p. 424. In force March 4, 1899.]

1509. Duties of school trustees—Graded high schools.—1. That the school trustees shall take charge of the educational affairs of their respective townships, towns and cities. They shall employ teachers, establish and locate conveniently a sufficient number of schools for the education of the children therein, and build or otherwise provide suitable houses, furniture, apparatus and other articles and educational appliances necessary for the thorough organization and efficient management of said schools. Such school trustees may also establish and maintain in their respective corporations at least one separate graded high school, to which shall be admitted all pupils who are sufficiently advanced: *Provided*, That the school trustees of two or more school corporations may establish and maintain joint graded high schools in lieu of separate graded high schools, and when so done they jointly shall have the care, management and maintenance thereof: *Provided further*, That any trustee instead of building a separate graded high school for his township may pay the tuition of pupils of his township competent to enter a graded high school, to another school corporation, such payment to be made out of the special school revenue and not to exceed ten dollars for any one pupil in each year: *Provided further*, That all payments of tuition provided for under this act, heretofore made by school trustees for such high school privileges are hereby legalized: *Provided further*, That no such graded high school shall be so built unless there are at the time such house is built at least fifteen common school graduates of school age residing in the township.

1510. Term of school.—2. Said school trustees shall maintain in each school corporation a term of school at least six months in duration and shall authorize a local tuition levy sufficient to conduct a six months' term of school each year based on estimates and receipts from all sources for the previous year which may include that received from the state's tuition revenue: *Provided*, Such levy shall not exceed the limit now provided by law.

1511. Management of school property.—3. Said school trustees shall have the care and management of all property, real and personal, belonging to their respective corporations for common school purposes, except the congressional township school lands, which lands shall be under the care and management of the trustee of the civil township to which such lands belong.

[Acts 1897, p. 115. In force March 2, 1897.]

1512. Schools, control of in certain towns.—1. That in all incorporated towns of this state having a population of fifteen hundred persons or less, as shown by the last preceding United States census, the board of trustees of any such incorporated town of this state which has not taken control of the public schools, but which are now under the control of the township trustee in which such town is located, may, at their option, refuse to elect school trustees as provided for in section 4439 of the Revised Statutes of 1881 [R. S. 1894, § 5915], and in such case the care and control of the schools of such incorporated town shall be and continue under the control of the township trustee of the school township in which such incorporated town shall be situated, the same as the schools of such school township not located within the limits of such incorporated town, and in any such town no school town corporation shall exist until school trustees are elected therefor according to section 4439 of the Revised Statutes of 1881 [R. S. 1894, § 5915]. Burns' Supp. 1897, § 5915*a*.

[Acts 1899, p. 373. In force April 28, 1899.]

1513. Town may abandon control of schools.—1. That any incorporated town in the state, that has no school indebtedness, the inhabitants of which does not exceed fifteen hundred, as shown by the last preceding general census, may, through its town board of trustees, abandon and discontinue its management and control of public schools within such incorporated town, and abolish the board of school trustees therein.

1514. Property conveyed to township.—2. The town board of trustees of any such incorporated town, upon deciding to abandon and discontinue the control of the public schools therein, shall make and cause to be made a good and sufficient deed, conveying all real estate belonging to such school town to the township trustee of the township in which such incorporated town is located; and shall transfer all the personal property and fixtures belonging to such school town to such township trustee, all of which shall be accepted and held by such township trustee for the use and purposes of the school township wherein such town is located.

1515. Control by township trustee.—3. After the requirements set forth in the preceding section are complied with, the township trustee shall have full and complete control of all the schools within such town, and shall conduct the same as provided for by law for the other schools of such township.

[Acts 1877, p. 18. In force March 3, 1877.]

1516. Surplus special school revenue in cities and towns.—1. The board of school trustees of any city or incorporated town in this state is hereby authorized and empowered to pay over to the common council or board of trustees of such city or town any surplus special school revenue in the hands of such school trustees, not necessary to meet

current expenses—such excess of the revenue, aforesaid, to be applied to the payment of the interest or principal, or both, of any indebtedness incurred under the provisions of the act of March 8, 1873, authorizing cities and incorporated towns to negotiate and sell bonds to procure means to erect and complete unfinished school buildings, and to purchase any ground and building for school purposes, and to pay debts contracted for the erection, completion and purchase of buildings and grounds. R. S. 1894, § 5926.

[Acts 1871, p. 20. In force March 3, 1871.]

1517. Tax—Collection and payment.—5. All levies of taxes made by order of the board of school commissioners shall be certified by its president and secretary to the city clerk, who shall cause the same to be placed on the tax duplicate against all property assessed for city taxes; and the city treasurer shall collect the same as city taxes are collected, and shall, once in each month, pay over all such taxes so collected to the treasurer of the board of school commissioners of such city. All taxes hereafter collected by the county treasurer for school purposes on levies hereafter made, and all moneys that may be hereafter distributed as part of the common school fund by county officers, to which the common schools of such city shall be entitled, shall be paid over by the county treasurer to the treasurer of the board of school commissioners; and all taxes hereafter collected by the city treasurer on levies heretofore made for school purposes, shall be paid over by such treasurer, once in each month, to the treasurer of the board of school commissioners of such city. R. S. 1894, § 5943.

[Acts 1873, p. 60. In force March 8, 1873.]

1518. Bonds for school buildings.—1. Any city or incorporated town in this state which shall, by the action of its school trustees, have purchased any ground and building or buildings; or may hereafter purchase any ground and building or buildings; or has commenced, or may hereafter commence, the erection of any building or buildings for school purposes; or which shall have, by its school trustees, contracted any debts for the erection of such building or buildings, or the purchase of such ground and building or buildings; or such trustees shall not have the necessary means with which to complete such building or buildings, or to pay for the purchase of such ground and building or buildings, or pay such debt—may, on the filing by the school trustees of said city or town of a report, under oath, with the common council of such city, or the board of trustees of such town, showing the estimated or actual cost of any such ground and building or buildings, or the amount required to complete such building or buildings, or purchase such ground and building or buildings, or the amount of such debt, on the passage of an ordinance authorizing the same by the common council of said city or the board of trustees of such town, issue the bonds of such city or town to an amount not exceeding in the aggregate fifty thousand dollars, in

denominations not less than one hundred nor more one thousand dollars and payable at any place that may be designated in the bonds (the principal in not less than one year nor more twenty years after the date of such bonds, and the interest annually or semi-annually, as may be therein provided) to provide the means with which to complete such building or buildings, or to pay for the purchase of such ground and building or buildings, and to pay such debt. Such common council or board of trustees may, from time to time, negotiate and sell as many of such bonds as may be necessary for such purpose, in any place and for the best price that can be obtained therefor in cash: *Provided*, That such bonds shall not be sold at a price less than ninety-four cents on the dollar. R. S. 1894, § 5975.

Issuing bonds.—As to what facts are necessary to be shown in order to authorize the issue of bonds, see Williams v. Albion, 58 Ind. 329.

Bonds issued under this section constitute liabilities of the civil city or town, and should be included in estimating such city or town's indebtedness under the constitutional two per cent. limitation. Wilcoxon v. City of Bluffton, Ind. Sup. Ct., June 14, 1899.

Prior to act of March 9, 1891 (R. S. 1894, § 4377; *ante*, § 1232), incorporated towns might issue bonds to procure money with which to build school-houses without a petition from the property owners. Clark v. Noblesville, 44 Ind. 83.

Bonds issued under this section are negotiable by delivery and are not *ultra vires* and void, merely because the school-house is not located within the corporate limits of the town. Gardner v. Haney, 86 Ind. 17; City of Bloomington v. Smith, 123 Ind. 41.

Brokers—Compensation.—Brokers may be employed to sell the bonds and the corporation will be liable for their services. Reed v. Orleans, 1 App 25.

Municipal bonds—Towns can not issue negotiable securities.—Under the laws in force in May, 1878 (R. S. 1894, §§ 4357, 4377, 5975, 5976), upon the subject of the power of towns to borrow money, contract loans, incur debts and issue bonds, towns had no power of issuing, for sale in open market, negotiable securities, in the form of bonds and coupons, which, in the hands of bona fide purchasers before maturity, will be subject to no legal or equitable defenses in favor of the maker.. Merrill v. Monticello, 138 U. S. 673; Hopper v. Covington, 118 U. S. 148.

1519. Use of proceeds.—2. The proceeds of the sales of such bonds shall be paid to the said school trustees, to enable them to erect or complete such building or buildings and pay such debt. But before payment to them, such school trustees shall file with the county auditor a bond, payable to the state of Indiana, in a sum not less than the full amount of the said money so to be paid to them, and with security to be approved by said auditor, conditioned for the faithful and honest application of such money to the purpose for which the same was provided; and such trustees, and their surety or sureties, shall be liable to suit on such bond for any waste, misapplication or loss of such money, in the same manner as now provided for waste or loss of school revenue. R. S. 1894, § 5976.

[Acts 1875, p. 29. In force March 11, 1875.]

1520. Special tax.—3. In addition to levying the tax by cities or incorporated towns for general purposes, now authorized by law, the common council of any such cities, and boards of trustees of any such incorporated towns as shall avail themselves of the provisions of this

act, are hereby authorized and required to levy, annually, a special additional tax, at the same time and in the same manner as other taxes of such city or town are levied, sufficient to pay the interest and principal of said bonds falling due; which additional special tax shall be assessed and collected as the taxes for state and county revenue are assessed and collected. The treasurer of said city or town shall keep accurate account of the revenue arising from said special tax, and shall in his reports, when required by the city or town authorities, show the amount thereof received, the amount disbursed, and the amount thereof, if any, remaining delinquent. He shall pay out the same only by the authority of the common council of said city or board of trustees of such town; and shall permit the same to be applied to no other purpose than the payment of the principal and interest of such bonds; and official bonds of city and town treasurers shall be construed to cover and include revenue arising from this source. Persons residing outside of any such city or town, and electing to be transferred to such town or city for educational purposes, or who shall send their children to the school taught in any such building, shall, with their property, be liable to such tax, as if they resided in such city or town, on all property owned by said person in the township where such city or town is located: *Provided, always,* That nothing in this act shall be construed to prevent the school trustees of such town or city from admitting pupils into such schools from outside such city or town, in their discretion, upon the payment of tuition therefor, and without subjecting the property of their parents to such taxation, when such schools are not crowded and their admission shall in no way, interfere with the progress of the children within such city or town: *Provided, further,* That the additional special tax, hereby authorized, shall not, in any one year, exceed fifty cents on any one hundred dollars of taxable property and one dollar on each poll. R. S. 1894, § 5977.

This section is constitutional. Robinson v. Schenck, 102 Ind. 307; Kent v. Town of Kentland, 62 Ind. 291.

School corporation—Incorporated town—Location of school-house—Validity of bond.—Each incorporated town is by law a school corporation, and, as a rule, the school grounds and school-houses of such corporation should be located within the corporate limits of the town; but the bonds of such town, negotiated and sold to procure means for the erection and completion of a school-house for the town, are not *ultra vires* and void, merely because such school-house is not located within the corporate limits of such town. Gardner v. Haney, 86 Ind. 17.

Special additional tax—Duty of trustees—Mandate.—Under this section it is the duty of trustees of an incorporated town to levy annually a special additional tax sufficient to pay the interest and principal of the bonds of the town issued for school buildings, and falling due; and where it appears that the trustees of the town have failed, neglected and refused to discharge their statutory duty, a writ of mandate is the proper legal remedy. Gardner v. Haney, 86 Ind. 17.

Persons who are transferred from one school corporation to another must pay taxes in the corporation to which they are transferred, as well as in the one in which they reside. Johns v. State, 130 Ind. 522.

Persons who send their children to school in a corporation within a township other

than the corporation in which such persons live, are liable to pay school taxes upon their property situated in such township for the benefit of such corporation. Kent v. Town of Kentland, 62 Ind. 291; Robinson v. Schenck, 102 Ind. 307.

[Acts 1879 S., p. 86. In force March 20, 1879.]

1521. Condition before building.—1. Before the school trustees of any incorporated town or city in this state shall purchase any ground for school purposes, or enter into any contract for the building of any school building or buildings, they shall file a statement with the trustees of such incorporated town, or common council of such city, showing the necessity for such purchase of ground, or the erection of such building or buildings, together with an estimate of the cost of such ground or building or buildings, and the amount of means necessary to be provided to pay for such ground or building or buildings. And they shall not purchase any ground, or enter into any contract for the building of any school building or buildings, until such action be approved by the trustees of such incorporated town, or by the common council of such city: *Provided, however,* That there shall be nothing in this act so construed as to affect any purchase of grounds or contract made for the erection of any building or buildings, for school purposes, prior to the taking effect of this act. R. S. 1894, § 5978.

See Wilcoxon v. City of Bluffton, Ind. Sup. Ct., June 14, 1899.

Contract for erection of school-house—Abandonment.—If the parties who have contracted with a town for the erection of a school-house, the contract providing that the town may complete the building and charge the expense to the contractors if they fail to complete the same, abandon the contract before completion, they can not recover of the town for the value of the materials left by them, if the cost of completion above the contract price exceeds the value of the materials. School Town of Winamac v. Hess, 151 Ind. 229.

[Acts 1879 S., p. 95. In force May 31, 1879.]

1522. Surplus special school revenue.—1. It shall be the duty of the board of school trustees of any city or incorporated town in this state to pay over to the common council or board of school trustees of such city or town any surplus special school revenue in the hands of such school trustees, not necessary to meet current expenses; such excess of the revenue aforesaid to be applied for the payment of the interest or principal, or both, of any indebtedness incurred under the provisions of the act of March 8, 1873, authorizing cities and incorporated towns to negotiate and sell bonds to procure means to erect and complete unfinished school buildings, and to purchase any ground and building for school purposes, and to pay debts contracted for the erection and purchase of buildings and grounds. R. S. 1894, § 5979.

1523. Title to school property.—157. The title to all lands acquired for school purposes shall be conveyed to the township, incorporated town, or city for which it is acquired, in the corporate name of such township, town or city, which is used for school purposes, for the use of common schools therein. In all cases in which the title to any such land is vested in any other person or corporation than as

above provided, it shall be the duty of the trustee for school purposes of the township, town or city to procure the title to be vested as in this section provided. R. S. 1894, § 5996.

Conveyance to school township for school purposes—Implied condition—Reversion.—Where land is conveyed by warranty deed to a school township for the use of the common schools, without any expressed condition, there is no implied condition by which the property would revert to the grantor upon a mere non-user of the same for school purposes. Newpoint Lodge, etc., v. Town of Newpoint, 138 Ind. 141.

Any negligence or inattention to duty on the part of the school trustee could not work a forfeiture of the property, of which he had but temporary charge. Newpoint Lodge, etc., v. Town of Newpoint, 138 Ind. 141.

[Acts 1893, p. 194. In force March 3, 1893.]

1524.—Annexation of territory—Title to school property.—1. That whenever there has been, or may hereafter be, by proper proceedings, any territory annexed to any city, or incorporated town of this state, which territory included within such boundary as annexed any real estate, which prior to such annexation was the property of the school township adjoining such town or city, and used for school purposes by such school township, such real estate shall by virtue of such annexation at once become in fee simple, the property of the school corporation of such town or city, within the corporate boundaries of which it is found after such annexation of territory, and it is hereby made the duty of the township trustee to at once execute and deliver to the school corporation of such town or city, a deed conveying such title as his school township has, for all school property which has passed by such proceedings from the territorial jurisdiction of the township to that of a town or city. R. S. 1894, § 5997.

This section is constitutional. Board, etc., v. Center Tp., 143 Ind. 391.

Territory annexed—School property—Title.—When lands are annexed to a city or town and there is located within the territory annexed school property of a school corporation the title to such property vests in the school corporation to which such lands are annexed. Board, etc., v. Center Tp., 143 Ind. 391; see Heizer v. Yohn, 37 Ind. 415; State v. Shields, 56 Ind. 521; Reckert v. City of Peru, 60 Ind. 473; School Town of Leesburgh v. Plain School Tp., 86 Ind. 582; School Town of Allen v. School Town of Macy, 109 Ind. 559; Newpoint Lodge, etc., v. School Town of Newpoint, 138 Ind. 141.

School property.—When a new school corporation is formed within the limits of another, the new corporation becomes vested with the title to the school property within its boundaries. School Town of Leesburgh v. Plain School Tp., 86 Ind. 582; School Tp. of Allen v. School Town of Macy, 109 Ind. 559; Carson v. State, 27 Ind. 465; see Reckert v. City of Peru, 60 Ind. 473.

One school corporation can not own property within the limits of another school corporation. State v. Shields, 56 Ind. 521; School Town of Leesburgh v. Plain School Tp., 86 Ind. 582.

[Acts 1899, p. 376. In force March 3, 1899.]

1525. Annexation—Reimbursement of school township.—1. That in all cases where any city or incorporated town of this state has annexed or shall hereafter annex any territory, or where any town shall

be hereafter incorporated in which territory so annexed or incorporated there was or shall be the property of any school township used by such school township for school purposes, and such school township was, or shall be at the date of such annexations, indebted either for the purchase of said school property, or for buildings constructed thereon, which indebtedness is unpaid at the date of the passage of this act, it shall and is hereby made the duty of the school corporation of such city or incorporated town to pay such indebtedness, and such school corporation is hereby declared to be and made liable therefor. Until such city or town school corporation shall have paid such indebtedness it shall not be entitled to possession of such property, or to a deed therefor, and upon paying such indebtedness by said school township such school township shall be entitled to recover the amount so paid from said city school corporation with interest at the rate of six per cent. per annum from date of payment, and on payment of such amount the said school corporation shall be entitled to a deed and possession of such property as now by law provided.

[Acts 1865, p. 3. In force March 6, 1865.]

1526. Suits, how brought.—145. Suits brought on behalf of the schools of any township, town or city shall be brought in the name of the state of Indiana, for the use of such township, town or city. R S. 1894, § 6025.

Suits in corporate name.—Suits by or against a school corporation should be brought in the name of the school corporation as designated by the statute. Carmichael v. Lawrence, 47 Ind. 554; Greensboro Tp. v. Cook, 58 Ind. 139; Wright v. Stockman, 59 Ind. 65; Wingate v. Harrison Tp., 59 Ind. 520; Utica Tp. v. Miller, 62 Ind. 230; City of Huntington v. Day, 55 Ind. 7; Hornby v. State, 69 Ind. 102; Jarvis v. Robertson, 126 Ind. 281; Braden v. Leibenguth, 126 Ind. 336; Middleton v. Greeson, 106 Ind. 18, 24.

An action to recover money due to a school corporation may be brought in the name of the state on the relation of the corporation. Hadley v. State, 66 Ind. 271.

The corporate name of the corporation may be stated in the title of the pleading or in the body thereof. Town of Noblesville v. McFarland, 57 Ind. 335.

School corporation—Actions—Parties.—An action to recover for materials furnished and services rendered by the plaintiff in the erection of a school-house, under the employment of the school trustees of a city, should be brought, not against such trustees, nor against the city in her ordinary municipal capacity, but against the school corporation, by the name and style of the "School city of ————," filling the blank with the name of the city. The summons should be served on the school trustees. Sims v. McClure, 52 Ind. 267; City of Huntington v. Day, 55 Ind. 7; Jackson Tp. v. Barnes, 55 Ind. 137.

[Acts 1897, p. 42. In force February 23, 1897.]

1527. Donations by counties, cities or towns to state university.—1. That whenever fifty (50) freeholders and taxpayers of any county in this state, or twenty-five (25) freeholders of any city, town, or township in this state, in which any state university may be situate, shall petition the board of commissioners of such county, in the case of the county or township, or the common council, in the case of a city, or the board of trustees of a town in case of a town, to make a donation

to such state university, in any sum not exceeding $25,000, as to such county or city; $10,000, as to said township or town, it shall be lawful for such board of commissioners, on behalf of such county, or township, or the common council, on behalf of such city, or board of trustees on behalf of such town to make such donation, not exceeding the amount so named in such petition, and to enter in their respective records the proper order, ordinance, or resolution therefor, and which shall be a sufficient justification for the proper officer to draw his warrant therefor. Burns' Supp. 1897, § 6166*d*.

1528. Agreements and conditions of donation.—2. Such board of county commissioners, common council of such city, and board of trustees of such town, are hereby authorized for and on behalf of their respective corporations, to make all proper agreements with any such state university, with reference to the purpose for which such donations shall be used; and the terms and conditions on which donated and accepted, and when so made and such donation accepted shall be binding on such state university accepting the same. Burns' Supp. 1897, § 6166*e*.

1529. Bonds—Issue—Sale.—3. For the purpose of raising the money with which to make such donation, the board of commissioners of such county are hereby authorized to issue the bonds of such county, or township, and such common council, and board of trustees of such town, the bonds of such city, or town, respectively, none of which shall bear a higher rate of interest than six (6) per cent., payable annually, nor run a longer time than six (6) years from their date of issue, and shall not be sold for less than their face value, and accrued interest. Burns' Supp. 1897, § 6166*f*.

1530. Only one donation.—4. If either the county, city, town, or township, makes such donation, it shall not be lawful for any one or more of such corporations to make a donation under this act. Burns' Supp. 1897, § 6166*g*.

[Acts 1899, p. 416. In force April 27, 1899.]

1531. Aid to educational institutions—Petition.—1. That when a petition designated as a county petition signed by at least three freeholders of each township of any county in this state containing a population of not more than 29,000 nor less than 28,000 according to the census of 1890, or a petition designated as a township petition, signed by at least twenty-five freeholders of any township of such county, or a petition designated as a city petition, signed by at least twenty-five freeholders of any city of such county, shall be presented to the board of commissioners of such county, or in the case of a city, to the board of aldermen or council, or proper city officers, at any regular or special session thereof, asking such county, township or city, as the case may be, to make an appropriation of money, not exceeding two per centum of the amount of the taxable property in such county, township or city as the case may be, as shown by the last preceding tax duplicate, to aid any company, association or corporation

in locating and establishing a high school, academy, college, university and other educational institutions, or to erect and repair suitable buildings and properly equip the same for the use of such high school, academy, college, university and other educational institutions, such petition shall be sufficient evidence of the public utility of the educational institution, thus to be aided and encouraged, and it shall be the duty of such board of commissioners, or board of aldermen, city council, or other proper city officers, after being satisfied that such petition has been properly signed by the requisite number of freeholders, as aforesaid, to cause the same to be entered at full length upon their records.

1532. Appropriating money—Election.—2. Said board of commissioners, or in case of a city, said board of aldermen, or council or proper officers, shall thereupon order the polls at the several voting places in said county, township or city, as the case may be, so petitioning, to be opened on a day to be named in the order, which shall not be less than thirty days nor more than sixty days thereafter, and the votes of the legal voters of said county, township or city named in said petition to be taken upon the subject of appropriating money by such county, township or city named in such petition, for the purpose of aiding such educational institution as prayed for in said petition. The judges, inspectors and clerks of election shall be governed in the reception of votes by the laws then in force, regulating general elections.

1533. Notice.—3. The auditor of such county shall immediately give notice, to be published for at least four weeks successively in some weekly newspaper in general circulation in said county, and by printed hand bills to be posted in three public places in each township or city, where the appropriation is prayed for in the petition. Said hand bills shall be posted by the sheriff of the county three weeks prior to the day fixed for taking a vote as named in said order. Said notices shall specify the amount proposed to be appropriated, either in aggregate or the percentum on the taxable property, and the auditor of the county shall make his official certificate that said notice was published, and said sheriff shall make his like certificate that said hand bills were posted as required by this act, which certificate shall be entered upon the records of the board of commissioners, or in the case of a city, the board of aldermen, or the council or other proper city officers, and shall be sufficient evidence of the facts therein stated.

1534. Election to conform to general laws.—4. Said elections shall be held in all respects in conformity with the laws then in force for holding general elections.

1535. Form of ballot.—5. The ballots used for such voting as provided for in this act, shall be written or printed, and those cast for the appropriation shall contain the words, "for the appropriation," and those cast against the appropriation shall contain the words,

"against the appropriation," and if two or more ballots shall be purposely folded together they shall be rejected.

1536. Certificate of vote.—6. When the ballots shall be counted, the board of judges shall make out a certificate under their hands, stating in words the number of votes given for such appropriation, and the number of votes against such appropriation, and such certificate, together with one of the lists of voters, or poll books, and one of the tally sheets, shall be deposited with the inspector, or with one of the judges selected by the board of judges.

1537. Board of canvassers—Duties.—7. The inspectors of precincts, or the judges of the election to whom such certificates, poll books and tally sheets shall have been delivered, shall constitute a board of canvassers, who shall canvass and estimate the certificates, poll books and tally sheets returned by each member of said board, for which purpose they shall assemble at the court-house on the Thursday next succeeding the day of such voting, between the hours of 10 o'clock A. M. and 6 o'clock P. M. Said board of canvassers shall select one of their number as chairman, and the county auditor shall act as clerk, and being thus organized shall carefully compare and examine the papers, and shall prepare and sign a statement of the whole number of votes cast, and the number for such appropriation, and the number against it, and shall file said statement of such vote with said county auditor, who shall record the same at full length in the records of the board of commissioners of said county, or in the case of a city, in the records of the board of aldermen, or council or proper city officers, and carefully file away and preserve the certificates, poll books and tally sheets aforesaid.

1538. Tax levy.—8. If a majority of the votes cast shall be in favor of such appropriation, the board of county commissioners, or in the case of a city, the board of aldermen, or city council, or other proper city officers, at the next regular session, shall grant the prayer of said petition, and shall levy a special tax as prayed for in said petition, and specified in said notice, and cause the same to be placed upon the then current tax duplicate, to be collected as other taxes are collected, and subject to the same penalties for the non-payment thereof, when due: *Provided, however,* That the taxes upon said special levy shall be payable in four equal payments, one-fourth payable on or before the third Monday in April next, after the date of the said levy, and one-fourth each succeeding six months thereafter until fully paid.

And the moneys thus collected shall be paid out by the treasurer collecting the same, or upon the order of said board of commissioners, or in the case of a city, upon the order of said board of aldermen, or city council, or other proper city officers.

1539. Advancements.—9. After the special tax [shall] have been levied as in this act provided, and before it has been collected, the board of commissioners of such county, or in the case of a city, the board of aldermen or city council, or other proper city officers, may order advancements against said fund out of any money in the county

treasury, or in the case of a city, the city treasury, not otherwise appropriated, to be refunded to the county, or in case of a city, to the city, when such special tax shall have been collected.

1540. City may take stock.—10. Said board of commissioners, or in case of a city, board of aldermen or city council, or other proper city officers, may, after the assessment herein provided for, or any part thereof shall have been collected, or when advancements are made as in section 9 of this act provided, take stock in such company, association or corporation from time to time in the name of such county, or the proper township or city, as the case may be, and pay therefor when the same is taken, out of the moneys so collected or advanced as aforesaid, or they may donate such moneys to such company, association or corporation, for the purpose contemplated in this act, or they may loan the same for such purpose to said company, association or corporation, taking ample security therefor upon such terms and conditions as they may deem proper and safe, and in the name of such county, township or city, as the case may be, is hereby authorized and empowered to bring suit against such company, association or corporation to enforce the terms and conditions of its agreements.

1541. Election officers—Pay.—11. The officers conducting the elections provided for in this act shall be allowed the same pay as is allowed for like services in case of a general election. Should the election result in favor of such appropriation, the expense of the election after being paid by the county, township or city, as the case may be, shall be charged against the company, association or corporation benefited, and deducted out of the first moneys collected by virtue of said appropriation.

1542. Forfeiture of rights.—12. A failure on the part of such company, association or corporation to perform its agreements with regard to such educational institutions, shall forfeit the rights of such company, association or corporation to the aid thus voted, unless the county commissioners, or in case of a city, the board of aldermen, or council or proper city officers, for good cause shall extend the time in which to perform its said agreements, and the money so levied and collected shall revert to and become the property of the taxpayers from whom the same was collected, in the proportion by them severally paid.

1543. Jurisdiction of circuit court.—13. The circuit court of such county shall have jurisdiction to determine, upon the complaint of any taxpayer who shall have paid any portion of the taxes of such special levy, as to whether or not such company, association or corporation, for the benefit of which such tax was levied and collected, has forfeited its right to said moneys.

1544. Taxpayers released.—14. In all cases where the levies of taxes have been made in pursuance of this act and remain uncollected and the rights of said company, association or corporation thereto have been adjudged by the court to be forfeited, the taxpayers or par-

ties against whom such levies stand charged, shall be released and discharged from the payment thereof.

Schools in cities of 30,000 or more, 70,000 or more, and 100,000 or more.—For laws concerning schools in the larger cities, see R. S. 1894, §§ 5936–5950, and Acts 1899, pp. 434–447.

Cities of 100,000—Act of 1899—Powers and duties of city officers.—As indicated in note at the beginning of this chapter it is not within the scope of this work to include a full compilation of the school laws; but special attention is directed to the act of 1899, for the reason that it imposes certain powers and duties upon city officers, and the several sections relating to the powers and duties of city officers are set forth in this note:

[Acts 1899, p. 434. In force March 4, 1899.]

Board of school commissioners—Powers.—1. That the government of common schools in cities of one hundred thousand or more inhabitants, according to the last United States census, shall be vested in a board of school commissioners, which shall consist of five school commissioners. The said board of school commissioners shall have and exercise all the powers now conferred by an act of the general assembly of this state, approved March 3, 1871, entitled "an act providing for a general system of common schools in all cities of thirty thousand or more inhabitants, and for the election of a board of school commissioners for such cities, and defining their duties and prescribing their powers, and providing for common school libraries within such cities," and all acts amendatory thereof and supplemental thereto; and also all powers now conferred by law on boards of school commissioners in cities of thirty thousand or more inhabitants, according to the United States census of 1870, as well as the powers now conferred by law on boards of school commissioners in cities of one hundred thousand or more inhabitants, except as otherwise herein provided. And said board of school commissioners provided for by this act shall assume, pay and be liable for all the indebtedness and liabilities of boards of school commissioners heretofore elected under the above described acts.

Qualifications—Ineligible to other offices.—2. The members of such board of school commissioners shall be at least twenty-five years of age, residents of the city, and shall have been such residents for at least three years immediately preceding their election. They shall be ineligible to any elective or appointive office under such board of school commissioners and under the government of such city while holding membership in said board. They shall not be interested in any contract with or claim against the school city in which they are elected, either directly or indirectly. If at any time after the election of any member of said board, he shall become interested in any such contract with or claim against said school city, he shall thereupon be disqualified to continue as a member of said board, and a vacancy shall thereby be created. Every member of said board shall, before assuming the duties of his office, take an oath before some one qualified to administer oaths that he possesses all of the qualifications required by this act, that he will honestly and faithfully discharge the duties of his office, that he will not, while serving as a member of such board, become interested, directly or indirectly, in any contract with or claim against said school city, and that he will not be influenced during his term of office by any consideration of politics or religion or anything except that of merit and fitness in the appointment of officers and the engagement of employes. No compensation shall be received by members of the board, but they shall be exempt from jury duty during their term of office.

Nomination on petition—Elected at regular city election.—3. The said board of school commissioners shall be elected, except as specified in section four of this act, on a general ticket for the term of four years by the voters of such city qualified to vote at its city elections. The members of such board shall be elected at the regular city elec-

tion of such civil city, and shall be taken from the city at large without reference to districts, and such election shall be held under the provisions of the general laws governing such city elections, so far as they are not inconsistent with the provisions of this act. Not later than thirty days before any election for members of the board of school commissioners provided for in this act, householders of said city may present names of candidates for election as members of said board of school commissioners to a board of canvassers, consisting of the mayor, the treasurer and the comptroller of said city, in the manner following: Each candidate shall be proposed in writing by not fewer than two hundred householders of said city. No more than one candidate may be named in any one petition and no person may sign more than one petition for any one election. Upon the presentation of such petitions to said board of canvassers, the said board of canvassers shall publish for five days the names proposed, in at least two of the daily papers of the city, and shall certify at the time required by law such nominations to the regular board of election commissioners for said city election, who shall prepare ballots printed on plain paper which shall contain the names of all such candidates, arranged in an order to be determined according to lot by said board of canvassers. There shall be nothing on said ballots, except as otherwise provided herein, and except the names of the candidates and the offices to be filled, together with the square in front of each name and a statement at the head of the ticket of the number of commissioners for whom the elector may vote. Such ballots shall be voted at said regular city election and deposited in a separate ballot box provided for such purpose. The name of any candidate shall not be thus published and placed on the official ballot by the said board of canvassers if it shall appear that he is ineligible for membership on the said board of school commissioners under the provisions of section two of this act. Each elector may vote for as many of said candidates as there are members to be elected, by making a cross in the square opposite the name of the candidate. The candidates, in number equal to the number of members to be chosen, who have the highest number of votes shall be declared elected. If at any election a member is to be chosen to fill a vacancy and to serve out an unexpired term, candidates may be chosen as above provided, but they shall in all cases be designated on the ballot as candidates to fill a vacancy, and the date of the unexpired term shall be stated. The vacancies in said board of school commissioners shall be temporarily filled by the board as soon as practicable after such vacancy occurs. Such member so chosen shall hold office until his successor be elected and qualified. His successor shall be elected at the next general city election, when the vacancy shall be filled for the remainder of the term.

First election—Organization—Terms.—4. At the city election occurring on the second Tuesday of October, 1899, five members of the board of school commissioners shall be elected to serve as herein provided. They shall assume office on the first day of January, 1900, and shall meet at the office of the present board of school commissioners of such city at twelve o'clock noon, and shall proceed to organize. Within one week after the organization of said elected board they shall meet to divide themselves by lot, in such manner as they shall determine, into two classes, as follows: The first class, consisting of three members, shall hold office through the 31st day of December, 1901. The second class, consisting of two members, shall hold office through the 31st day of December, 1903. Thereafter, regular elections of members of the board of school commissioners shall occur at the regular city elections, held on the second Tuesday of October of each alternate year. In the year 1901, and every fourth year thereafter, three members shall be elected. In the year 1903, and every fourth year thereafter, two members shall be elected.

Annual organization—Treasurer of city treasurer of board—Duties.—5. The board of school commissioners shall organize annually at their first regular meeting in January, by choosing one of their members president, another vice-president, and electing a secretary who shall not be one of their number, and who shall receive a salary, to be fixed by

the school commissioners, which shall not exceed fifteen hundred dollars per year. The treasurer of the city shall be treasurer of the board, and shall serve as such without any additional compensation. The treasurer shall make a monthly statement to the board of the amounts received and expended during the month, and the amount on hand to the credit of the board. He shall give bond to the approval of the board in such sum as it may determine, and with not fewer than two sureties or a surety company.

City comptroller is auditor of board—Duties.—13. The city comptroller shall be the auditor of the board of school commissioners of such school city. He shall keep an accurate account of all taxes levied for school purposes, and of all moneys due to, received and disbursed by the board; also of all assets and liabilities of, and all appropriations made by the school board, and shall receive and preserve all vouchers for payments and disbursements made by the board.

Issues warrants.—14. The auditor of the board shall issue all warrants for the payment of money from the school funds, but no warrant shall be issued for the payment of any claim until such claim has been allowed by the board and approved in writing by the business director; but when the board has authorized the payment of money, notwithstanding his veto, the business director shall approve the same. The pay-roll, however, for assistants, principals and supervisors in the school work and teachers, shall be allowed by the board and approved by the superintendent of schools instead of by the director.

May require proof of claim.—15. Whenever the auditor of said board shall be called upon to issue any warrant, he shall have power to require evidence that the amount claimed is justly due and is in conformity with the law, and for that purpose he may summon before him any officer, agent or employe of the board, or any other person, and examine him on oath or affirmation relative thereto, which oath or affirmation he may administer.

Illegal warrants.—16. If the auditor of said board shall draw a warrant for any claim contrary to law, he and his sureties shall be individually liable for the amount of the same.

Money drawn only on appropriations.—17. No money shall be drawn from the treasury except in pursuance of appropriations made by the board upon an aye and nay vote duly recorded, and whenever an appropriation is made by the board, the secretary shall forthwith give notice thereof to the auditor and treasurer. No appropriation shall be made for a longer period than to the end of the current year, ending June 30, and at the end of such year all the unexpended balances of all appropriations, except from the tuition fund, shall be covered into the special school fund as an addition thereto.

Auditor's annual report.—18. The auditor shall submit to the commissioners annually, and oftener if required by them, a report of the accounts of the board, verified by his oath, exhibiting the revenues, receipts, disbursements, assets and liabilities, the sources from which the revenues and funds are derived, and in what manner the same have been disbursed. He shall give bond for the faithful discharge of his duties in the sum of five thousand dollars ($5,000), with not fewer than two sureties, or a surety company, to the approval of the commissioners, which bond shall be filed with the secretary. The auditor of the said board shall receive no compensation for his services as auditor, but the board shall provide for the appointment of such assistants for such auditor as it shall deem necessary and fix their compensation, which shall be paid monthly out of the school funds; but such assistants shall be appointed by the auditor.

Mayor—Appoints expert accountants.—19. At the close of each year ending June 30, the mayor of such city shall appoint one or more expert accountants, who shall examine the books, accounts and vouchers of the director, the treasurer, and of all other departments of expenditure of said board, and of the librarian provided for herein, and

shall make report thereof to the mayor and to the board of school commissioners of said city. All the officers and employes of said board shall produce and submit to such accountants for examination all books, papers, documents, vouchers and accounts in their offices belonging to the same or thereto pertaining, and shall in every way assist said accountants in their work. In the report to be made by said accountants, they may make any recommendations they deem proper as to the business methods of such officers and employes. A reasonable compensation for such services shall be paid by said board.

Money paid to treasurer.—20. All money payable to the board shall be paid to the treasurer, and his receipt for the same shall be filed with the auditor of said board, who shall issue his quietus therefor, which alone shall be sufficient evidence of such payment. No person except the treasurer shall collect or receive any moneys payable to the board, and any payments made, except to such treasurer, and any receipt given therefor by any other person shall be void as against the board.

Special tax--Separate account.—25. The board of school commissioners in any such city is hereby authorized and empowered to levy annually, in addition to other taxes authorized by law, a special tax of not exceeding five cents on each one hundred dollars of taxable property in the city, for the purchase of grounds and the erection and repair of school buildings. The proceeds of such tax shall be segregated from other funds of the board, and a separate account of the same shall be kept, and shall not be used for any other purpose than the purchase of grounds and the erection and repair of school buildings. The said board is also hereby authorized to levy annually, in addition to all other taxes authorized by law, and as an addition to its special fund, eleven cents on each one hundred dollars of taxable property in said city: *Provided, however,* That any sum levied in any year by such board in pursuance of an act entitled "an act concerning the education of children," and approved March 8, 1897, shall, to the extent of such sum so levied, reduce the power to levy the said tax of eleven cents above mentioned: *And, provided further,* That the aggregate sums levied by such board for all purposes shall not in any one year exceed fifty cents upon each one hundred dollars of taxable property in such city.

Cities that may hereafter come within the provisions of act.—33. Whenever any city which has not [now] sufficient population to bring it within the purview of this act, shall, acccording to any United States census hereafter taken, have a population of more than one hundred thousand people, an election of the board of school commissioners shall be held at the next general city election following the year in which such census shall be taken. Such election to be held in accordance with the provisions of this act, and this act shall then in all respects apply to and govern said city from thenceforward.

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See chapter note preceding § 1308, *ante*.

[1 R. S. 1852, p. 355. In force May 6, 1853.]

1545. How established.—1. The inhabitants of any city, town, village, or neighborhood, in this state, or any part of them, whenever they have subscribed the sum of fifty dollars, or upwards, toward the establishment of a public library, may assemble themselves for the purpose of holding an election for directors. R. S. 1894, § 4972.

1546. Chairman and clerk.—2. If two-thirds of the subscribers are present, they may proceed to choose, by voice, a chairman, who shall preside at that meeting, and a clerk, who shall keep a record of the same. R. S. 1894, § 4973.

1547. Election of directors.—3. After a chairman and clerk are chosen, the shareholders may proceed to choose, by ballot, seven directors, and to agree upon a name by which their library shall be known. The directors shall appoint one of their number to be president at their meetings, who shall have no other than a casting vote. R. S. 1894, § 4974.

1548. Statement.—4. A true statement of the proceedings of such meeting, including the amount subscribed and the number of subscribers present at their meeting, shall be sworn or affirmed to before some justice of the peace of the county, by the chairman or the clerk provided for by the second section of this act, and filed in the recorder's office; and it shall be the duty of such justice to certify on such statement that it was sworn or affirmed to before him. R. S. 1894, § 4975.

1549. To be recorded.—5. The recorder of the county shall record the said statement in his book of record, when required. R. S. 1894, § 4976.

1550. Powers.—6. After such statement shall be duly recorded, the president and directors, and their successors forever, shall be a body corporate and politic, to be known by such name as is registered in the recorder's office. They shall be capable, in law and equity, to sue and be sued, plead and be impleaded, answer and be answered unto, defend and be defended, in any court or courts, or before any judge or judges, justice or justices, person or persons whatsoever, in all manner of suits, actions, plaints, pleas, causes, and demands whatever, in as effectual a manner as any other person or persons, body or bodies corporate or politic, may or can do. R. S. 1894, § 4977.

1551. Banking forbidden.—7. Nothing contained in this act shall be so construed as to authorize any library company incorporated in this state to issue notes or bills of credit payable to any person or persons or his or their order, or to bearer; nor to deal in any kind of bills of exchange, notes or due bills whatever. R. S. 1894, § 4978.

1552. Directors annually elected.—8. Except the first election of directors, the annual election forever thereafter shall be held on the first Monday in January; but if any annual election should be omitted, the directors shall remain in power until the next annual election, and until successors shall be chosen. R. S. 1894, § 4979.

1553. By-laws.—9. Such library or libraries shall be governed and regulated by such by-laws as may from time to time be made by the president and directors of the same, not inconsistent with the constitution and laws of this state, who shall have power to alter, amend, abolish and renew any such by-law or by-laws at pleasure. R. S. 1894, § 4980.

1554. Seal—Assessments—Officers.—10. The president and directors shall have power to make a common seal, and the same to alter, break, change or renew at pleasure. They shall have power to levy a tax on the shareholders, provided such tax do not exceed one dollar on each share in any one year. Nothing, however, in this act shall be so construed as to prevent a majority of two-thirds of the shareholders, attending at their annual meeting, from increasing such tax to any sum not exceeding five dollars on each share in any one year. They shall have power to appoint a treasurer and librarian, and the same to remove at pleasure. R. S. 1894, § 4981.

1555. Quorum—Vacancies—Term.—11. A majority of the directors shall be necessary to form a quorum. They shall have power to fill vacancies that may happen in their own body, and the director or directors by them elected shall serve until the next annual election thereafter, and until others are elected in their stead. R. S. 1894, § 4982.

1556. Donations.—12. They shall have power to receive, by donation, any books, moneys, papers, lands, or any other thing or things; and such donation, or the income or the interest thereof, shall be applied to no other purpose than to the true interest and objects of the library on which it was bestowed, according to the true intent and meaning of this act. R. S. 1894, § 4983.

[Acts 1873, p. 176. In force March 8, 1873.]

1557. Stock.—2. All stock in such library association shall be deemed personal estate, and shall be transferred in the manner and under the conditions prescribed by the by-laws of the same; and such stock shall be exempt from the levy of any state, county, township, or municipal tax, and shall not be liable to execution for the debts of the owners of the same. R. S. 1894, § 4993.

1558. Voting stock.—3. At all meetings of shareholders, each shareholder shall be entitled to one vote for each share of stock held

by him; and provision shall be made by the by-laws by which absent shareholders may vote by proxy. R. S. 1894, § 4994.

1559. Museum.—4. Library associations may make such provisions as the board of directors may deem proper, for maintaining, in addition to the library, a reading-room and museum. R. S. 1894, § 4995.

1560. Fines—Costs—Judgment without relief.—5. All fines and forfeitures accruing from the violation of the by-laws and regulations made by the directors shall be recoverable, with costs, in an action before any court of competent jurisdiction, and judgments for the same shall be collected without relief from valuation or appraisement laws. R. S. 1894, § 4996.

1561. Corporations may take stock.—6. Any mining or manufacturing company or other voluntary association within the state shall have the power to subscribe to and purchase stock in such library associations, and the provisions of all laws inconsistent with this section are hereby repealed. R. S. 1894, § 4997.

1562. Cities may take stock.—7. Any city incorporated under the laws of this state may, by the vote of two-thirds of the members of the common council thereof, subscribe to the stock of any public library association organized within its limits, and for the payment of such shares of stock, and the assessments on the same, may, from time to time, as the common council may think proper, annually levy and collect not more than two mills on the dollar upon the taxable property within the limits of the city, which shall be paid into the city treasury, and applied to the payment of such stock and assessments made thereon. R. S. 1894, § 4998.

1563. Stock as prizes.—8. The common council of such city shall have the power, in their discretion, to cause the distribution and transfer of shares of stock held by the city, as prizes to the children of the public schools in the city for good behavior and scholarship. R. S. 1894, § 4984.

1564. Dissolution—City to manage.—9. Upon the dissolution or forfeiture of the franchises of such library association in which any city may have purchased stock, and is, at the time of such dissolution or forfeiture, the holder of one-third of the shares of the whole stock, the property of such association shall become the property of the city, for the free use and enjoyment of the inhabitants of such city, under regulations to be prescribed by the common council; and the common council shall thereafter control such library, and shall have power to increase the same, and levy and apply the tax provided for in section 7 of this act, to the increase and expenses of such library. R. S. 1894, § 4985.

[Acts 1879 S., p. 171. In force March 14, 1879.]

1565. Tax.—1. That in any township in which there has been, or may hereafter be established, by private donations, a library of the value of one thousand dollars or more, for the use and benefit of all

the inhabitants thereof, the township trustee of such township shall annually levy and collect not more than one cent on the one hundred dollars upon the taxable property within the limits of such township, which shall be paid to the trustees of such library, and be applied by them to the purchase of books for said library, and may, with the consent of the board of commissioners of the county, when it shall become necessary to erect or enlarge a library building, annually, for such period as may be necessary, levy and collect not more than five cents on the one hundred dollars upon the taxable property of said township, for not more than three years successively, which shall be expended by such trustees in the erection or enlargement of a library building. [As amended, Acts 1885, p. 9. In force February 18, 1885.] R. S. 1894, § 4986.

[Acts 1899, p. 228. In force March 2, 1899.]

1566. Library by donations—Township library, transfer to.—1. That in any township in this state in which there has been or may hereafter be established by private donations a library of the value of one thousand dollars, or more, for the use and benefit of all the inhabitants thereof, the board of commissioners of the county in which such township is situated, may, upon due proof thereof, by proper order entered upon its records, abolish the office of township librarian and require and order that the township library in the hands of the township trustee, or the librarian thereof (including all the books, papers, records, furniture and paraphernalia pertaining thereto), be turned over and transferred to the trustees or other managing officers of such library established as aforesaid.

1567. Library to revert to township.—2. That in the event said library association so established or to be established, shall from any cause cease to exist, or to perform its duties to the inhabitants of such township, then all its property of every kind shall be turned over to and become the property of such township.

1568. Library associations legalized.—3. All library associations of this state which purport to have been organized and established pursuant to the provisions of the laws of this state, for the use and benefit of all the inhabitants of any township in this state, and to which private donations to the amount of one thousand dollars, or more, have been subscribed, are hereby legalized, made valid and declared to be legal library corporations within the purview of this act, and all records, proceedings, subscriptions to and acts of the said library associations are hereby ratified, legalized and made valid.

[Acts 1883, p. 200. In force March 8, 1883.]

1569. Public libraries—Tax—Directors.—1. That whenever any library, or library and reading-room combined, established under an act entitled "an act to establish public libraries," approved February 16, 1852, and the acts supplementary thereto and amenda-

tory thereof, shall be located within the corporate limits of any incorporated town of this state, the president and board of directors of such library may file a written request and agreement, duly signed by them or a majority of them, with the board of trustees of such town, agreeing therein to keep and maintain such library, or library and reading-room, open and free to the use and benefit of all the inhabitants of such town, and requesting the board of trustees of such town to levy a tax upon the taxable property of such town, to be applied in the purchase of reading matter for such library. If, in the judgment of the board of trustees of such town, the books and other reading matter of such library is worth, at the time of filing such agreement and request, the sum of seven hundred and fifty dollars or more, they may annually levy a tax upon all the taxable property of said town of not less than one-fourth nor more than three-fourths of one mill upon the dollar, to be collected as other taxes of such town are collected. Such tax, when collected, shall be paid over to the president and directors of such library, and shall be by them expended for the purpose of purchasing reading matter for such library, and for no other purpose; and they shall keep such tax separate from all other funds, and, in a proper book kept by them, shall show the amount of tax received, to whom and when paid out, the amount, and upon what purchase. From the time of the first receipt of any tax under this act, and so long thereafter as the trustees of such town shall annually levy and collect, or cause to be collected and paid over a tax under the provisions of this act for the purpose aforesaid, it shall be the duty of the president and directors of such library to keep the same open and free to the use and benefit of all the inhabitants of such town, subject only to such reasonable and proper restrictions as they, the president and board of directors, may impose for the preservation and usefulness of the same. But if the trustees of such town shall during any year fail or refuse to levy and collect a tax for the purpose aforesaid, under the provisions of this act, then the president and directors of such library shall not be longer required to keep the same open for the use and benefit of the inhabitants of such town, and the books purchased with the proceeds of such tax shall be the property of such library association, the same as if derived from any other source, after the receipt of any tax under the provisions of this act, and so long as the trustees of any such town shall annually levy and collect a tax or cause the same to be collected and paid over for the purpose aforesaid. If the president and board of directors of any such library shall fail or refuse to keep the same open and free to the use of all the inhabitants of such town, subject to the restrictions aforesaid, then all of the property of such library association, real estate excepted, shall become the property of such town, and be subject to the control and directions of the trustees thereof, and they may then levy and collect the tax provided for in this act, to be expended as well in keeping and maintaining such library as supplying reading matter therefor. R. S. 1894, § 4987.

1570. Tax limited.—2. The trustees of any town shall have no authority by virtue of this act to levy and collect a tax for more than one library association in any one year. R. S. 1894, § 4988.

[Acts 1885, p. 120. In force April 2, 1885.]

1571. Tax-levy by cities.—1. That whenever the board of directors of a library heretofore situate within the limits of any incorporated town may have filed the agreement and request with the board of trustees of said town, provided for in an act entitled "An act supplementary to an act entitled an act to establish public libraries," approved February 16, 1852, approved March 8, 1883, and the board of trustees of such town may have levied a tax for the support of such library in pursuance of such request and agreement and in accordance with said act, and such town may afterward have become incorporated as a city, the common council of such city shall have all the powers to levy tax, and do all other things granted by said act above named to trustees of towns, and all the provisions of said act applicable to such library and its relations to the town before its incorporation as a city shall, after such incorporation, be applicable to such library and its relations to such city. R. S. 1894, § 4999.

[Acts 1881 S., p. 588. In force April 7, 1881.]

1572. Incorporation.—1. Whenever any number of persons, not less than seven, shall desire to associate themselves together for the purpose of establishing and maintaining a public library in any city or county in this state, for the general benefit and advantage of all the inhabitants of such city or county, it shall be lawful for such persons to become incorporated under this act in the manner hereinafter provided. R. S. 1894, § 4989.

1573. Instrument of association.—2. Whenever any persons shall desire to become incorporated under this act, for the purposes aforesaid, they shall, by an instrument in writing, set forth the objects of the association, the corporate name to be adopted, the names and places of residence of the incorporators, and a description of the corporate seal; and they shall also, in said instrument, provide the manner in which, in case of the death, resignation or removal for any cause of any of the original incorporators, their successors shall be selected, so that the number of the members of such incorporation shall never be less than the original number. They shall also provide, in said instrument, what officers shall be elected by such corporation, and the time and manner of their election; and shall also provide therein, generally, in what manner the business of said corporation shall be conducted. Which instrument shall be signed by all the proposed incorporators, and filed in the office of the recorder of the county in which such library or reading-room is proposed to be established. R. S. 1894, § 4990.

1574. Recording—Powers—Exemption from taxation.—3. Upon the filing of such instrument in the proper recorder's office, it shall

be the duty of the recorder to record the same in the miscellaneous records of such county; and from the time of the recording thereof, as aforesaid, the said association and their successors shall be deemed and held a corporation, and shall have, possess and enjoy all the rights, powers, and privileges given to corporations by common law; to sue and be sued; to borrow money and secure the payment of the same by notes and mortgages, bonds, or deeds of trust, upon the person or real estate of such association; to purchase, rent, lease, hold, sell, and convey real estate for the benefit of such corporation; and to erect and maintain suitable buildings for the purposes aforesaid and for other objects properly connected therewith. Such corporation shall, also, have the right and power to receive and accept donations, either of money or real estate, either by gift or devise, and to hold, use, enjoy, mortgage, sell, and convey the same, for the benefit of such corporation, in the manner provided in the deed of gift or devise by which the same was received. And the real estate and personal property of any such corporation which shall have established a public library for the purposes aforesaid, and shall have put the same into operation, shall be exempt from taxation for state, county, and all municipal purposes, and shall remain exempt, as aforesaid, so long as the same is used exclusively for the general benefit of the inhabitants of the city or county in which such library may be located. R. S. 1894, § 4991.

1575. Gallery of art—Reading-room—Park.—4. Whenever any such corporation shall be established as in this act provided, it shall be lawful, and such corporation shall have the power, to establish and maintain, in connection with its library, a gallery of art and public reading-rooms, and may also maintain, either in connection with its library building or separate therefrom, a public park. R. S. 1894, § 4992.

[Acts 1899, p. 67. In force February 17, 1899.]

1576. Public libraries—Free use of in cities of 19,700 to 20,000.—1. That wherever there is established in a city or town being the county seat of a county having a population according to the census of 1890, exceeding nineteen thousand seven hundred, and less than twenty thousand, in which there is or may be established a public library, containing for the use of the public more than three thousand volumes, the directors or trustees thereof propose in writing to the common council of the city, or board of trustees of the town, to maintain such library for the free use of all the inhabitants of said town or city and to keep the same open to the public for not less than one-half of each day in the year, except legal holidays, it shall be the duty of said common council to levy, collect and pay over to the directors or trustees of said library for its support and maintenance an annual tax of not less than four-tenths of a mill nor more than one mill on the dollar: *Provided*, That upon the dissolution of said public library or the association operating it, the property of such library or association shall revert to said city or town for the use of the inhabi-

tants of the city or town under such rules and regulations as may be prescribed by the common council or board of trustees.

1577. Books and property of county library.—2. That, wherever there is established at the county seat of any county having a population of not less than nineteen thousand seven hundred, and not exceeding twenty thousand, according to the census of 1890, a public library which is open upon equal terms to all the inhabitants of such county, the trustees of the county library of such library of such county shall deposit with said public library all of the books, furniture and property of every kind belonging to such county library, and be used together with the books of such public library by all the inhabitants of such county upon equal terms.

1578. Care and maintenance.—3. The board of county commissioners shall appropriate and pay to the trustees of said library annually for the care and maintenance of said library, a sum not less than one hundred dollars.

1579. Property listed and labeled.—4. That all papers, books and property of the county library so deposited, and all papers, books and property which may hereafter be purchased with funds of said county library shall be so listed and labeled that their identity may be preserved.

1580. Loan of library fund.—5. That the trustees of such county library shall loan the principal sum of the county library fund upon the same terms and conditions and under the same restrictions as school funds are loaned, and at the rate of seven per cent. per annum payable in advance, and the same laws as to collection of principal and interest shall govern, as in the case of the school fund. The said trustees of the county library shall collect such interest as it may become due and shall pay over the same to the directors of said public library, who shall expend it for the proper care and renewal of the books and property of the county library.

1581. Property reclaimed.—6. That if said public library shall cease to exist, or shall cease to furnish equal facilities to all the inhabitants of the county, it shall be the duty of the trustees of the county library to reclaim the books and property.

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List of special and temporary acts relating to cities and towns passed at the session of 1881, and subsequent sessions.

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